

Maine Department of Education
Due Process Hearing
12.075H

Parents)	
)	Order Granting Partial
)	Motion to Dismiss
v.)	
)	
Portland Public Schools)	

On May 25, 2012, a hearing was held in Parents v. Portland at the offices of Drummond Woodsum in Portland, Maine. In attendance were Parents of student (“Student”); Richard O’Meara, Esq., counsel for the family; Bonnie Violette, Director of Special Services for the Portland School Department (“School”); and Eric Herlan, Esq., counsel for the School. Also in attendance to observe the proceedings, with the agreement of the Parties, was Max Aronson, high school student.

The purpose of the hearing was limited to the presentation of evidence related to the School’s affirmative defense that state and federal statutes of limitations limit the Parents’ claim that the School failed to provide the Student a free appropriate public education (“FAPE”) during school year 2008-2008 and 2009-2010 (up through March 27, 2010). Both Parents testified for the family. Marcia Hunter, Ph.D., and Christopher Kaufman, Ph.D., testified for the School.

The Parents and the School submitted briefs on May 29, 2012.

II. Findings of Fact

1. The Parents filed their due process hearing request (“Hearing Request”) on March 28, 2012. (Hearing Request.)

2. The Student, is XX years old, born on XX/XX/XXXX. (Hearing Request.)
3. In September 2002, Cumberland Child Development Services had evaluated the Student and he was found eligible for services due to “developmental delay.” (P-9). Intervention services included speech/language and occupational therapies. (P-5).
4. A neurological evaluation by Dr. Steven Rioux in 2003 indicated that the Student had a mild coordination disorder. (P-12).
5. An IEP meeting was convened on December 3, 2003. (P-17). The exceptionality was noted as Speech/Language Impairment. An IEP was developed that included speech and language services, and occupational therapy. The IEP indicated that he would receive two hours per week for therapy to work on articulation errors, word discrimination skills, and fine and gross motor skills. He also would be cued for reminders on using proper pencil grip. (P-13-15).
6. At the age of five, the Student entered Kindergarten at the Hall School. The IEP created on December 3, 2003 continued to be in effect. (P-20). The Student’s father reported that The Student began to have issues keeping an appropriate distance from his peers, and had difficulty making friends. Writing and organization issues became apparent as well. The Parents were becoming concerned. (Father’s testimony).
7. An IEP meeting was convened on November 10, 2004. The minutes indicate that The Student continued to have fine motor skill problems, specifically with writing. It was reported that he had a short attention span in the classroom, and that he was not connecting with other students socially, approaching them inappropriately. The Student’s mother reported that The

Student did not believe other students liked him. She stated that The Student had not substantially improved from the prior year, and had a follow-up appointment with Dr. Rioux. Sensory breaks were included into his day for breaks. Jane Anderson, occupational therapist, indicated how hard it was to differentiate between sensory issues and attention issues in students, and raised the possibility that The Student had both. The family was given sensory rating scales to fill out. The IEP Team agreed that The Student would see the social worker for social skills group, participate in sensory breaks in the resource room three times daily, and participate in literacy group four times per week. (P-19).

8. An IEP meeting was convened on January 7, 2005 for The Student's annual review. (P-23). The IEP Team reported that his fine and gross motor skills were improving. However, he still had difficulty organizing his work, had a short attention span, and had been chewing on his clothes. He needed prompting to participate in class activities and assistance in organizing himself through the day. He lacked a clear internal sense of personal space and did not have a clear sense of his body's position, resulting in difficulty with motor planning and organization. Three sensory breaks a day seemed to decrease the frequency in which he chewed his clothes. While he had good language skills and advanced to Level 6 in reading, he continued to need therapy for articulation and word discrimination. The IEP Team agreed that he was a good candidate for the Reading Recovery Program. The Student's mother reported that Dr. Rioux indicated a possible diagnosis of dysgraphia. She also noted that The Student had made a few friends at his birthday party. Karen Hunter, social worker, suggested that she work with The Student on improving his self-expression, self-confidence, interaction with others, social skills, and ways to make friends. The IEP determined that he would continue his speech/language and OT therapies at the same frequency, continue with a literacy group, start Reading Recovery services, continue sensory breaks

three times per day, provide social work services for pragmatics and social skills, as needed, and provide an option for quiet lunch. (P-26).

9. The Student entered second grade in the fall of 2005. Both Parents were worried about his temperament and apparent pervasive unhappiness. The Student told his parents that he did not have any friends and other students were mean to him. He frequently cried at night. He felt that his peers did not like him. The Parents saw that The Student felt he could not fit in with his peers and that he could not focus on his work. (Parents' testimony).

10. An IEP meeting was convened on October 17, 2005. (P-34). The Team discussed how The Student had made "great strides" in reading and comprehension, expressing himself in the classroom, and essentially correcting his lisp. However, all the other components of The Student's progress discussed at the prior IEP meeting in January 2005 still persisted. He was not self-directed in his independent learning times and did not pay attention to instructions. His handwriting was still poor. He continued to struggle with appreciating his peers' personal space, creating negative social issues. He continued to benefit from sensory breaks. The Team agreed that he should be reinstated into a social group and needed to be reevaluated, since it did not appear that his eligibility under speech/language impairment was accurate. (P-38).

