

All witness testimony was taken under oath.

I. PROCEDURAL BACKGROUND

On May 1, 2018 the Student's father ("Parent") filed a due process hearing request on behalf of his son, the Student in this action. ("Student").¹ On July 30, 2018, RSU #31 MSAD #31("the District") filed a motion to dismiss on the grounds that: (1) the Parent lacked standing to file a claim under the IDEA on his own behalf or in a representative capacity on behalf of his adult son; (2) The Parent's claims based on laws other than the IDEA are beyond the jurisdiction of the hearing officer; (3) the relief sought by the Parent is not recoverable in an IDEA due process hearing; and (4) the hearing request is barred in whole, or in part, by the two-year statute of limitations under IDEA and MUSER. On September 6, 2018, the Hearing Officer granted the District's motion to dismiss the Parent's claims not brought under the IDEA and MUSER, while denying the District's motion with regard to the other asserted grounds.²

On October 18, 2018, a telephonic prehearing conference was held. Documents and witness lists were exchanged in a timely manner. A Prehearing Report and Order was issued by the Hearing Officer on October 18, 2018.

The Parent distributed 212 pages of documents (herein referenced as P-#) and the District distributed 347 pages of documents (herein referenced as S-#) at the prehearing

¹ On January 6, 2017, the Student signed a durable power of attorney appointing his father as his agent to pursue this claim. On August 7, 2018 the Student's father and the Student jointly retained Mr. O'Meara and his firm as counsel to pursue this action on their behalf. The Student's mother was actively involved with the Student's educational programming and testified on behalf of the Parent and Student. As she did not join as a party to this action, however, references to the Parent *as a party to this* action will be in the singular.

² With regard to the statute of limitations issue, the Hearing Officer ruled in his order that the four-year filing deadline from the date the Parents knew or should have known about the alleged action that forms the basis of the complaint was in effect at the time the Parents requested a due process hearing in this matter, pursuant to *Ms. S. v. Regional Sch. Unit 72* (2017 Dist. LEXIS 191257, 2017 WL 5565206 (D. Me. Nov. 20, 2017)).

conference and at the hearing, with the agreement of the parties. Following the hearing, both parties requested to keep the hearing record open until February 8, 2019 to allow the parties to prepare and submit closing arguments. Pursuant to a post hearing order issued on December 10, 2018, the closing arguments were limited to a maximum of 35 pages and reply briefs to a maximum of 10 pages, double spaced.

Both parties submitted 35-page final argument memoranda and 10-page reply briefs within the required time periods.

On February 15, 2019, the First Circuit Court of Appeals issued its decision in *Ms. S. v. Reg'l Sch. Unit 72*, ruling that Maine has established a two-year statute of limitations for due process complaints, overturning the Federal District Court ruling in *Ms. S. v. Regional Sch. Unit No. 2:13-CV-453-JDL, 2017 WL 5565206, at *7-11* (D. Me. Nov. 20, 2016.) In a letter dated February 19, 2019, the District requested the Hearing Officer to reconsider and grant the District's previously filed motion to Dismiss. The Parent also requested an opportunity to respond to this issue and both parties agreed to amend the December 10, 2018 Post Hearing Order and keep the hearing record open to submit revised closing arguments in light of this recent First Circuit Court of Appeals ruling. The December 10, 2018 Post Hearing Order was amended to allow the Parent and the District to submit briefs by February 25, 2019 and March 1, 2019, respectively. The Hearing Officer's final decision was due on March 15, 2019.

Stipulations: The parties stipulate that the Student received a High School Diploma in June, 2016. The parties offered no additional stipulations.

II. ISSUES: Evidence was taken on the following issues:

1. Did the District fail to properly implement its Child Find obligations to evaluate

and identify the Student as IDEA-eligible, thereby resulting in a denial of a FAPE for the Student for the period of May 1, 2014-present?

2. Did the District fail to provide procedural safeguard notices to the Parent?
3. If the answer to either of the preceding issues is in the affirmative, is the Student entitled to receive compensatory educational services or other remedies from the District?

