State of Maine

SPECIAL EDUCATION DUE PROCESS HEARING

January 3, 2017

17.024XH —Parents v. Lincolnville School Department

Representing the Parents: Atlee Reilly, Esq.
Representing the District: Eric Herlan, Esq.
Hearing Officer: Sheila Mayberry, Esq.

This decision was issued pursuant to the Individuals with Disabilities Education Act ("IDEA"), Title 20-A M.R.S.A. Chapter 301 *et seq.*, Title 20 U.S.C. § 1415 *et seq.*, and accompanying regulations. The hearing was held on November 29 and December 7, 2016, at the office of the Maine Department of Education in Augusta, Maine, and at the Lincolnville Town Office in Lincolnville, Maine. Present for the proceedings were: [redacted] and [redacted] [redacted] the Student's grandparents as his legal guardians ("Parents" for purposes of this decision); Atlee Reilly, Esq., counsel for the Parents; Deborah Bailey, Director of Special Education for the [redacted] School Department ("District"); Eric Herlan, Esq., counsel for the District; and Sheila Mayberry, Esq., Hearing Officer.

Testifying at the hearing were:

- Grandfather ("Father")
- Grandmother ("Mother")
- Tracy Boardman – SequelCare of Maine
- Karen Toothaker – MAS Homecare of Maine
- Lori Albert – Acadia Healthcare Family Behavior Services
- Roger Quehl – SequelCare of Maine
- Deborah Howard – Principal, [redacted] Community School
- Deborah Bailey – Special Education Director for the District
- Karen Etheridge – Special Education Director for [redacted]
- David Kelley, LCPC – Clinician for day treatment programs at [redacted] [redacted] School

All testimony was taken under oath.

I. PROCEDURAL BACKGROUND

On October 31, 2016, the Parents requested an expedited due process hearing regarding their grandson, [redacted] ("Student"). The Parents included Regional School Unit No. [redacted] ("RSU [redacted] as a party to the matter. The District filed a motion to dismiss RSU [redacted] as a party. The Parents submitted their response. The District simultaneously moved to dismiss all non-IDEA claims.

On November 8, 2016, I issued an Order granting the District's motion to dismiss RSU [redacted] as a party. On November 23, 2016, a pre-hearing conference was held at the Disability Rights Center ("DRC") in Augusta, Maine. A pre-hearing report was issued the same day. The report included an order dismissing the Parents' non-IDEA claims. The parties submitted 586 pages of documents into the record.

Both parties requested to keep the record open until the submission of closing briefs. Briefs were submitted on December 13, 2016, and the record was closed.

II. THE ISSUES

The issues in this matter are as follows:

1. Did the District violate the IDEA by changing and/or by permitting RSU [redacted] to change the Student's placement without first conducting a manifestation determination?
2. Did the District violate the IDEA when it failed to return the Student to the placement from which he was removed once it was determined that the behaviors that led to his removal were manifestations of his disabilities?
3. Was the interim alternative educational setting provided by the District on or about September 27, 2016 inadequate, and did the District fail to deliver the interim alternative educational services?
4. Was the Student denied a free and appropriate public education in the least restrictive environment from September 9, 2016 through the present, as a result of the illegal change in placement and inadequate interim alternative educational services?

III. SUMMARY OF THE FACTS

1. The Student is a [redacted] year-old boy ([redacted] who lives with his [redacted] Maine. (Hearing Request Form).

2. The Student was placed by the State with his maternal grandparents in 2010 and adopted in 2012 due to issues of neglect, substance abuse, and abandonment by his biological mother. (S. 2, 5-7, 170; P. 200-201).

3. The Student has had a long history of behavioral difficulties and has been diagnosed with Regulation Disorder of Sensory Processing (at age [redacted] Mood Disorder NOS, Attention Deficit Hyperactivity Disorder-Combined Type ("ADHD"), Reactive Attachment Disorder, Oppositional Defiance Disorder ("ODD"), and has extreme difficulties with social, emotional, and unsafe behavioral skills. (S. 5, 9-10; P. 202XX).

4. In 2012, a psychological evaluation was performed by Farhana Shah, Ph.D., clinical psychologist. (S.1). On the *Standford-Binet Intelligence Scales: Fifth Edition*, the Student obtained an abbreviated IQ standard score of 10 that falls in the "average" range. (S. 4-5). On the *Vineland – II Adaptive Behavior Scales: Survey Interview*, the Student obtained an Adaptive Behavior Composite standard score of 83 +/- 5, indicating that his independent living skills were "developing" somewhat more slowly than those of the typical age child. (S. 4). Dr. Shah's diagnosis was Regulation Disorder, Sensory Stimulation-Seeking/Impulsive. (S. 6). Dr. Shah recommended that the Student be provided specially-designed instruction to enhance his coping skills, as well as his self-regulation skills. (S. 6). He also recommended one-on-one support for at least part of the day to attend to teachers, comply with instructions, follow behavioral rules, make transitions from one activity to the next, complete tasks, and interact appropriately with peers and adults. Dr. Shah recommended that the Parents work with a behavioral specialist to develop additional strategies for managing his behavior and enhancing his self-regulation skills, and also suggested consulting with the Student's occupational therapist ("OT").

5. At age [redacted] the Student exhibited behaviors at [redacted] that included bolting, locking doors, climbing out of windows, and extreme non-compliance. (S. 9-10). He could not be toilet trained and would not sleep by himself. (S. 9). He had been prescribed medications for his hyperactive behaviors and was being treated by a psychiatric nurse practitioner. (S. 10). He received [redacted] intervention services through Maine's Child Development Services ("CDS"). (S. 15). At that time, school and psychological providers did not believe he was ready for [redacted] (S. 9, 11). The Parents continued receiving 26 hours of in-home support services. (S. 14).

6. In April 2014, Laurence Starr, Ed.D, conducted a psychological evaluation. (S. 9) Based upon his assessment, he recommended that, due to the Student's extreme negative behaviors, [redacted] should be delayed or his program should include special education support. He also recommended that school and home intervention plans be developed, and that the Parents be trained in behavior modification techniques. (S. 10-11).

7. In April 2014, Marissa E. Kelley, MS, OTR/L, of the Children's Collaboration Center, conducted an occupational therapy evaluation. (S. 12.) She found that the Student continued to have sensory processing and fine motor skill delays. (S. 14). She recommended direct OT services with a home programming component to address sensory processing difficulties and the use of a weighted blanket for added tactile security while sleeping. (S. 14).

8. In May 2014, a transition meeting was held to determine whether the Student was ready to begin [redacted] in the public school setting. (Bailey testimony). Deborah Bailey, special education director for the District, recommended that the Student would benefit from repeating [redacted] based upon her observations and reporting from CDS staff regarding the Student's emotional and behavioral development.