11. In December 2005, the School's psychologist, Sally Serunian, performed a psychological evaluation. (P-41). The IEP Team reviewed her report on February 16, 2006, as part of The Student's annual review. (P-60). The Team, which also included Dr. Christopher Kaufman, the School's lead psychologist, was informed that The Student had performed within the average ranges on the testing instruments (WISC-IV, Bender Visual-Motor Gestalt.) However, his math scores indicated significant deficits. In addition, the parents' and teachers' ratings scales for hyperactivity, depression, withdrawal, and

attention problems were significantly high. Teachers also reported that The Student still had difficulty working in small groups, frequently touched other students, and felt that peers were mean to him. He frequently was inattentive. (P-60). The Parents reported that they had taken him to be evaluated by Dr. Jack Mann and that he had an Attention Deficit Hyperactivity Disorder (“ADHD”) diagnosis. The IEP Team agreed that The Student’s eligibility category should be changed to Other Health Impairment (“OHI”). The IEP agreed that The Student would receive six hours of direct instruction per week; social work services on an informal basis for pragmatic and social skills; OT for .5 hours per week; an option to be in the quiet lunchroom; and sensory breaks built into his school day. (P-61).

12. The Student’s mother testified that she believed the diagnosis of ADHD was accurate since she had been diagnosed with Attention Deficit Disorder as a child, and her father was also diagnosed with it. She felt that they were on the right track with helping The Student. (Mother’s testimony).

13. The Student began third grade in the fall of 2006. An IEP meeting was convened on October 11, 2006. (P-92). The discussion was focused on The Student’s emotional, psychological and social issues that had become apparent. The team noted the following: “The Student is demonstrating anxiety at school. When he is anxious he moves around a lot, cries, gets emotionally worked up, worries, worries about not being in the right place and is overwhelmed. It is hard to bring him back from these anxiety episodes. The Student wants to make friends but his skills are weak and he has little success. The other students are becoming less tolerant than they were in the past. He misperceives incidents and will react to another student inappropriately based on his misperception.” (P-97). While he was academically making progress, the team noted that, “He is anxious about projects. The Student is inconsolable. Everything is an emergency for him. The team is very concerned about how unhappy The Student seems to be.”

(P-97). It was reported that students did not tolerate The Student's physical approaches (e.g., hugging, licking, getting into their personal space.) The team discussed whether he was in the right placement. (P-97).

14. In a memorandum to Cheri Drago, the School's learning strategist, dated October 10, 2006, Karen Hunter, the School's social worker, stated her impression of The Student. (S-407). She noted that she had worked with The Student the prior year on his social pragmatics, along with another boy from his class. She stated that, "My concern is that The Student seems totally overwhelmed this year, although I've only met with him a few times. He still complains about having "no friends", and he states he just walks around on the playground alone. He seems preoccupied with odd things at times - grass, last year the cardboard cutout. He has a very low frustration tolerance and has a great deal of anxiety when attempting new things or activities he does not enjoy. He is so sweet and kind but his anxiety can literally sicken him and take away his appetite. I see him as very emotionally fragile at times and not comfortable in his own skin." (S-407).
15. Dr. Kaufman, who was present at the IEP meeting on October 11, 2006, asked the IEP Team if it felt that The Student may fit the Asperger's profile. The Team agreed that an Asperger's checklist would be completed to rule out Asperger's. (P-97).
16. Dr. Kaufman testified that he "dimly" remembers attending at least one IEP meeting to discuss The Student's progress. He stated that, as the lead School psychologist, he was asked to attend IEP meetings in cases of students that were more difficult or complex, such as those cases when Autism or Asperger's may be a possible diagnosis. He stated that he remembered The Student's case in a general sense. He recalled that The Student had behavioral and social issues complex enough to warrant his consultation, along with Mr. Serunian's opinions. He recalls the IEP Team agreeing to

collect data using rating scales from Parents and teachers to make diagnostic determinations. However, Dr. Kaufman testified that he has no recollection of what happened after the IEP Team agreed to submit rating scales. He does not recall producing a report or speaking to the School or the Parents about rating scales. He stated that it would be unusual for him not to do so, but he had no recollection of discussing the issue further with anyone. (Kaufman testimony).

17. The Student's mother began to read more about Asperger's on her own. She believed that benchmark symptoms associated with Asperger's were not seen with The Student. He was not withdrawn from other children; he was not obsessive about particular subjects. When he became interested in something, but then became confused or did not have enough information, he would make up ideas or facts. (Mother's testimony).

18. The Student's mother recalled that, while the IEP was tasked with completing the checklist Dr. Kaufman suggested at the IEP meeting, at no point thereafter was the issued raised again at an IEP meeting until a few years later. (Mother's testimony).

19. The Student was referred by Dr. Mann to Barbara Baum Freethy, M.Ed. for a social cognitive evaluation. Her evaluation took place on October 13, 2006 and March 15, 2007. (S-284-291). In summary Ms. Freethy stated that The Student has difficulty sustaining communications with others, and was awkward in his attempts to initiate conversation or play with peers. However, he showed eagerness to learn and was receptive to new ideas when in a situation where he felt safe. The Student scored in the average ranges in six areas of reasoning. There were "Probable Concerns" in adaptability, social skills, leadership, activities of daily living and functional communication. Several areas on the Sensory Profile were marked "definite difference" and were likely impacting The Student's social and academic

success. Difficulties were indicated in executive, function, language processing, emotional regulation, cognitive flexibility, and social skills. Ms. Freethy reported that the interventions in use seemed to be working. She recommended that The Student continue his social thinking groups, include activities for increasing problem solving/reasoning skills in his social group and at home, and incorporate the Collaborative Problem Solving approach into his school day to reduce his frustration and anxiety in the academic setting. (S-288-290).

20. The Parents testified that during third grade The Student continued to cry at night. He was feeling bad about himself. Ms. Freethy suggested that they see Marcia Hunter, Ph.D., to try to find out why he was so anxious and unhappy. (Father's testimony).