III. FINDINGS OF FACT

1. The Student is [REDACTED] years old (d.o.b. [REDACTED]) and resides with his Parents in [REDACTED], Maine. [Complaint].
2. The Student has been diagnosed with autism spectrum disorder (formerly known as Asperger's syndrome), traumatic brain injury and ADHD. [P-39; Parent testimony]. The Student experienced a birth injury that resulted in seizures at [REDACTED] days old due to a blood clot in his brain. Doctors installed a shunt when the Student was [REDACTED] months old, which currently remains in place. [P-5, 6].
3. In 2002, the Student began speech therapy and was assessed by Dr. Royal Grueneich, a clinical neuropsychologist, who concluded that the Student's overall cognitive skills were in the low average to average range and that he "demonstrates some behavioral features which are suggestive of pervasive developmental disorder." [P-10].
4. The Student qualified for special education services through CDS while he was in preschool under the category of traumatic brain injury. [S-1 at 2, 12]. While the Student was at CDS, he received physical, occupational, and developmental therapy. [S-1 at 3].

5. In 2003, the Student entered kindergarten with an IEP that included occupational therapy for 30 minutes per week and physical therapy for 30 minutes per week. [S-1 at 3]. In the minutes of his initial IEP Team meeting, the Student's teacher noted that the Student appears to prefer adult interactions. [S-3 at 12]. The Student's mother noted that he needed help to "socialize more with his peers." [S-3 at 12].
6. At an IEP team meeting held on September 10, 2004, (the Student's first grade year) the team determined that he no longer qualified for special education services as he had "met all of his goals". [S-8].
7. In March 2005, Dr. Grueneich conducted a neuropsychological examination of the Student. [P-013]. He diagnosed the Student with Asperger's Syndrome, and noted in his report that the Student's "limited interaction with peers is likely to have a negative long-term impact on his functioning through a failure to develop critical interpersonal skills." [P-021, P-022]. He recommended that the Student be provided with peer interaction guidance during structured group activities. [P-022].
8. At the request of the Parents, a Section 504 team meeting was held on May 24, 2005. At this meeting, it was determined that the Student was not eligible for a 504 plan. [S-10 at 30]. The 504 team made several informal recommendations including the Student's participation in a friendship group at school and Title One services to maintain his academic skills and to enhance his social skills. [S-10 at 30].

- 9.** In September 2006, the Parents referred the Student for a special education evaluation. [S-13 at 34]. In their referral letter, the Parents stated that they believed that his diagnosis has “affected his social progress” and that he “does not realize when others are teasing him.” [S-13 at 35].
- 10.** An IEP Team meeting was convened on November 1, 2006, to discuss the Parents’ special education referral. [S-14 at 36]. It was determined at this meeting that the Student would be screened for ADHD and that staff would let parents know about any bullying. [S-14 at 38]. The evaluations included social worker observations and an Attention Deficit Disorders Evaluation Scale (ADDES). [S-17 at 55, S-15 at 48].
- 11.** A Section 504 meeting was held on February 9, 2007 during the Student’s third grade year. [S-22 at 61]. It was determined at this meeting that the Student was not eligible for special education services but would be eligible for Section 504 status. The team determined that the Student’s autism spectrum disorder “limits the major life activity of learning in the areas of social progress and performance.” [S-22 at 61]. The Student’s 504 accommodations included a weekly meeting with guidance, participation in a friendship group and feedback from the Student’s homeroom teacher to the Parents regarding the Student’s peer interactions. [S-22 at 62].
- 12.** During the Student’s fourth grade year, (2007-2008), the Parents requested a referral for special education services based on their concerns regarding the Student’s social pragmatics and sensory integration. [S-26; S-27]. In response, evaluations were ordered for the Student which included an intelligence test,

full academic testing, classroom observations, OT and PT evaluations, and a test of pragmatic language. [S-27].

13. The pragmatic language testing results indicated that the Student's skills were in the average range, however the examiner noted that the Student had significant difficulty in "justifying or giving a rationale for a response." [S-30].

14. Dr. Adrienne Butler performed a cognitive evaluation on the Student on January 17, 2008. [S-31 at 92]. According to her report, the Student's overall intellectual ability was in the low average range. [S-31 at 94]. The Student's verbal and thinking ability scores "demonstrated significant intra-cognitive weakness and his auditory learning score was at the 1st percentile. [S- 31 at 93, 95].

15. On January 17, 2008, the Student's IEP team considered his eligibility under the category of a specific learning disability and found him ineligible because of his "average range in all areas". [S-32 at 99, 107]. It was determined that the recommendations developed from the Student's testing would be implemented through a 504 plan. [S-32].