9. In late summer 2014, Ms. Bailey received additional information about the Student's progress during his summer programming and observed him in a few settings. She

concluded that while it was still questionable whether the Student would be successful, she was open to attempting to provide programming for him in [redacted] on an abbreviated basis. (Bailey testimony)

10. The [redacted] School Department operates a single school, [redacted] Community School ("[redacted] for grades kindergarten through eighth grade. The building houses two special education classrooms, one for kindergarten to fifth grade and one for sixth though eighth grade. Both special education classrooms are traditional resource rooms, with students moving in and out of the room, primarily serving groups of students with learning disabilities and similar issues. There is no specialized program at the school for students with significant behavioral challenges. (Bailey testimony).

11. In Fall 2014, the Student began [redacted] at [redacted] (Bailey testimony).

12. On September 17, 2014, an IEP meeting was held at the school to develop the Student's IEP for the 2014-2015 school year. (S. 16). The IEP indicated that he was eligible to receive special education and related services under the category of Developmental Delay. (S. 16-17, 19). The IEP included seven measurable goals including:

- The ability to move safely throughout the classroom 80% of the time as measured by the OT progress report;
- Increase his understanding of personal safety on the playground for himself and others by using a safe body 80% of trials, as measured by the OT trimester progress report;
- Attend to a teacher-directed task to completion up to 15 minutes, 4 out of 5 opportunities, as measured by Behavioral consultant's data;
- Transition throughout the day (from recess and in the school) without meltdown 4 out of 5 opportunities as measured by Behavioral consultant's data;
- Engage in a turn-taking/sharing game with peers for 10 minutes, waiting his turn without adult support, 4 out of 5 opportunities as measured by behavioral consultant's data;
- Independently choose an activity during free play time and attend to it for 10 minutes, 4 out of 5 opportunities;
- Sit and participate in circle time activities, without support, for 10 minutes, 4 out of 5 opportunities as measured by Behavioral consultant's data.

(S. 19-21).

13. The IEP included one-on-one support from a behavioral health provider ("BHP") and Master level clinical services from the Providence Corporation, in all settings, up to 6 hours daily. (S. 23). Classroom instruction would include behavior support for positive reinforcement; defined limits and expectations; modeling appropriate behaviors; and occasional breaks and cooling off periods. A behavior management plan, consultation services with a special education teacher, OT for one hour per week, and a communication system for both home and school were also provided. (S. 22-23).

14. The IEP also indicated that the Student would attend school on an abbreviated day, from 8:00 a.m. to 11:30 a.m. at the beginning of the school year, and that he would participate with his non-disabled peers at all times, with the exception of 60 minutes per week for OT services. (S. 25).

15. At the beginning of the 2014-2015 school year, the Student struggled at school. The Student eloped from the classroom or out of the building frequently. He did not receive OT services at school until sometime in late September or early October 2014. (S. 26). A BHP was not hired until later in the fall. (Bailey testimony).

16. On October 8, 2014, a psychological evaluation was performed by Mary Ellen Gellerstedt, M.D., Section Head of Developmental Pediatrics at Eastern Maine Medical Center. (S. 32). A cognitive assessment was part of this evaluation and performed by Ellen Santilli, Ph.D., licensed psychologist.

17. Dr. Gellerstedt's evaluation indicated that based upon the Student's history and continued behavioral deregulation at school and home, the Student suffered from Mood Disorder and recommended that his treating therapist add a diagnosis of Reactive Detachment Disorder. (S. 32). Dr. Gellerstedt opined that the Student suffered significant trauma leading to ongoing challenges in developing healthy attachment during the first two years of his life. She reflected that the "noxious influences" in his infancy were likely to have been as highly detrimental to the Student's central nervous system development as was his in-utero exposure to his mother's abuse of suboxone. Given the many potential

neurologic insults, as well as the Student's "very significant irritability," she suggested that his primary care physician consider a referral to neurology to look at other possible contributors to his mood irritability. (S. 32). She stated that the Student needed "very intensive intervention" and that it was likely that he needed to be in a special purpose class with individual, highly skilled staff experienced in dealing with children with very significant emotional disorders. (S. 32).

18. Dr. Santilli's cognitive evaluation indicated that the Student did not have any cognitive delays. However, the Student scored in the low-average range in verbal comprehension and high-average range in visual spatial skills. She stated that his significant mood irritability, as reported by Dr. Gellerstedt, were more concerning at that point than his cognitive development. (S. 28).

19. Dr. Santilli provided additional recommendations along with those of Dr. Gellerstedt. She recommended strong support for continuing his identification for special education and related services; a full-time, highly trained, one-on-one aide working with the Student in the school setting to maintain safety, on-task behavior, and any degree of compliance; a restrictive setting if it was not possible to maintain the Student for full days in his current school program; the use of visual schedules and backups; continued case management services; medication management; OT, and home- and community-based treatment ("HCT") services. (S. 29).

20. In December 2014, the Student was hospitalized for medication management. (Bailey testimony). After the holiday break, the Student went back to [redacted] for an increased number of hours a day. (Bailey testimony). By March 2015, the Student attended school all day and was being transported by the District, rather than by his Parents. (Bailey testimony). While he continued some maladaptive behaviors, including bolting, he finished the year at [redacted] and then participated in extended year programming. (Bailey testimony).

21. By the end of the 2014-2015 school year, Ms. Bailey believed that the Student had not made adequate academic progress due to his continued maladaptive behaviors and that he should repeat [redacted] (Bailey testimony). However, she acquiesced to the recommendation of his [redacted] teacher that he be moved forward into [redacted] grade. (Bailey testimony).

22. In September 2015, the Student began [redacted] grade at [redacted] (S. 40). The BHP who had been with the Student the prior year was replaced with a new one. (Parents testimony). Also, the District was unable to provide an OT in a timely manner (Bailey testimony). The Student's Parent was called to pick up the Student twice during the first two weeks of school due to the Student's maladaptive behaviors. (S. 41; Parents testimony).

23. On September 15, 2015, an IEP meeting was held to discuss the Student's placement and IEP. (S. 40). The Parents informed the IEP Team that they believed the Student needed a different placement and suggested placing the Student at the [redacted] School ("[redacted] in [redacted] Maine. (S. 41). The District believed that while the transition into first grade had been difficult, it would become easier, and did not agree to the placement. (S. 41). The District ultimately disagreed with the Parents and the Parents went forward with their unilateral placement at [redacted] (Parents testimony).

24. Ms. Bailey testified that while she understood that the Student needed an IEP, she also had to be fiscally responsible and would do what was necessary to keep the Student at [redacted] (Bailey testimony).