21. Dr. Hunter performed a neuropsychological evaluation on December 19, 20, 2006, and January 17, 2007. (S-261-283). Her diagnostic impressions were as follows:

The Student presents with a complicated profile of emotional, educational, and social difficulties. By history and current presentation there is evidence of fluent speech, motor skills, social skill development, academic skills, and self-regulation of mood and behavior. A primary component of The Student's presentation is an underlying anxiety, which interacts with other vulnerabilities to leave him in a great deal of distress across home and school environments. The Student also carries a previous diagnosis of Attention Deficit Hyperactivity Disorder (ADHD). While it is *necessary* to consider his attentional disorder as contributing to his functional impairment, it is *insufficient* as a way to understand his overall profile.

Taken together, The Student's history and symptoms raise the possibility of a developmental disorder, and an Autism Spectrum disorder, such as Asperger's Syndrome (AS), cannot be ruled out. However, the most conservative diagnosis is warranted at the level of temperamental sensitivity and associated symptoms of anxiety. In fact, The Student's current emotional sensitivity is so diffuse and intense, that diagnosis of more specific syndromes, such as AS, must be deferred. For example, The Students' s reactivity to frustration is so heightened, that it is difficult to distinguish between true developmental delay and performance anxiety. Diagnostic action is also warranted given the lack of certain 'markers' of AS such as family history, stereotypical behaviors, serious communication deficiencies, and marked problems with comprehension. Thus, the current diagnostic impression is of Generalized Anxiety Disorder, NOS, and ADHD. (S- 271-272).

22. Dr. Hunter noted in her recommendations for The Student that he was in a high state of distress at the time he was referred. (S-274). She provided general, academic, social, and therapeutic recommendations. She also stated that medication was recommended to target anxiety given The Student's current state of distress. "He continues to need support for more focused attention, but the first line of intervention may need to be at the level of quieting of his mind and body." (S-274). She also suggested that the IEP Team consider modifications to his plan to shift him out of 'crisis' mode. She suggested a shortened school day if necessary and a short term restricted environment to see how he responds to dramatic reduction in demands and reduced environmental stress. Many of Dr. Hunter's general recommendations focused around attending to her diagnosis of an anxiety disorder: a slower pace; reduced stimulation; incremental learning strategies

that reduce his experience of failure; offering to switch to a preferred interest before he escalates; time to rehearse new behaviors and anticipate times of transition or novelty; explicit scripts to learn as a means of organizing his problem-solving; and engagement in cognition, e.g. counting backwards, to help him to decrease emotionality and reestablish his equilibrium. These recommendations carried over into the Academic and Social setting. Recommendations for therapeutic interventions included individual and family therapy, and parent guidance work with The Student's therapist. (S-274-280).

23. Dr. Hunter testified at the hearing. She recalled that The Student was in a "crisis" at the time of her evaluation. He had "zero resilience" in coping with stress. He had a very high level of anxiety and the Parents were having trouble getting him to go school. (Hunter's testimony).

24. Dr. Hunter stated that she was conservative in diagnosing The Student with anxiety. While she did not want to rule out Asperger's Syndrome, she did not believe that the functional impact of The Student's symptoms reflected an Asperger's diagnosis. She stated that, at that time, Asperger's Syndrome was not being frequently diagnosed in the field of clinical psychology. She noted that much of her work has been centered on patients who have been diagnosed with Asperger's Syndrome. She stated that she did not recall that The Student's eligibility category was incorrect. (Hunter testimony).

25. During this period, the Parents believed that, based upon Dr. Hunter's explanation, the Anxiety Disorder diagnosis fit The Student's symptoms and was at the root of his behaviors. (Mother's testimony). Both Parents testified that Dr. Hunter told them she did not rule out Asperger's, but that she was unwilling to diagnose it based upon her evaluation. They understood her to believe that anxiety was the clinically significant problem and that medication could help to bring down his level of anxiety to be more

successful. They gave Dr. Hunter's report to the School to discuss it at the next IEP meeting and asked her to attend.

26. The IEP Team met on March 19, 2007. (P-116). Dr. Hunter and Ms. Freethy attended the meeting. The Team reviewed Dr. Hunter's report, as well as Ms. Freethy's report of The Student's progress in her small social group. (P-121) It was noted that Dr. Hunter had evaluated The Student when he was in crisis. The IEP minutes stated that Dr. Hunter reported that an Asperger's diagnosis was not ruled in or out, but was a possibility she could not confirm at that time. She confirmed an ADHD diagnosis along with anxiety. (P-121). Ms. Freethy reported that The Student had made steady gains since he began the small group work with another boy. At the suggestions of both providers, the IEP Team included strategies into The Student's Goals and Objectives. (P-123). The Parents reported that it was during this period that The Student was prescribed Zoloft. The eligibility category remained Other Health Impairment. (P-121).

27. The Student began fourth grade in the fall of 2007. He was placed in the Many Rivers Program ("Program") at the Halls School. (Father's testimony). The Program was an integrated 3rd-5th grade classroom setting. The Parents felt that it was a better fit for The Student due to the reduction in transition from one teacher to the other, and included the same set of students over the course of the grades. (Father's testimony).

28. An IEP Team meeting was convened on October 22, 2007. (P-138). The Written Notice indicated that The Student seemed generally better at that time. (P-158). He was handling transitions without getting upset, and there had not been any true meltdowns at that point. (P-156). Frustrations were controllable and occurred less often. He was responding better to redirections and understood that people were watching out for him. He was feeling liked by others, but did not seem to have any "true" friends. However,

he easily partnered up with other students for cooperative grouping, and was willing to go along with other students' ideas and be open to suggestions. He followed along well with the routines of the class. He was still somewhat anxious on Sunday evenings, anticipating going to school, and when he thought he was going to do something difficult. (P-158).