16. Dr. Howorth testified that in her opinion the District failed to sufficiently evaluate the Student since the Parents were not asking to evaluate him with regard to a learning disability, but rather for services related to social concerns and his autism diagnosis. [Howorth testimony at 178.]

17. The Student continued on his 504 plan as he entered middle school in the fall of 2009. [S-41 at 134]. At a 504 team meeting held on September 30, 2009, the Student's mother told the 504 Team that the Student was "struggling socially,"

and still being picked on at school. [S-41 at 134, 136].

- 18.** The 504 plan for the 2009-2010 school year continued the Student's participation in a friendship group and academic accommodations to help him with accuracy and organizational issues. [S-38 at 127].
- 19.** In the May, 2010 "end of year" teacher reports, Mrs. Cormier, the Student's ELA teacher, noted that her "big concern...[was the Student's]...lack of peer interaction" [S-44 at 142]. Jeanne Reed, the school nurse stated: "I seldom see him interacting with his peers, he is usually alone. I have known [the Student] since kindergarten and his demeanor appears to have changed." [S-44 at 143].
- 20.** In an e mail dated May 17, 2010, Shane Yardley, the Student's social studies teacher, wrote that the Student "didn't socialize as much as he did earlier in the year" and "seemed to become more introverted as the year has progressed." [S-44 at 145].
- 21.** In a Section 504 Individual Accommodation Plan ("IAP") dated November 19, 2010 the District amended the Student's seventh grade 504 Plan to state, that "[t]eachers will prevent the Student from socializing solely with staff and kindly redirect him to peers, [and that staff would] look for the teachable moment to instruct [the Student] on social skills required for the specific situations." [S-47 at 150].
- 22.** In a written notice dated May 23, 2011, the Student's 504 team referred the Student for an IDEA evaluation, due to "performance below grade level expectations in the areas of written expression and complex oral expression." [S-52 at 161]. The written notice stated that "the team is requesting input

from child psychologist Dr. Adrienne Butler and speech therapist Kim McNally as to which tests would be best to assess [the Student's] written and oral expression." [S-52 at 162]. There was no referral related to the Student's social skills.

23. In October 2011, Dr. Butler administered the Test of Written Language (TOWL) which showed a number of the Student's scores within the average range, except for his vocabulary score at the 16th percentile and his logical sentences score at the second percentile; [S-55 at 170]. Dr. Butler noted that the Student had "areas of significant weakness within his expressive written language skills" and recommended tutorial assistance to address the Student's expressive written language issues. [S-55 at 174]. It is unclear if the District provided the recommended tutorial services to the Student.

24. An IEP Team meeting was held on November 14, 2011 to consider the Student's eligibility for special education services. A written notice dated December 15, 2011 stated that the Student "did not qualify for special education services in his writing, communication areas...[and that the Student] did not have a qualifying condition for special education services." [S-60 at 185; S-61 at 186.] The Team noted that the "significant social gains [the Student] has made at school, playing sports, [developing a] group of friends, etc., were big factors" in the decision to find him ineligible for specially designed instruction. [S-61 at 188].

25. The Student entered high school in the fall of 2012. His 504 IAP described his disability as "borderline impairment in social understanding and memory of

facial information and organization are impacted which, in turn, impacts his learning. He tends to interpret things literally, struggles with open ended or self-reflective statements, and had difficulty with changes and transitions.” [S-63 at 206].

- 26.** The Student’s standardized testing continued to show that he was scoring in the average range in reading, writing, and math. [S-64; S-65; S-66]. His grades during the 2012-2013 school year were in the 80s and 90s. [S-101].
- 27.** During the Student’s sophomore year, he was the victim of two different bullying/harassment incidents. In October, 2013, one of the Student’s teammates on the soccer team videotaped the Student while he was using the toilet in the boys’ locker room. [P-205; Parent testimony]. This student then uploaded the video to Snapchat, which was subsequently viewed by a number of the Student’s peers. [P-205; Parent testimony]. In February of 2014, another student put trash in the Student’s locker. [P-205; Parent testimony].
- 28.** These incidents were addressed at a 504 team meeting on February 12, 2014. At this meeting, the parents expressed concern that the Student was engaging in “shut in” behavior at home, appeared short-tempered, and was talking even less than usual. [S-67 at 214]. At this meeting, the Student’s IAP was amended to permit him to use the bathroom in the school office whenever he preferred. [Parent testimony; S-68].
- 29.** The Student’s pediatrician testified that after these bullying incidents, the Student became “quieter than ever,” and would say “everything is fine, school is fine...He didn’t want to complain” [Clough testimony].