25. During the balance of the 2015-2016 school year, the Student attended [redacted] (Parents testimony). [redacted] provided the Student with a safety plan and IEP (P. 114-126, 131). The effective dates of the IEP were from September 18, 2015 through September 17, 2016. (P. 114). It included three academic goals in reading, writing, and math, as well as nine functional goals. (P. 118-120). The IEP summarized the Student's functional performance and his needs. It stated that, with respect to safety concerns, "His behavior impairs his ability to be educated and puts him in dangerous and compromising situations

that are a risk to his safety. Current behaviors include: eloping, hitting, kicking, throwing items at students and staff, and destroying property." (P. 118). It included specially-designed instruction, as well as OT and social work services. (P. 125).The IEP indicated that the Student could not be with non-disabled children during any portion of the day, explaining that, "Due to (the Student's) behavior outbursts and need for intense staff support due to limited social functioning and inability to regulate strong emotions, he needs individualized programming in a small highly structured private separate day school placement with a high teacher-to-student ratio to meet his academic and emotional needs." (P. 126). The Student also had a behavior intervention plan, and an individual behavior plan. (P. 127-131).

26. Over the course of the school year, there were several reports detailing inappropriate, noncompliant, and unsafe behavioral incidents, including hitting and kicking staff and peers, bolting, throwing glass marbles at staff, and threatening to kill or harm others. (S. 68, 72, 85, 86, 90, 93, 107, 109, 112, 115, 117, 120, 124, 136, 138). However, he made some academic progress in several areas while he was at [redacted]. (S. 94-98, 125-133).

27. On June 24, 2016, the Student was admitted to [redacted] Hospital in [redacted] Maine due to his increased physical and verbal threatening behavior towards clinicians and his parents. (S. 144, 297; P. 197-198). He had also eloped from home. (P. 198). While in the hospital, the Student struggled much of the time with high frustration, hyperactivity, irritability, and mood lability. (S. 297). He needed an unusually high amount of staff support, including one-on-one staffing, to remain safe. (S. 297). He required a behavior plan and a sensory diet. (S. 297). His medications were changed a number of times. (S. 297). He was treated with individual, group, and milieu therapies, as well as medication and OT management. (S. 297). At the time of discharge, professional staff recommended that the Student be placed in a residential facility. (S. 297). The Parents did not approve. The Student was thereafter discharged to the Parents with in-home services. (S. 297). It was also noted that he was at a low risk of suicide, but at a medium risk of "acting out acutely and chronically." (S. 297). He was discharged on August 1, 2016. (S. 297).

28. In July 2016, while the Student was in the hospital, an OT evaluation was performed by Jason Phelps, MS, OTR/L. In summary, it was reported that the Student presented with a complex sensory system profile that inhibited his ability to focus and perform. (S. 148-149.) He also presented with deficits in both gross and fine motor skills. (S. 149). Based upon this evaluation, multiple recommendations were provided. They included a multi-sensory approach to learning to allow him to increase his attention and meet his sensory needs, as well as strategies to reduce overstimulation and other calming techniques (weighted blanket, fidget toys, meditation, and other coping strategies). (S. 149-152).

29. On August 1, 2016, the Student was released from [redacted] Hospital. (S. 274). The discharge report indicated that the Student was diagnosed with Reactive Attachment Disorder, Generalized Anxiety Disorder, Unspecified Disruptive Impulse Control and Conduct Disorder, and Attention Deficit Hyperactivity Disorder. (S. 274).

30. Upon the Student's return home in August 2016, the Parents were provided with HCT services through SequelCare, a behavior health provider organization. (S. 160; P. 197). Roger Quehl, LCSW, a clinician for SequelCare, performed a comprehensive assessment of the Student upon his return home from [redacted] Hospital. (P. 197). He reported that the Student's behavior had regressed since his return home. His behavior included refusal to take medication, hostile and aggressive behaviors toward his parents, impulsivity, and proneness to tantrums. (P. 197).

31. The family worked with Mr. Quehl and Tracy Boardman, a BHP, several hours per week on the Student's Individualized Service Plan. (S. 160; P. 202). The long-term goals were to help the Parents and Student improve the Student's interposal behavior in social situations; demonstrate knowledge of considering consequences of behaviors; engage in problem-solving with parents and other adults; and remain on task at home and in school (S. 161-162). Goals and progress notes indicated that providers worked intensively with the family throughout the summer and fall of 2016. (P. 212-255). "Moderate" progress towards the goals was made in October and November 2016. (P. 211, 214, 222). There were instances when the Student eloped from home to a stranger's apartment, cut his

hands when he took and broke someone's recycled bottles, and generally regressed in his behavior after returning from [redacted] Hospital. (S. 153).

32. In early August 2016, the Parents were notified that [redacted] was suspending its operations. (Parents testimony). The Parents contacted Ms. Bailey to inform her that the Student would be attending school in the District and to arrange for a meeting to discuss programming. (Parents and Baily testimony; P. 186).

33. Attempts were made by the District Special Education Director to find an appropriate placement for the Student. (Bailey testimony). She felt that [redacted] was not appropriate for the Student since it did not have a day treatment program. (Bailey testimony). She immediately contacted several day treatment programs, however, except for one of them, none were available due to lack of appropriate staff or available room. (Bailey testimony).

34. On August 22, 2016, an "informational meeting" was held with the Parents; Lori Albert, the Student's case manager from [redacted] Hospital; Roger Quehl, LCSW; Karen Toothaker, one of the Student's in-home BHPs; Ms. Bailey; and David Kelley, clinical director of the [redacted] Day Treatment Program ("DTP") in RSU [redacted] (P. 187; Bailey and Kelley testimony). They discussed whether RSU [redacted]s [redacted] DTP would be a good fit for the Student and discussed his general current behavioral challenges, the need for OT and motion breaks during the day; and the Student's hospitalization. (Toothaker, Albert, Quehl, Parents testimony; P. 187, 246, 256). It was noted that the Student's IEP would be expiring shortly and that another meeting would be scheduled to develop a current one. (Bailey testimony). No reports from providers or IEPs were provided to Mr. Kelley at the time of the meeting, although they were sent to him thereafter. (Bailey testimony). Based upon the description of the [redacted] DTP, the Parents agreed to visit the program with the Student. (P.187). Mr. Kelley indicated that the Student's behaviors were nothing that he had not seen before. (Parents and Quehl testimony).

35. The [redacted] DTP is an intensive special education program for students with profound mental health conditions, who require specialized trained staff with an understanding of behavior interventions. (Kelley testimony). David Kelly supervises and trains staff for the program. (Kelley testimony). The [redacted] DTP has three multi-grade, therapeutic classrooms: kindergarten through second; third and fourth; fifth and sixth. (Kelley testimony). Each classroom has one special education teacher and three to four BHPs. (Kelley testimony). Students access their educational programming along with developmental therapy in the classroom. (Kelley testimony). It uses a developmental therapy approach with a ratio of 6 students to 4 adults (1 teacher and three educational technicians) with OT supports integrated throughout the day, and access to mainstream programming as appropriate with supports. (Kelley, Parents, Quehl testimony, P. P. 246).

36. The meeting on August 22, 2016 did not include a regular education teacher. (Parents and Albert testimony). The Parents believed it was an IEP meeting because decisions were being made about the placement of the Student for the 2016-2017 school year. (Parents testimony). The meeting was described as an "informational meeting" only in order to discuss the option of sending the Student to the [redacted] DTP in RSU [redacted] (Kelley and Bailey testimony; P. 187). No Advance Written Notice or Written Notice of the meeting on August 22, 2016 was submitted into the record.