29. The Student's IEP noted that he still had a poor ability to stay focused and attend to his work, be organized approaching tasks, cope with changes in routines, and understand others' personal space. (P-140). His parents were still concerned about his self-esteem and social skills. (P-140). Academically, he was on grade level in reading and math. (P-142). Writing was still a struggle for him. He produced below grade level independently. (P-142).
30. By the end of fourth grade, the Parents reported that The Student was somewhat stable. They felt that perhaps the medications were working, but that there was no improvement, and perhaps deterioration, with his social interactions or self-esteem. He still expressed negative thoughts at night, but his anxiety level was "in check." (Father's testimony).
31. Progress reports were made during the 2007-2008 school year. In March 2008, the description of The Student's progress on his OT goals indicated that while he was doing a good job identifying and beginning to remember letter positions on a keyboard, leaving class for OT was becoming too stressful for him. As an alternative he had been going to sensory brain gym during the morning group, which seemed to be working. (P-164). With respect to his organizational skill goals, it was reported in June 2008 that The Student was doing a "great job" at organizing assignments on his own, and that he needed minimal support to complete an acceptable piece of work. (P-167). His progress on writing goals indicated his writing had improved a "great deal." He had good ideas and "mostly" carried them through independently. (P-168). With respect to his behavioral and social goals, The

Student's behavior had improved; he still faced challenges under some circumstances, but had come "a long way." (P-169).

32. The Student started fifth grade in the fall of 2008. The Student's father reported that, while the school year started out well, higher expectations in school seemed to increase his anxiety levels. (Father's testimony). He was still being prescribed Zoloft, as well as other medications. His Parents were trying to find a "magic bullet" that would be effective. The Student was again becoming more distraught at night and would cry frequently. (Father's testimony).

33. An IEP Team meeting was convened on November 21, 2008 to review The Student's program. (P-175). The Written Notice indicated that no changes were made to his IEP. The Notice stated that, "The Student has been more flexible than in the past. The team is introducing a fun learn to type program to support The Student's keyboarding skills." (P-176). It also noted that The Student's medication had been changed and that his Zoloft had been increased to address his increased anxiety at school. The Parents were seeking a new doctor to manage his needs. (P-176).

34. Progress notes for February 2009 indicated that The Student continued to progress in his organization skills and writing level. (P-179, 180). He had made good progress the beginning of the year with respect to his behavioral skills, but had a set back about mid-year, and was being coached again. (P-181.)

35. Daniel Bates, DO, had been privately treating The Student for ADHD and anxiety. On March 4, 2009, Dr. Bates reported a visit with The Student for a medication recheck. (P-178). He saw no change in The Student's behavior after a reduction in his Strattera dosage. Zoloft had been continued at nighttime. The Parent told Dr. Bates that she felt that there was some

improvement, but not enough. Dr. Bates noted that The Student's "triggerable" hypersensitivity tended to be what was getting him "in trouble" and would be the main target, "although improving his focus and reducing his impulsivity would help him out both academically and socially." (P-178). His assessment was ADHD, mixed type, with generalized anxiety. His plan was to raise the dosage for Zoloft and continue with Strattera. (P-178).

36. Progress reports were made in March 2009. He was using supports more effectively to accomplish his organizational skills. (P-179). While still struggling with his writing, The Student was more willing to take direction. (P-180). He did well in math, but usually when working with a teacher one-on-one. (P-182.) With respect to his behavioral goals, the Progress Report stated, "Lately The Student has shown some improvement in this area, however, it is very up and down with him. He will have a good day and then have a bad day it is not always predictable." (P-181).

37. An IEP Team meeting was convened on March 18, 2009. (D-251). Dr. Kaufman attended the meeting. (P-184). The Team discussed The Student's transition to King Middle School. There was no discussion of changing his eligibility category or doing additional evaluations.

38. The Student was excited that he was going to middle school because it seemed like a fresh start to him. (Father's testimony).

39. An IEP Team meeting was convened on April 3, 2009. (P-205). The Written Notice stated that teachers saw The Student as being anxious at school. (P-205). He did not have a perspective on how others saw him or how he was doing. He did not want to stand out in front of his peers. The Student had made good friends, had great ideas and a good imagination for writing. He did not like editing and his handwriting was a weakness. He had a good sense of humor and understood sarcasm. He loved to read and understood math

concepts but needed review for the processes and for starting on assignments. The Student's IEP was amended to include various services, accommodations, and special instruction for middle school. (P-205-206). The Written Notice also indicated that The Student was seeing Dr. Bates at Integrated Behavioral Health and therapist Dr. Audry Stemple. (P-207). The Parents were, "relooking at his diagnosis" and working on strategies to reduce anxiety. (P-207).

40. The IEP created for The Student, dated April 3, 2009, included his "Present Level of Academic and Functional Performance." (P-192). It indicated that he was on grade level in reading and math, while writing was a challenge for him. (P-192). He remained below grade level with respect to organizational, writing, social, and behavioral skills. The IEP indicated that, "The Student is significantly below his age level" behaviorally and socially. "He has difficulty staying in his own space and is frequently very 'silly' with his peers, often to the point of annoyance. When corrected about situations, The Student often becomes very defensive and has difficulty listening to others' opinions. He has been coached for these issues for the past three years and has made some progress, however, is still not able to change his behavior without constant reminders of the appropriate actions." (P-192). "He becomes extremely anxious in difficult situations and may become belligerent. (P-192).