- 30.** In November of 2014, Dr. Clough referred the Student to Dr. Grueneich for a neuropsychological evaluation to provide an updated assessment of his cognitive and behavioral functioning and to make recommendations regarding treatment planning. [P-31-41].
- 31.** Dr. Grueneich evaluated the Student on November 13, 2014 and wrote that since the bathroom videotaping, he had not used the bathroom while at school and had refused to change in the locker room during soccer season. [P-31]. Dr. Grueneich concluded that the Student's "...symptoms of Asperger syndrome are having a significant impact on his functioning, as he has not been able to establish effective friendships, he is bullied by his peers, he engages in limited social interaction even with family members...." [P-39].
- 32.** With regard to treatment options, Dr. Grueneich stated as follows in his November 2014 report:
- Dealing with the Student's problems with peer interaction is admittedly difficult, particularly since there are logistical problems in getting access to relevant interventions. Perhaps the most practical way to address his social difficulties is through directed peer interaction, which involves providing the adolescent with explicit guidance (i.e., through prompting from an adult) on how to interact with peers during structured group activities." [P-41].
- 33.** On January 5, 2015, a 504 team meeting was held to address the Parents concerns, discuss Dr. Grueneich's neuropsychological evaluation and to review the Student's 504 plan. At this meeting, the Parents explained their concerns regarding the Student's refusal to use the bathroom at school and noted that the Student's grades and "overall attitude have changed." [S-72 at 226]. The

Student's father stated at this meeting that he feels "that [the Student's] right to a free, appropriate public education are being violated." [S-72 at 226].

- 34.** At the January 5, 2015 meeting, the 504 Team added an accommodation to the 504 Plan requiring "close monitoring" and with specific direction given by staff for required interactions, group role and responsibilities during times of group activities. [S-72 at 228]. The January 5, 2015 504 plan was also modified to allow for an "adaptation" of abstract written language and comprehension work, so the Student could complete his high school work "at a different scale." [S-72 at 228].
- 35.** In the Student's eleventh grade year, (2014-2015) he participated in the Region III Information & Technology program. The Region III class was a college-equivalent course, allowing the Student to earn credit at [REDACTED] Maine Community College (" [REDACTED] ") for the grades earned while in high school. [Parent testimony].
- 36.** The Student's eleventh grade science teacher (within the RSU #31 District) testified that he did not recall the Student having any difficulty interacting with peers, however most of the Student's group activity time in his class was "structured." [Simone testimony].
- 37.** In February 2015, the Student was the target of another harassment incident on the team bus, during which another student took his hat. [Parent testimony]. The high school principal investigated this event and in a February 25, 2015 e-mail wrote to the Parents saying that she "did not feel it was disability-related harassment." [P-058].

- 38.** The Student chose not to participate in the school baseball team during his eleventh-grade year due to concerns with peer harassment. [P-60].
- 39.** A 504 Team meeting was held on July 30, 2015 “to review [the Student’s] plan in light of his participation in the fall soccer season.” [S-84 at 256; P-76]. The team also discussed the adverse impact of the Student’s disability and how it may impact his ability to interact socially with his peers and interpret meanings of social interactions. [S-84 at 257; P-76].
- 40.** At this meeting, the Student’s father expressed concern about the actions of other students during the last school year and stated that the Student “has been more isolated” and reluctant to complete his workout practice. [S-84 at 257; P-76]. No changes were made to the Student’s IAP at this meeting. [S-84 at 257; P-76].
- 41.** A 504 Team meeting was held on November 9, 2015 as part of the Student’s annual review and to review [the Student’s] plan in light of his participation in the basketball season.” [P-82]. The team again discussed the adverse impact of the Student’s Asperger’s diagnosis and how it may impact his ability to interact socially with his peers and interpret meanings of social interactions. [P-83].
- 42.** At this meeting, the Student’s father expressed concern about the interactions between the coaches and the Student and the reduction of the Student’s playing time. [S-84 at 257; P-76]. The 504 team agreed that the Student’s plan would be amended to have the coaches give more verbal feedback on areas the Student can improve. [P-84]. The Student’s father submitted an e mail message to Sue Reed on November 17, 2015 to clarify that the minutes of the November 9,

2015 504 meeting should include his concern that during drills and during games, other players don't pass the ball to the Student or otherwise include him. [P-86].