37. The Parents and the Student's in-home providers believed that the placement at [redacted] was his placement for the 2016-2017 school year. (Albert, Quehl, Toothaker, Parents testimony). After visiting the facility at the [redacted] DTP, the Parents filled out the registration forms for RSU [redacted] and signed releases for documents. (P. 69-70, S. 163-167, 171-173).

38. The RSU [redacted] administration testified that they considered the placement at the [redacted] DTP to be a 30-day out-of-district "trial" placement and that the Student was a "visitor." (Howard, Bailey, and Kelley testimony). Kelley testified that it was their intention to review the progress of the Student after 30 days, and then develop an IEP and treatment plan. (Kelley testimony). He testified that the program could not support those who need

physical management and do not respond to direction from adults. (Kelley testimony). He also stated that the [redacted] DTP is not equipped to handle students who elope, since the doors are not locked. (Kelley testimony). He acknowledged that he did not review any documentation about the Student or his safety plan or behavior intervention plan from [redacted] prior to attending the [redacted] DTP. (Kelley testimony).

39. On August 29, 2016, the Student began attending the [redacted] DTP in the classroom for [redacted] through [redacted] grade. (Kelley testimony). The District provided door-to-door transportation for the Student. (Mother, Bailey testimony).

40. RSU [redacted] was not implementing an IEP or a behavior plan for the Student at any time while he was attending the [redacted] DTP. (Kelley testimony).

41. Between August 30 and September 7, 2016, [redacted] DTP staff charted the Student's progress and behaviors using a point system. (P. 72-74). On August 30, 2016, the Student was in full compliance in 7 of 9 segments of the day. On August 31, 2016, the Student was in either full or partial compliance in 12 of 12 segments of the day. During the segments of the day when he was not in full compliance, it was noted that he rolled on the floor in morning meeting; yelled and kicked during lunch; refused to stay for his computer instruction; and did not follow directions at first request in the Mindful Moment segment of the day. However, he received 1s and 2s in all other areas, and he earned bonus points in his writing workshop. (S. 177).

42. On September 6, 2016, the Student was in full compliance in 8 of 9 segments of the day. However, during the "Mindful Moment" segment, it was noted that he swore and yelled, slammed a door, but then took a break and rejoined the group for reading. (S. 178). It was also noted that he was mainstreamed for math class and fully complied in the classroom. (S. 178).

43. On September 7, 2016, the Student's behavior became non-compliant and dangerous. (P. 76, 84; S. 185; Howard and Kelley testimony). On that day, his teacher was on leave and

one of the BHPs / ed techs took over the classroom. (Kelley testimony). No additional staff was added to make up the number of adults in the room. (Kelley testimony). It was reported that during mid-morning, while the Student was in the classroom working with an ed tech, he took a pair of open scissors and "lunged" at her in a threatening manner. (P. 76, 84; S. 185, 271; Kelley testimony). The assistant principal was able to escort the Student to the "time out" section of the classroom. (P. 76; Kelley testimony). The assistant principal was then able to escort the Student to the cafeteria. (P. 76). However, the Student ran from the assistant principal and hid behind the stage, and then ran out into the hallway. (P. 76; Kelley testimony). The Student ran towards the foyer on the second floor. While the assistant principal was trying to coax him, Mr. Kelley approached the scene. (Kelley testimony). At some point, Mr. Kelley contacted the Mother to come and pick up the Student. (Kelley and Parents testimony). While the two adults were talking, the Student grabbed a sign on a stand and began swinging it around. (Kelley testimony). He then took the sign off the stand and was about to use it as a sled to slide down the stairs. (S. 271, Kelley testimony). Mr. Kelley was able to defuse the situation and walked the Student to the office. (Kelley testimony). The Student became combative and was moved to the "time out" room with Mr. Kelley accompanying him the entire time. The Student began hitting and kicking. Mr. Kelley warned him that if he continued his behavior he would have to physically hold him. He tried talking to him about problem-solving, but the Student could not be consoled. For 45 minutes, the two of them were in the room. (Kelley testimony). Therapeutic restraint was used three times during this period. (Kelley testimony). The Mother arrived and was eventually able to get him into the car. (Kelley testimony).

44. Upon the recommendation by David Kelley to Deborah Howard, Principle of the [redacted] Community School, the Student was to stay home until a meeting was held. (Howard testimony). Thereafter, all documents reflecting the Student's status at the [redacted] DTP indicated that he was suspended. (S. 186, 235, 271; P. 248).

45. RSU [redacted]s policies include suspensions for any person who makes a threat against the school or threatens the safety of school personnel. (P. 40-41, 55).

46. The Mother stated that Mr. Kelley indicated to her on September 7, 2016 that if the Student could express remorse for his behavior, he would be able to return to school and that a meeting would be arranged for the next day, September 8, 2016, to discuss the situation. (Parents testimony). He called her later in the evening on September 7, 2016, and told her that the meeting was rescheduled for September 9, 2016. (Parents testimony).

47. An Advanced Written Notice was issued by RSU [redacted] and sent to the Parents on September 9, 2016. (P. 78).

48. An IEP meeting was held on September 9, 2016. (S. 183; P. 82). The IEP Team discussed the incident that occurred on September 7, 2016, and its consequences for the Student's programming. Mr. Kelley notified the Team that the [redacted] DTP was not a proper fit for the Student's needs and that the Student required a higher level of intervention than could be provided at the [redacted] DTP. (S. 185; P. 84, 249). He stated that it was his belief that the Student was not ready for public school and needed more of a mental health setting. (S. 185). He stated that if there was any way that there could be a guarantee that this type of incident would not happen again, then maybe things would be different. (S. 185; P. 84). While the Team reviewed the discussion from the meeting on August 22, 2106, Mr. Kelley indicated that the Student's placement at the [redacted] DTP was inappropriate and that his attendance would be discontinued. (S. 185; P. 84).

49. The Parents, Ms. Albert, and Ms. Bailey were confused by the determination to suspend the Student because they believed that Mr. Kelley had assured them that, based upon the description of the Student's behaviors discussed by the team members at the meeting on August 22, 2106, the staff at the [redacted] DTP were equipped to handle the Student. (S. 185; P. 246; Albert, Quehl, and Parents testimony).

50. The Written Notice from that IEP meeting, dated September 9, 2016, indicated that the Student had been "suspended" and that he would not be returning to RSU [redacted] (S. 186). It

also noted that no alternative placement had been decided upon, although the District would be investigating options. (S. 186). There was no discussion at the IEP meeting of planning for a manifestation determination due to the suspension.

51. At no point during the IEP Team meeting on September 9, 2016 was there a discussion about a manifestation determination, a functional behavioral analysis, or the development of a behavior plan. (Bailey testimony). However, Mr. Kelley reported to his colleagues that there was no doubt that the Student's behavior on September 7, 2016 was a manifestation of his disability. (S. 235).