41. In April, June, August, October 2009, and January and April 2010, The Student was seen by Dr. Bates or another associate from Integrated Behavioral Health. (P- 208, 209, 210, 217, 218, 219). In reports of the visits, Dr. Bates or his associate assessed The Student's profile as ADHD, Asperger's, and anxiety or "possible Asperger's." *Id.* In the 2010 reports only the diagnoses codes were given for the assessment: 300.02, 314.0, and 299.80. *Id.*

42. The Student's Father testified that he did not see any of the notes from Integrated Behavioral Healthcare until they were produced in preparation for the due process hearing. (Father's testimony). He stated that if the Parents had been aware of the notes from Dr. Bates, they would have provided them to the IEP Team. (Father's testimony).
43. The Student began 6th grade at King Middle School in the fall of 2009. His Father stated that expectations for homework and classwork were higher. It became immediately apparent to the Parents that things were not going well for The Student. They were getting reports of high anxiety and difficulty with transitions going from class to class, and completing homework at night was difficult. He frequently cried at home. (Father's testimony).
44. While The Student's triennial evaluation and IEP review were due in December 2009, there is no record that they were performed at that time. Dr. Kaufman did not have any memory of why they did not occur. (Kaufman's testimony).
45. On October 26, 2009, Dr. Bate's notes indicated that The Student had "proudly" showed his report card, and that The Student's mother reported that she had seen a "vast mood improvement." (P-219). He indicated that improvement had been made regarding depression, anxiety, sleep, and concentration. While homework was overwhelming at first, The Student had become "more efficient at it." (P-219).
46. Progress reports on The Student's IEP goals were reported in March 2010. (P-212). While no descriptive narrative was included, the reports indicated that he made satisfactory progress (designated as a "2") on all goals, including organization, behavioral, and writing skills. (P-212).

47. On April 5, 2010, Dr. Bate's notes indicated that The Student "regresses routinely as defenses." (P-217). Father did not see these notes until it was produced in preparation for the due process hearing. (Father's testimony).
48. On April 27, 2010, Mr. Ottalen noted a visit from The Student and his mother. (P-215). He stated that The Student's mother needed to discuss The Student's stress responses and coping skills. He noted that The Student was not responding well to teachers' rules. He was tearful, angry, intrusive, demanding, and avoidant. (P-215).
49. On April 28, 2010, a psychological evaluation was performed by Dr. William J. Ferreira as part of The Student's triennial review. (S-151-156). The report was forwarded to the Parents on May 3, 2010. (P-156). Dr. Ferreira's diagnostic impressions indicated that The Student demonstrated average to above average range of conceptual reasoning, but increasing difficulty in his capacity to process visual, spatial, and symbolic information, which placed him in the lower average range. "His relative increasing weaknesses in processing more complex visual symbolic information may be reflective of nonverbal processing difficulties." (S-155). Dr. Ferreira also indicated that The Student continued to exhibit high levels of emotional and behavioral disinhibition, along with attentional, executive function, and social competence weaknesses. He stated further that, "While weaknesses in attention and executive dysregulation support an ongoing diagnosis of attention deficit hyperactivity disorder, the level of emotionality liability mood irritability, and social interactive difficulties that The Student is rated as experiencing indicates that he likely experiences a broader range of difficulties than AD/HD alone. Diagnostically, the question as to whether The Student experiences functioning reflective of Asperger Disorder or mood disorder still remains open, but needs to be addressed." (S-155). "The Student is viewed as in need of continued assessment to further rule out

whether his functioning represents Asperger disorder and/or additional impact from mood disorder.” (S-155).

50. An IEP Team meeting was convened on May 3, 2010 to discuss evaluation results. (S-141). The Team agreed with Dr. Ferreira’s recommendation to assess The Student’s social pragmatic perceptions, visual spatial processing, and flexibility of thinking, in order to rule to out Asperger’s Disorder. The Team further agreed that until such testing was completed and reviewed in the fall of 2010, teachers would lessen The Student’s workload to help manage his anxiety. (S-142).
51. The Father reported that by the end of 6th grade, The Student had not improved his social skills. His anxiety was high and he had not progressed academically. He was very disorganized. Dr. Ferreira’s report made the Parents wonder if something different should be done since he had only been treated for anxiety and ADHD. (Father’s testimony).
52. An IEP Team meeting was convened on November 10, 2010. (S-127). The Written Notice indicates that the Team reviewed Dr. Ferreira’s evaluation and agreed with his suggestion that the Parents and teachers fill out rating scales to help determine if further testing was necessary. (S-129). At that time, the Parents shared with the Team that The Student was seeing psychiatrist Dr. Gordon, and that The Student was not currently taking medication for ADHD, but was taking Zoloft and Corladine. (S-130).
53. Dr. Kaufman testified about his opinion regarding Dr. Hunter’s evaluation of January 2007. He stated that, while Dr. Hunter’s evaluation was comprehensive, if there was a suspicion that Asperger’s Disorder may be an underlying condition, then classroom observations and the use of standard rating scales commonly used in assessing Autism Spectrum disorders may have been an appropriate and helpful addition to the evaluation she

performed. He felt that it may have added a higher level of confidence in making a distinction between the possible diagnose (Kaufman’s testimony).

II. Statutory and Regulatory Provisions

In 2004, the IDEA, which previously had no statute of limitations, was amended to provide:

Timeline for requesting hearing. A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if that State has an explicit time limitation for requesting a hearing under this subchapter, in such time as the State law allows. (20 U.S.C. § 1415(f)(3)(C)).

In addition, the IDEA sets forth a limitation on the filing of complaints such that a complaint must set forth:

. . . an alleged violation that occurred not more than 2 years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint . . . (20 U.S.C. § 1415(b)(6)(B)).

Maine special education regulations mirror the federal law, providing that a hearing request “must allege a violation that occurred not more than two years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the due process hearing request.” *MUSER* § XVI.5.A.2. Separately, under the heading of “Timeline for Requesting a Hearing,” the regulations state that a parent or agency “must request an impartial hearing on their due process hearing request within two years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the due process hearing request.” *MUSER* § XVI.13.E. The Maine regulations also provide the same exceptions as the federal law at *MUSER* § XVI.13.F.

III. School’s Position

The School argues that it provided the Parents with all the various types of substantive notice required by the IDEA, and they should be presumed as a matter of law to have known, or should have known, the core facts on which they could either proceed or not proceed with due process. The School argues that there is no dispute that The Student was appropriately evaluated, that the Parents received copies of the evaluations, graded progress reports and Written Notices, and that the IEP Team met regularly. The School also cites the results of Ms. Freethy's work with The Student, Dr. Hunter's evaluation of him, and the discussions with Dr. Kaufman. The School claims that the Parents have failed to identify any fact that they did not know about The Student, other than the technical diagnosis of The Student's Asperger's Syndrome-a diagnosis that no one has said should have been issued earlier than it was determined. Based upon all the information provided to the Parents, the School argues that it should be presumed that Parent had knowledge at each stage in the proceeding of the basic facts that the IDEA expects families and school to have in order to make decisions about the student. Therefore, the Parents' allegations beyond the two-year statute of limitations period must be barred.

The School argues in the alternative that the facts in this particular case make it clear that the Parents fully knew all the important details about The Student's learning profile at the same time everyone else knew, if not sooner, and had this knowledge long before May 2010. The School asserts therefore, that the Parents "knew or should have known" of the "alleged action that forms the basis of the hearing request." The School asserts that the "alleged action" is not when the Parents knew or should have known about The Student's diagnosis of Asperger's Syndrome. Instead, the focus should be on whether they knew, or should have known, at an earlier period of time the underlying characteristics of The Student's learning profile, and the issues that were impacting his education performance. It is not the technical DSM IV diagnosis that is critical to the factual analysis of "knew or should have known."

The School furthers its argument that it is not the diagnosis, but instead, a student's educational limitations, that are key in determining what educational programming is appropriate. The School cites *J.W. Contoocook Sch. Dist.*, 154 F. Supp. 2d 217 (D. N.H. 2001) for the proposition that the key question is not whether a student is eligible by virtue of a specific diagnosis but whether the student's emotional and attention problems cause learning difficulties, requiring services not being delivered by or not available in the School, thus constituting unique needs not addressed by the IEPs. See also *Town of Burlington v. Dept. of Edu.*, 736 F.2d 773 793 (1st Cir. 1984), *aff'd.*, 471 U.S. 359 (1985)(requiring understanding of nature of learning difficulties); *Roland M.*, 910 F.2d 993. (Noting that real question is adequacy, not procedure); *Galina C. v. Shaker Reg'l. Sch. Dist.*, 41 IDELR 3 (D. N.H. 2004)(Parent did not demonstrate that the student's IEP would have been proposed substantively different programming or services for the student than if it had labeled her as dyslexic. Therefore, the IEP was not deficient in its failure to use her parents' preferred terminology for her disability

IV. Parents' Position

The Parents contend that there was no basis for the Parents to have knowledge either actual or imputed, concerning The Student's proper diagnosis ad/or the inappropriateness of his programming and placement during his fifth grade and most of his sixth grade.

The Parents assert that it was not until Dr. Ferreira's evaluation of April 2010, which the Parents received on May 3, 2010, that they knew that something other than ADHD was impacting The Student's educational performance. Dr. Ferreira's report first suggested that the potential diagnosis of a developmental delay was in need of serious exploration. This is the point in time that the Parents arguably should have known that his fifth and sixth grade placements and IEPs were defective for reasons previously unknown to them. Until that point in time, their knowledge of The Student's diagnosis was limited to the information they had

received during his third grade year about his ADHD and Generalized Anxiety Disorder. The Student's IEP was deficit in that his fifth grade IEP indicated that he did need communication skills, had only four hours of specialized instruction, supplemented with related services. The Parents claim there was no instruction in pragmatic language or social thinking skills. His sixth grade IEP continued to lack programming specifically designed to address his behavioral and social needs.

The Parents argue that they cannot be charged with the responsibility for knowing more about why The Student's program was not working than the expert school staff, citing *Draper v. Atlanta Independent School System*, 518 F.3d 1275 (11th Cir. 2008). Therefore, from the point that the information about the likelihood of a developmental delay came to their attention in May 2010, the Parents argue they had two years file a request for hearing and raise claims that went back not more than two years prior to the date they knew or should have known of the basis or their claims.

III. Analysis

The key determinant of the impact of both the state regulations and federal statute in this case is the point in time when the family knew or should have known about the alleged action that forms the basis of the allegation that The Student was not provided with a FAPE. The parties disagree as to the meaning of the governing language of "the action that forms the basis of the due process hearing request," as well as the point in time that the family "knew or should have known" about the action.

1. "Action that Forms the Basis of the Complaint"

In *Murphy v. Timberlane Regional School District*, 22 F.3d 1186 (1st Cir. 1994), decided ten years before the 2004 amendments to the IDEA, the First Circuit Court of Appeals held that a claim for compensatory education began to accrue when the parents knew or had reason to know of the "injury or the event" that was the basis for their compensatory education claim. *Id.* at 1995 (quoting *Hall v. Knott County Bd. Of Educ.*, 941 F.2d 402, 408 (6th Cir. 1991)); see also *James v. Upper Arlington City Sch. Dist.*,

228 F.3d 764, 769 (6th Cir. 2000) (holding that the parents' "initial claim accrued when they knew of the injury to their child [i.e., the inadequate education]").