52. After the IEP meeting on September 9, 2016, Ms. Bailey and members of the Student's IEP Team attempted to set up an interim placement for the Student. (Bailey testimony). A visit to Sweetser Day Treatment in Belfast, ("Sweetser-Belfast") was made on September 12, 2016, but was rejected by all members of the Team. (Bailey, Albert, Toothaker, and Parents testimony; S. 188; P. 192). While the facility is adequately staffed, it is an old and drab school and has a [redacted] grade classroom with approximately six students. (Bailey testimony). On the day of the visit, the team was disturbed by a teenager acting out in the hallway. (Bailey, Albert testimony). It was also noted that there was no playground. (Baily, Albert testimony).

53. Other possibilities were considered, including the Camden-Rockport DTP; the Spurwink Day Treatment in Chelsea, Maine ("Spurwink-Chelsea"); Captain Albert Stevens School in Belfast, Maine, part of RSU 71; and the Nexus program in Belfast (S. 188, 192-193, 202; P. 158; Bailey testimony). However, none of them, except for Sweetser-Belfast, were available. (Bailey testimony).

54. The Student's IEP expired on September 17, 2016 (P. 114, 195). He has been without educational programming since September 7, 2016. (P. 141).

55. On September 27, 2016, an IEP meeting was held to formulate the Student's annual IEP. (P. 108; S. 201). The Written Notice summarized the discussion and events leading up to

the Student's current status. It indicated that after the [redacted] School had closed, the Student was placed at the [redacted] DTP, but as of September 9, 2016, he was no longer able to stay in that program. (P. 110; S. 202). The Parents also reported a positive change in the Student's behavior after a medication change. (P. 111; S. 203).

56. The IEP Team also agreed upon interim tutoring in math and reading for two to three hours per day while a permanent placement was sought. (P. 110-111; S. 202). The Team also determined that the Student would be placed in a DTP when an appropriate program was found. (P. 110-111; S. 202).

57. Before and after September 27, 2016, several attempts were made to find an appropriate tutor, but without success. (P. 195-196; Bailey and Parents testimony). Also, inquiries were made about potential DTPs. (S. 205-211, 214; Bailey testimony). Ms. Bailey visited Spurwink-Chelsea and found it to be a potential option for the Student. (S. 208).

58. By October 12, 2016, the Parents reached out to the DRC to inquire about the possibility of returning the Student to the [redacted] DTP. (S. 218).

59. Ms. Bailey was able to locate a tutor and an OT on or about October 18, 2016. (S. 220).

60. On October 19, 2016, Lori Albert, the coordinator of services for the Student from [redacted] Hospital, reported to Ms. Bailey that the attorney for the Parents suggested not starting with tutoring. She indicated that the attorney wanted the Student to return to the [redacted] DTP. (S. 220). There is no evidence that the Parents or their attorney informed the District about this.

61. On October 19, 2016, Ms. Bailey informed Ms. Etheridge, RSU [redacted] special education director, that the Parents had reached out to the DRC and that their attorney was involved. (S. 221). Ms. Etheridge reported this to Mr. Kelley. (S. 221) Mr. Kelley replied that:

> We accepted him for a trial placement. We made clear at that time the limits of this setting. We never had a MSAD [redacted] IEP that place(d) him here. We had an informal

meeting where we agreed to try him, with the plan to formalize the placement if he was successful for 30 days. His then current IEP had him at the [redacted] School. His behavior was widely unsafe. In the last meeting, the family indicated that they were disappointed but they also agreed that they didn't want anyone to get hurt. If they press the issue, as for an accelerated hearing. (I can't remember the term, but it's when the state agrees to do a quick hearing when health and safety issues are at play.) (S. 221).

62. On October 20, 2016, the Mother emailed Ms. Bailey inquiring about tutoring and commencing OT. (S. 222). She was willing to transport the Student and also requested a one-on-one aide while the Student was being tutored. (S. 222).

63. On October 21, 2016, Mr. Kelley sent an email to Ms. Etheridge elaborating his views about the legal status of RSU [redacted] in relation to the incident that occurred on September 7, 2016 at the [redacted] DTP. (S. 235). He stated that due to the behaviors, the Student was "suspended" and characterized the placement of the student as a "trial placement." He further stated that, "A manifestation determination isn't appropriate as no one doubts that his behavior of concern is a manifestation of his disability." (S. 235).

64. On October 31, 2016, the Parents submitted to the District a request for an expedited hearing. (P. 88).

65. An IEP meeting was held November 1, 2016 (S. 223-225). It was also used as a manifestation determination to decide whether the Student's removal from the [redacted] DTP was a manifestation of his disability. (S. 254). The Team reviewed the circumstances of the removal and determined that it was due to his disability. (S. 254). A functional behavior assessment ("FBA") was also planned. (S. 254). A draft IEP was presented by Ms. Bailey, explaining that it was developed using information from [redacted] Hospital, and Mr. Kelley. The Team concluded that the Student needed a day treatment program. (S. 254). Two available settings for delivering his programming were discussed: Spurwink-Chelsea and Sweetser-Belfast. (S. 254). Based upon the recommendation of Ms. Bailey, the IEP Team agreed that Spurwink-Chelsea would be the setting for the Student's DTP. (S. 254). It was reported that the District did not have a DTP at [redacted] and that it would take months to develop one. (S. 255). It was also noted that

the [redacted] building itself would be over-stimulating for the Student because of its overwhelming physical design. (S. 255).

66. The Parents and their attorney, Atlee Reilly, rejected the idea of Spurwink-Chelsea, stating that because of its location, an hour away, and lack of good role modeling, they feared that the Student would pick up negative behaviors. (S. 255). However, the Parents agreed to visit Spurwink-Chelsea. (S. 255).

67. A draft IEP was presented at the IEP meeting on November 1, 2016. (S. 254). The Team determined that the Student's academic goals were still at the [redacted] grade level because he had made little to no progress towards his previous goals by the end of the year at [redacted] (S. 254).

68. The IEP developed from the IEP Team meeting on November 1, 2016, included two academic measurable goals in English Language Arts and Mathematics. (S. 259, 263). It included ten measurable goals in functional performance (7 behavioral and 3 occupational). (S. 264-266). The IEP summarized the Student's functional performance and his needs. With respect to concerns for the Student's safety, it stated that, "His behavior impairs his ability to be educated and puts him in dangerous and compromising situations that are a risk to his safety. Current behaviors include: eloping, hitting, kicking, throwing items at students and staff, and destroying property." (S. 263). The IEP indicated that he could not be with non-disabled children during any portion of the day, explaining that, "Due to (the Student's) behavior outbursts and need for intense staff support due to limited social functioning and inability to regulate strong emotions, he needs individualized programming in a highly structured day treatment program." (S. 270).

69. In a letter, dated November 10, 2016, from the Parents' attorney, Mr. Reilly stated that he wanted the Written Notice, dated November 7, 2016, to reflect that the Parents stated, at the IEP meeting on November 1, 2016, that they believed the Student had a legal right to be returned to school-based day treatment at the [redacted] DTP. He also indicated that no

representative from the [redacted] DTP was present. He also indicated that the Written Notice should reflect that the District was proposing a private DTP because no public DTP was available. Finally, he wanted the Written Notice to reflect that the Parents were not in agreement with the placement at Spurwink-Chelsea, but agreed to visit it. (P. 156).

70. During the period that the Student had not been in school, the Family continued to receive in-home services from clinicians and BHPs. (P. 249-253; Quehl testimony). However, he had regressed since being at home and the level of stress on the family had increased. (Toothaker testimony). He thrives in a structured setting and in an environment where he has access to special education and mainstreaming opportunities. (Toothaker testimony).

71. Ms. Bailey, Mr. Quehl, and Ms. Toothaker testified that, while neither believed Sweetser-Belfast was an appropriate interim academic placement for the Student, it would be better than having no academic programming. (Bailey, Quehl, and Toothaker testimony). Mr. Quell also testified that if tutoring could be located in the community, especially with a tutor trained in restorative justice, it may be an acceptable option as well. (Quehl testimony). Ms. Bailey, Ms. Albert, and Ms. Toothaker testified that Spurwink-Chelsea could be a good fit for the long term, but distance was a problem. (Mother, Bailey, Toothaker, and Albert testimony).

IV. SUMMARY OF THE PARTIES' POSITIONS

Parents' Position

The Parents argue that on August 22, 2016, the IEP Team placed the Student in an out-of-district day treatment program in RSU [redacted]s [redacted] DTP. It asserts the District violated the IDEA when the Student was suspended and removed from the [redacted] DTP to his home on September 7, 2016 without a manifestation determination. They argue that the Student must be returned to the placement from which he was removed. They suggest that placement was either the [redacted] based upon the IEP last agreed upon between the District and the Parents, or the [redacted] DTP, but they believe that the correct placement was the [redacted] DTP.

The Parents also argue that the Student has been denied a free and appropriate education ("FAPE") by not being provided with any educational programming since September 7, 2016. They note that the Student has been at home without educational programming despite the efforts of the District to find interim services.

The Parents request compensatory education for the Student's lack of educational programming since September 7, 2016 and ask that the hearing officer order assessments in order to determine the proper level of compensatory education at a later hearing.

District's Position

The District argues that the Student's return to the District from [redacted] has required a concerted effort to find programming for the Student. It asserts that the meeting held on August 22, 2016 was not an IEP meeting, but an informal meeting to decide if the [redacted] DTP would be an appropriate "trial placement" for the Student, since the District did not have a day treatment program at [redacted] It cites the lack of any written documentation that the IEP Team agreed to permanently place the Student at the [redacted] DTP. It notes that a regular education teacher was not present at the meeting, thus making it an informal meeting.

The District asserts that the trial placement ended on September 7, 2016 when it became apparent that the [redacted] DTP was unable to provide the significant level of behavioral services needed to support the Student.

The District asserts that the trial nature of the [redacted] DTP fell outside the reach of disciplinary removal regulations because there was no disciplinary removal. It argues that educational services merely came to an end when it became apparent that the [redacted] DTP was unable to provide the significant services needed to support the Student. The District urges that the Student was neither suspended nor expelled.

The District argues, in the alternative, that if the cessation of programming at the [redacted] DTP was a disciplinary removal, the appropriate remedy is a 45-day interim placement while the

IEP Team continues its effort to find an appropriate long-term placement, citing 34 C.F.R. § 300.532.(b); MUSER XVII(3)(B). It suggests that tutoring at [redacted] would not be appropriate because it does not have a day treatment program and there is a present and substantial likelihood of injury to the Student and others, citing his recent history of hospitalizations and threats to staff and himself, both in school and at home. It argues that the term "substantial likelihood of injury" is not confined to actual infliction of serious harm, but must be more broadly defined to include bruises and other injuries that don't require blood to be drawn or hospital visits. Citing *Light v. Parkway C-2 School District*, 41 F. 3d 1223 (8th Cir. 1994). The District refers to incidents where the Student threatened to stab a staff member with scissors, threw glass marbles at the face of a staff member, hit and kicked staff members, threatened to kill a BHP, broke bottles (bloodying his hands), and eloped from home and school. The District also cites the report from [redacted] Hospital wherein the Student needed an unusually high amount of staff support to be kept safe.

The District suggests that the Student be temporarily placed in a setting that can support his high level of need. It insists that, at this point, the only interim placement available and ready to receive him is Sweetser-Belfast. It requests that the Student be placed there for the 45-day time period while it searches to find an appropriate long-term placement.

The District argues that the IEP Team's agreement, on September 27, 2016, to provide tutoring as a temporary measure until a permanent placement could be found, was the appropriate action under MUSER IX.3(B)(3), since it found itself unable to contract with the professional staff necessary to implement the Student's IEP.

V. LEGAL FRAMEWORK

Congress enacted the Individuals with Disabilities Educational Improvement Act ("IDEA") to ensure that children with disabilities receive a FAPE. *See* 20 U.S.C. § 1401(d)(1)(A). FAPE consists of special education and related services that are provided to children with disabilities at public expense and under public supervision during preschool, elementary school, and secondary school. *See id.* at § 1402(8). The states and local educational

agencies located within them are responsible for ensuring that children with disabilities receive a FAPE. *See id.* at § 1412-13. In return, the states receive funds from the federal government for use in implementing the provisions of the Act. *See id.* at § 1412(a).

In *Honig v. Doe*, 484 U.S. 305 (1988), the Supreme Court grappled with the difficulty in balancing students' right to a FAPE with a public school's right to safeguard students and staff from dangerous behaviors of students. It acknowledged the presumption expressed by Congress that all children with disabilities must be allowed to receive appropriate educational services in the least restrictive environment. It also affirmed the policies of the Department of Education that allow school districts to manage situations where students become dangerous to themselves or others, finding that suspensions up to 10 school days are not considered a change of placement. It also affirmed a school's right to appeal to the court system in extraordinary circumstances when it believes a student's conduct warrants a change in placement, where parents do not agree.

Since *Honig*, supra, Congress developed regulations by which school districts must review the behavior of disabled students that violates a school's code of conduct in order to determine if the conduct was substantially the result of a disability. 34 CFR §300.530 *et seq*. See also MUSER XVII. For purposes of analyzing the issues in this case, the *relevant* provisions are as follows:

> 1. Authority of School Personnel
>
> A. Case-by-case Determination. School personnel may consider any unique circumstances on a case-by-case basis when determining whether a change in placement, consistent with the other requirements of this section, is appropriate for a child with a disability who violates a code of student conduct.
>
> B. General.
> (1)...
> (2) After a child with a disability has been removed from his or her current placement for 10 school days in the same school year, during any subsequent days of removal the public agency must provide services to the extent required under paragraph (D) of this section.
>
> D. Services. (1) A child with a disability who is removed from the child's current placement pursuant to paragraphs (C), or (G) of this section must – (a) Continue to receive educational services, as provided in §300.101(a), so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP; and (b) Receive, as

appropriate, a functional behavioral assessment, and behavior intervention services and modifications, that are designed to address the behavior violation so that it does not recur. (2) the services required by paragraph (D)(1), D(3), D(4), and D(5) of this section may be provided in an interim alternative educational setting.