Although the current statutory and regulatory language utilizes the term "action" rather than "injury," courts have interpreted the language similarly. In *Draper, supra*, the Eleventh Circuit Court of Appeals held that the IDEA allowed parents to pursue claims for misplacement of a student in a restrictive classroom for a period of five years prior to the filing of their complaint, because the parents "did not have the facts necessary to know that [the student] had been injured by his misdiagnosis and misplacement until they received the results of his evaluation" the year before they filed their complaint. *Id.* at 1288. The court discounted the school system's argument that the family should have known that the student was misdiagnosed and misplaced even before the school did, and declined to conclude that the family should have been blamed for not being experts about learning disabilities. *Id.*

A district court in Pennsylvania held that a complainant had "two years from the date she learned or should have learned of her injury to request that the School District provide her with a due process hearing." *Bantum v. Sch. Dist. Of Philadelphia*, 2011 WL 1303312, *4, n.7 (E.D. Pa., Apr. 5, 2011). The Second Circuit Court of Appeals has held that an IDEA claim accrues when the parents knew of the injury to their child. *M.D. v. Southington Board of Education*, 334 F.3d 217, 221 (2^d Cir. 2003), citing *James v. Upper Arlington City Sch. Dist., supra* at 769; *Alexopoulos v. Riles*, 784 F.2d 1408, 1411 (9th Cir. 1986) (holding that "a cause of action generally accrues when a plaintiff learns of the injury which is the basis of his action" and applying this standard to claims brought pursuant to the IDEA's predecessor statute, the Education of All Handicapped Children Act, 20 U.S.C. §§ 1401 et seq. (1982)).

Outside the context of special education, in *Rakes v. United States*, 442 F.3d 7, 20 n.8 (1st Cir. 2006), the First Circuit Court of Appeals held that "a claim can accrue before the plaintiff knows that the injury was the result of a breach of a legal duty; it is for this reason that we speak of the plaintiff's knowledge of the 'factual basis' and not his

knowledge of the legal sufficiency of his claim.” *Id.* at 20 n.8 (internal quotations omitted). As such, the statutory language and interpretive case law indicate that the “action that forms the basis of the complaint” refers to the action that creates an injury done to the student, not to a family’s understanding of the potential liability of the school district.

With respect to new knowledge of a previously undiagnosed disability, an ALJ in New York succinctly stated that claims simply do not accrue because a school fails to timely diagnose a student. To do so would establish the principle that upon assessment of a student the school must essentially achieve a flawless diagnosis of all the student’s possible conditions and fully disclose that assessment and diagnoses to the parents before the statute of limitations becomes applicable to any claims that the school failed to develop an appropriate IEP for the student. *In re: Student with a Disability* (NYEA, December 23, 2011). However, courts have not generally held schools to such a standard when evaluating the school’s procedures for convening IEP teams and developing IEPs. *Id.*, citing *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 131-32 (2d. Cir. 1998), and other cases.

In this case, I find that the “action” that forms the basis of the complaint is the School’s implementation of allegedly inappropriate specialized instruction, services and accommodations.

2. “Knew or Should Have Known”

In *Swope*, a district court in Pennsylvania held that the inquiry into when a parent knew or should have known of the violations that formed the basis of the complaint requires a “highly factual determination.” *Swope v. Central York School District*, 56 IDELR 286 (M.D. Pa., June 21, 2011).

In *Draper*, *supra*, the student had been misplaced by the school system when, in 1998, it placed him in the most restrictive setting available, based upon a flawed evaluation. He was not reevaluated until 2003, after which his eligibility changed from

mild intellectual disabilities to a specific learning disability. In 2004, after failed attempts to have the student progress in reading, the Parents were given their due process rights. They filed a hearing request in 2005. The Court did not agree with the school's argument that the parents should have known that the student had been misdiagnosed and misplaced before the school informed the parents of the diagnosis. There was no way for the parents to know that the initial evaluation was severely flawed until 2003, when a re-evaluation indicated a specific learning disability.

In *Barnstable Public Schools and Cape Cod Regional Technical High School*, 111 LRP 42177 (June 15, 2011), the hearing officer granted the school's motion to dismiss on the basis of the statute of limitations. In that case, the parents' hearing request of August 24, 2010 alleged that the school failed to identify the student with Asperger's or provide services to him in middle school, in violation of the IDEA, Section 504 of the Rehabilitation Act of 1973, and state statutes. He had received services through the eighth grade, but was found no longer eligible for services in June 2008. The record showed that the student had significant difficulty with transitions, working in groups, making friends, and maintaining long-term relationships. He did not want to be perceived as different from his classmates. By June 2008, both parents and the school had access to the same information regarding the student's social anxiety issues, and both had sufficient information regarding the student's possible Asperger's Syndrome. The information available to both parties also indicated that the student was making effective progress and there was little indication that he required additional services to address those difficulties. The ALJ opined that even if the student had been diagnosed with Asperger's prior to June 2008, there was no evidence in the record that his behavior at the time suggested interventions that could not have been offered as part of regular education to address this diagnosis. The parents did not request additional interventions, nor did they challenge the June 2008 finding of no eligibility. Since the parents neither alleged misrepresentation for withholding of information, nor presented any evidence that exceptions applied, all of the pre-August 2008 claims were dismissed.

In re: *Student with a Disability*, New York State Educational Agency, 112 LRP 4278 (December 2011), the state review officer found that the school's alleged failure to diagnose the student with Asperger's disorder from 1996 to 2007 accrued more than two years before the parent filed her due process complaint notice, and was therefore barred by the statute of limitations. The record indicated that the parent began asserting her disagreement with the district's recommendations as early as December 2006, when the school found the student to be ineligible for special education programs and services. Further, in a report dated March 9, 2007, the parent's private evaluator provided a diagnosis of PDD-NOS (atypical autism) and recommended an educational classification of autism for the student. The parent then sought reimbursement from the school for the psychoeducational evaluation dated March 9, 2007. She also retained an attorney who filed a due process complaint, dated June 20, 2007, that referred to the PDD-NOS diagnosis. The state review officer found that the parent knew or should have known of the student's diagnosis of autism by at least March 9, 2007, and therefore the claims asserted in the parent's due process complaint notice from January 2010 were barred by the statute of limitations.