...

(5) If the removal is a change of placement under § 300.536, the child's IEP Team determines appropriate services under paragraph (D)(1) of this section.

E. Manifestation Determination. (1) Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the SAU, the parent, and relevant members of the child's IEP Team (as determined by the parent and the SAU) must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine— 05-071 Chapter 101, Maine Unified Special Education Regulation page 189 (a) If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or (b) If the conduct in question was the direct result of the SAU's failure to implement the IEP. (2) The conduct must be determined to be a manifestation of the child's disability if the SAU, the parent, and relevant members of the child's IEP Team determine that a condition in either paragraph (E)(1)(a) or (1)(b) of this section was met. (3) If the SAU, the parent, and relevant members of the child's IEP Team determine the condition described in paragraph (E)(1)(b) of this section was met, the SAU must take immediate steps to remedy those deficiencies.

F. Determination that Behavior Was a Manifestation
If the SAU, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team must –

(1) Either –
   (a) Conduct a functional behavioral assessment, unless the SAU had conducted a functional behavior assessment before the behavior that resulted in the change of placement occurred, and implement a behavior intervention plan for the child; or
   (b) If a behavior intervention plan already has been developed, review the behavioral intervention plan, and modify it as necessary, to address the behavior, and
(2) Except as provided in paragraph (G) of this section, return the child to the placement from which the child was removed, unless the parent and the SAU agree to a change of placement as part of the modification of the behavioral intervention plan.

7. Change of Placement Because of Disciplinary Removals [34 CFR 300.536]
   A. For purposes of removal of a child with a disability from the child's current educational placement under §§ 300.530 through 300.535, a change of placement occurs if—
   (1) the removal is more than 10 consecutive school days;
   (2) ...
   B.
   (1) ...
   (2) This determination is subject to review through due process and judicial proceedings.

A "placement" is not a physical location, but a program of educational services offered to a student. *Sherri A.D. Kirby*, 19 IDELR 339 (5th Cir. 1992); *Aw v. Fairfax County Sch. Bd.*, 41

IDELR 119 (4th Cir. 2004). A change in placement occurs when there is a substantive change in the student's educational program. 71 Fed. Reg. 46,588 (2006). The Education Department interprets a district's obligation for determining the appropriate interim alternative education setting to apply to all removals that constitute a change of placement for disciplinary reasons, as defined in 34 CFR 300.536. "We interpret 'setting' in this context to be the environment in which the child will receive services, such as an alternative school, alternative classroom, or home setting. In many instances, the location and the setting or environment in which the child will receive services are the same. It is possible, however, that a school may have available more than one location that meets the criteria of the setting." Citing 71 Fed. Reg. 46,719 (2006).

With respect to the requirement to conduct a manifest determination review ("MDR"), it is apparent that Congress believed that a speedy determination of whether a student's conduct was a manifestation of his/her disability was necessary, since the question of the student's educational placement would be at issue. The language of the Senate Committee report makes this evident:

> The bill requires that, if a disciplinary action is contemplated either as described in the preceding paragraphs for a behavior of a child with disability or if involving a change in placement for more than 10 school days for a child with a disability who has engaged in other behavior that violated any rule or code of conduct of the LEA that applies to all children, not later than the date on which the decision to take that action is made, the parents shall be notified of that decision and of all procedural safeguards accorded under section 615 of IDEA. *In addition, immediately, if possible, but in no case later than 10 school days after the date on which the decision to take that action,* a review shall be conducted by the IEP team and other qualified personnel of the relationship between the child's disability and the behavior subject to the disciplinary action. S. Report. 105-17, Senate - Labor and Human Resources, S.717, 05th Congress 1997-1998) (Emphasis added).

The parent of a child with a disability who disagrees with any decision regarding placement under §§ 300.530 and 300.531, or the manifestation determination under § 300.530(e) may appeal the decision by requesting a hearing. (34 CFR 300.532, MUSER XVII.3.A.,C.). In these cases, the hearing officer is limited to the remedies available, which are set forth in MUSER XVII.3.B., as follows:

> (B) Authority of Hearing Officer.
> (1) A hearing officer under §300.511 hears, and makes a determination regarding an appeal under paragraph (A) of this section.
> (2) In making the determination under paragraph (B)(1) of this section, the hearing officer may –

> (a) Return the child with a disability to the placement from which the child was removed if the hearing officer determines that the removal was for a violation of § 300.530 or that the child's behavior was a manifestation of the child's disability; and
> (b) Order a change of placement of the child with a disability to an appropriate interim alternative educational setting for not more that 45 days if the hearing officer determines that maintaining the current placement of the child is substantially likely to result in injury to the child or to others.
> (3) The procedures under paragraphs (A) and (B)(1) and (2) of this section may be repeated, if the SAU believes that returning the child to the original placement is substantially likely to result in injury to the child or to others.

Maine has emphasized that the expedited hearing process "shall only be available for persons who have been removed from school for disciplinary purposes." MUSER XVI.21(4).

While the IDEA does not address the burden of proof in due process hearings, the U.S. Supreme Court held in *Schaffer v. Weast*, 44 IDELR 150 (2005), that the party seeking relief bears the burden of persuasion. Thus, if the parent disputes the results of an MDR, the parent would bear the burden of showing that the child's misconduct was a manifestation of his disability. 71 Fed. Reg. 46,723-24 (2006).

VI. DISCUSSION

1. Did the District violate the IDEA by changing and/or by permitting RSU [redacted] to change the Student's placement without first conducting a manifestation determination?

The Parents claim that the District violated its obligations under the IDEA when it allowed the Student to be suspended from his educational programming without conducting an MDR within 10 school days of the date when RSU [redacted] reported to the IEP Team that it would not accept the Student back into the [redacted] DTP.

I find that the Student was suspended from his placement at the [redacted] DTP on September 7, 2016 when he was sent home because of behavior violating RSU [redacted]s Student's Code of Conduct. Every document submitted into the record from RSU [redacted] other than internal emails between Mr. Kelley and Ms. Etheridge, indicated that he was suspended due to his

behavior on that date. The principal at [redacted] Community School also stated that she approved of the recommendation to have the Student sent home. The Parents were told that he was suspended and could return only if there was a guarantee that his conduct would not occur again. The incident report and the Written Notice, dated September 9, 2016, indicated that he was suspended. As such, an MDR was required within 10 school days of the suspension (by September 21, 2016), pursuant to MUSER XVII.E.(1). There is no dispute that an MDR was not conducted until November 1, 2016, well beyond that deadline, and after the expedited hearing request was filed.

The District's argument that the Student was not suspended, but merely removed from the [redacted] DTP because he was not a suitable fit for the program, lacks merit. RSU [redacted] first claimed that the Student's placement was only a trial after the request for an expedited hearing was submitted. The facts cannot support this defense, since the official documents from RSU [redacted] the explanation provided to the Parents on September 7, 2016, and the manifestation determination all refer to a suspension.

Therefore, I find that the District changed the Student's placement/programming without conducting an MDR until November 1, 2016, more than 10 school days after the Student was removed from the [redacted] DTP, in violation of MUSER XVII.1.E.(1) and (3).

2. Did the District violate the IDEA when it failed to return the Student to the placement from which he was removed once it was determined that the behaviors that led to his removal were manifestations of his disabilities?

The Parents argue that the District violated the IDEA when it failed to return the Student to the placement from which he was removed, since his behavior on September 7, 2016 was subsequently found to be a manifestation of his disability.

It is important to note that the definition of placement under the IDEA is not synonymous with the word "place." Placement refers to the overall educational environment, not precisely the location or setting where a student is educated. *George A. v. Wallingford-Swarthmore Sch. District*, 655 F. Supp. 546 (E.D. Pa. 2009), citing *Michael C. V. Radnor Twp. Sch. Dist.*, Civ. A.

No. 98-4690, 1999 U.S. Dist. LEXIS 1352); *A.K. v. Alexandria City Sch. Bd.*, 484 F. 3d 672, 680 (4th Cir. 2007); *A.W. v. Fairfax County Sch. Bd.*, 372 F. 3d 674, 681 (4th Cir. 2004). Therefore, the challenge is to determine the Student's placement when he was removed from the [redacted] DTP.

On August 22, 2016, the Parents and the District informally agreed that the Student needed a day treatment program. While the meeting lacked the attendance of a regular education teacher, and was therefore procedurally flawed as an IEP meeting,[1] there were exigent circumstances that required the Parents and the District to reach an agreement on programming, at least on a temporary basis. There was no argument between the parties that he needed a day treatment program, given his recent hospitalization and history at [redacted] The Parents and his in-home BHPs made it clear that the Student had been extremely challenging. The District made it clear that it did not have a day treatment program, but was willing to provide one for him out of the district. The IEP Team officially confirmed that the Student needed a day treatment program on September 27, 2016, at his annual IEP meeting.

I find, therefore, that the Student's placement on September 7, 2016 was a day treatment program. I further find that the District was required to return the Student to a day treatment program based upon the MDR on November 1, 2016, which found that the Student's behaviors on September 7, 2016 were a manifestation of his disability.

Technically, the IEP Team agreed on September 27, 2016 that the Student's placement was a day treatment program. This was prior to the MDR on November 1, 2016. Therefore, the District has not actually violated the regulations because it did not change the placement from which he was removed. The true issue is whether the Student has been provided a FAPE due to the failure to provide him with day treatment programming since his suspension. However, that issue must be raised in a regular due process proceeding pursuant to MUSER XVI., *et seq.*

[1] The IEP meeting on August 22, 2016 lacked a regular education teacher without the written consent of the Parents. MUSER VI.2.(B)(2),E.

3. Was the interim alternative educational setting provided by the District on or about September 27, 2016 inadequate, and did the District fail to deliver the interim alternative educational services?

In summary, the IEP Team that met on September 27, 2016 established the Student's IEP for the 2016-2017 school year. The Team agreed to include tutoring at a to-be-determined location as an IAES while the District secured a setting for a day treatment program. While attempts have been made by the District to find tutoring services and a location in which to provide them, it has failed to do so. Therefore, I find that the District has failed to provide the interim tutoring and denied a FAPE to the Student in violation of the IDEA.

The District attempts to fit its circumstances into one wherein a district has been unable to find resources to provide IEP programming to a student within 30 days of the beginning of the school year, at which time the IEP Team must meet to determine alternative service options, pursuant to MUSER IX.3.B(3). However, the District cannot overcome its failure to provide required educational services, tutoring or otherwise, since September 9, 2016. The Student continues to remain at home without any educational services.

4. Was the Student denied a free and appropriate public education in the least restrictive environment from September 9, 2016 through the present, as a result of the illegal change in placement and inadequate interim alternative educational services?

The issue raises IDEA claims that are outside of the confines of an expedited hearing, which is limited to determining a placement, not compensatory education remedies.

While the District acknowledges that it is responsible for some level of compensatory education and services, the hearing officer does not have the authority to provide a remedy for compensatory education under XVII.3.B. Compensatory educational remedies must be determined either by agreement of the parties or through mediation and/or due process procedures in MUSER XVI., *et seq.*

VII. REMEDY

The IDEA and MUSER allow the hearing officer two choices in determining the appropriate course in an expedited hearing: 1) return the student to the placement from which he was removed, or 2) place the student in an IAES for 45 school days if there is a finding that the current placement will give rise to a substantial likelihood of injury to that student or others. 34 C.F.R. §300.532; MUSER XVII(3)(B).

I find that given the recent history of the Student's maladaptive and unsafe behaviors, there is a substantial likelihood of injury to himself or others if he does not have a high level of support, currently only available in a private day treatment setting. The Student's history of physical aggression toward others, as well as being unsafe with himself, requires that he be placed in an academic setting, at least temporarily, that has a high level of support.

The options presented at the hearing were limited. While it would be most preferable to have the Student at [redacted] Ms. Bailey was clear that it would take a while to set up a DTP. Everyone was clear that the Student needs not only academic services, but also appropriate supports, due to the potential for the Student to engage in maladaptive and potentially dangerous behaviors, as seen at the [redacted] DTP, [redacted] [redacted] Hospital, and at home. [redacted] does not have that capability at this time. The [redacted] DTP, the Parents' preferred setting, is not located within the District and is no longer available to the Student. All other public or private day treatment settings are unavailable at the moment, except for one.

The setting that is immediately available is at [redacted]. While none of the IEP Team members felt that this should be a permanent placement, Ms. Bailey, Ms. Albert, Mr. Quehl, and Ms. Toothaker all believed that, as an IAES, it would be better than nothing.

Based upon these circumstances, I find that [redacted] is the best temporary option at this point. It is available and has a [redacted] grade classroom with the appropriate staffing. I appreciate that this is not the best option, given the IEP Team's report after visiting the facility. However, while it is not the best setting, it is an appropriate setting.

VIII. CONCLUSION

Based upon the above, I order the District to place the Student at the [redacted] School in [redacted] for 45 school days, after which time it must either submit a hearing request to extend the period or place him in an appropriate DTP setting, as determined by the IEP Team.

It is so ORDERED.

Sheila Mayberry, Esq., Hearing Officer

January 3, 2017