Finally, in *Parents v. RSU #51*, 111 LRP 76760, (Order in Motion to Dismiss dated September 1, 2011)¹, a Maine hearing officer found that a parent knew of the existence of special education as a form of education, that a special educational system existed in the school district, that the student could potentially be referred to special education, and that one of the purposes of a meeting held in November 2007 was to determine whether the student should enter special education. The parents were aware that the student had taken part in special education at his prior public school, and that the student had a tutor with him for much of the day during the previous year at a private school. As of October 2007, it was clear that the student was struggling academically. While the parents may not have fully appreciated that these facts could potentially be the basis of a due process hearing request, the facts led the hearing officer to conclude that the parents knew or should have known that the decision not to place the student in

¹ On appeal as of the date of this decision.

special education in October 2007 could be injurious, and therefore their claims were barred by Maine's two-year statute of limitations.

Application of the statutory language to the facts of this case leads to a conclusion that the family knew or should have known of The Student's lack of progress on behavioral and social goals reported at the IEP Team meeting on October 22, 2006. It was reported that The Student was demonstrating a high level of anxiety. At school and at home he would cry and get emotionally "worked up;" he worried about not being in the right place and was "overwhelmed." It was hard to bring him back from anxiety episodes. His social skills were "weak" and he had "little success in making friends." The Team was "very worried about how unhappy he was," and discussed whether he was in the right placement. The possibility that The Student fit the profile for Asperger's was raised for the first time by Dr. Kaufman. The Team agreed to complete rating scales to help determine if Asperger's was an appropriate diagnosis. Therefore, I find that as of October 11, 2006, the Parents knew or should have known that The Student's educational program may have been inappropriate, based upon the lack of progress he was making toward his behavioral and social goals, goals which may have been impacted by a possible diagnosis of Asperger's or other developmental delay.²

The Parents' knowledge of The Student's alleged lack of progress prior to Dr. Ferreira's 2010 evaluation is underscored by the fact that in 2007, their private psychologist, Dr. Hunter, discussed with them that she was unwilling to conclusively find that The Student had Asperger's. If the Parents did not agree with Dr. Hunter's 2007 assessment, and if they were concerned about the School's failure to produce a report based upon the rating scales they had completed for Dr. Kaufman to determine the likelihood of an Asperger's diagnosis, their options filing a due process hearing request at that time. There is no evidence that they were not given copies of their procedural safeguards or in anyway influenced not to file a due process hearing request.

² When it became apparent that Dr. Kaufman had not submitted a report regarding the rating scales, the Parents still choose not to file a request for hearing.

In considering The Student's progress, or lack thereof, at a later point in time, there is evidence that the Parents suspected that something else was going on with The Student in April 2009. The Written Notice, dated April 3, 2009, indicated that The Student was anxious in school. He did not have a perspective on how others saw him. He did not want to stand out in front of his peers. The IEP, dated April 3, 2009, indicated that he was significantly below his age level, behaviorally and socially. He had difficulty staying in his own space and was silly to the point of annoyance with his peers. He would become defensive and had difficulty listening to others' opinions. He had been coached on these issues for three years and had made some progress, but was still not able to change his behavior without constant reminders of appropriate actions. He would become extremely anxious in difficult situations, possibly even "belligerent." At this juncture, the Parents clearly knew that The Student was not progressing toward his behavioral and social goals. They even reported to the IEP Team that they were relooking at his diagnosis. However, they chose not to file a due process hearing request. They did not need to wait until they had a different diagnosis to initiate action that could have possibly resulted in changes to his IEP sooner than May 3, 2010, when they received a possible Asperger's diagnosis from Dr. Ferreira.

Finally, the Parents knew that the School had not performed The Student's triennial evaluations on time. They were aware that his last IEP was dated December 3, 2006. They knew that an IEP Team meeting had not been scheduled in the fall of 2009 to start the triennial evaluation process, during which comprehensive evaluations would take place. Dr. Ferreira's neuropsychological evaluation was not submitted to the Parents until May 3, 2010. There is no record that an IEP Team meeting was convened until May 3, 2010, over a year after the April 2009 IEP Team meeting. The Parents knew or should have known that they could have filed a due process hearing request once the mandatory deadline for reviewing The Student's IEP had been missed.

The facts of this case are vastly different than those in *Draper*, supra., relied upon by the Parents. In *Draper*, the Parents had no reason to know that the student's evaluation in 1998 was not severely flawed comprehensive and failed to evaluate key aspects of the

student's abilities. The parents did not have enough information to know that was the case until he was re-evaluated in 2003. In addition, the parents were not given their procedural safeguards until 2004.

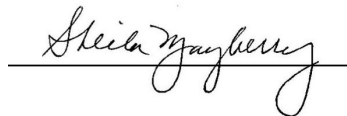
In this case, the Parents were fully involved in the Student's educational planning. They were comfortable with his 2003 initial evaluation by Ms. Serunian, the school's psychologist. The Student's mother believed that ADHD was a logical assessment based upon her own ADD and her father's similar diagnosis. There is no evidence that Ms. Serunian's initial evaluation was flawed.

In addition, there is no evidence to support an exception to the statutory and regulatory language, either that the School made specific misrepresentations or withheld information from the Parents.

Therefore, the School's Partial Motion to Dismiss is Granted. The Parents' claims relating to school years 2008-2009 and 2009-through March 27, 2010 are barred by the statute of limitations. The Parent may only assert claims against the School relating to events, or their absence, after March 27, 2010.

ORDER

All claims prior to March 27, 2010 are dismissed with prejudice. Parents may only proceed with claims against the School occurring on or after March 27, 2010.

A handwritten signature in cursive script, reading "Sheila Mayberry", is written over a horizontal line.

Sheila Mayberry, Hearing Officer

June 1, 2012