43. During the Student's 12th grade year, he received marks in the 80s and 90s, with a combined GPA of 88.26. [S-101]. The Student's December 2015 SAT scores for reading (410) and mathematics (420), *S-101 at 340*, gave him a composite score in reading and math 830 [S-262].³
44. The Student's soccer and basketball coach, Jeremy Durost, testified that while he didn't directly observe the Student's teammates excluding or bullying the Student, he acknowledged that there were things that went on that he didn't see, including the bathroom videotaping incident, the hallway locker incident and the incident when the Student's hat was taken on the team bus during in the Student's 10th grade year. [Durost testimony].
45. The Parent emailed Superintendent Wright on January 27, 2016 asking for a copy of his procedural rights under the IDEA: "Please advise [the Student's mother and me] of our rights in regards to violations of IDEA Part B. . . ." [P-107, 108].
46. A 504 team meeting was held on February 4, 2016 at the request of the Parents. [S-91 at 227]. The minutes of this meeting reflect the Parent's concern that the Student's scores had dropped in 3 out of 4 classes, and also that the Student might be depressed and was "more difficult to motivate". [S-91]. During this

³ The composite score the composite average score for critical reading, math and writing in Maine was 1392 (score out of 2400) <https://www.washingtonpost.com/apps/g/page/local/sat-scores-2015/1812/?noredirect=onof 1220> **placed the Student in the 21st percentile of all test takers in 2015.** <https://blog.prepscholar.com/sat-historical-percentiles-for-2014-2013-2012-and-2011>

meeting, it was determined that while the Student's quarter two grades were down, the Student's quarter three grades were improving. [S-91 at 277].

47. The February 4, 2016 504 team meeting minutes reflect that the Parent "might request a referral to special education services, however the Parent testified that the minutes were incorrect as he did request a special education referral, but was prevented from correcting the mistaken document as he was involved in a serious automobile accident shortly after this meeting and was unable to notify the District about this error in the minutes. [Parent testimony].

48. At a 504 team meeting was held on March 11, 2016 where it was determined that testing was necessary to "obtain the Student's present level of intellectual and academic functioning, to rule in / rule out the presence of depression, to assess his current ADHD symptoms, and to assess his adaptive functioning." [S-93 at 287]. It was determined that the Student would receive testing and evaluations consisting of "a classroom observation, rating scales as determined necessary by the examiner for ADHD and any needed emotional behavior scales, academic testing, cognitive testing, and any projective testing/interviews needed." [S-93 at 287].

49. Dr. Adrienne Butler conducted a psychological evaluation and released her report on May 31, 2016, just prior to the Student's high school graduation. [S-97 at 302; P-123]. Dr. Butler measured the Student's full-scale IQ at 97, which she characterized was in the average range. [S-97 at 307; P-128]. On the socialization scale of the Vineland which was administered on March 28, 2016,

Linda McCullen, the Student's teacher, rated him in the 13th percentile. [P-115 & P-116; P-118].

50. Dr. Butler testified that the Student made a "huge jump" in his written expression from middle school to 12th grade. [Test. Butler 453-54]. Dr. Butler said that she thought the Student had the intellectual ability and motivation to succeed in college with accommodations, but noted the uncertainties with regard to receiving accommodations for disabled students in college. [Butler testimony].

51. Although Dr. Butler noted that the Student was "happy with himself" with regard to his improved writing ability, she described his mental status as "guarded" due to the various bullying incidents he had experienced at school. [S-97 at 309; P-133]. Dr. Butler specifically noted in her report:

Throughout the evaluation [the Student] appeared well motivated and put forth good effort on all tasks presented... There was a significant difference in his affective responsiveness during the consultation meeting with his parents and [the Student's] mood then appeared to become somber and he withdrew from the meeting. It was the impression of the examiner that [the Student] had reacted to the retelling of a history of school incidents in which he was bullied from the third grade on. [The Student] had chosen not to share his struggles with peers in school except to say that he had been hassled in the past. It is the impression of the examiner although the Student was cooperative, he tended to be guarded in sharing his feelings and that is possible that he tended to under report his affective and internalized emotional experience.

However, it is important to note that [the Student] has been diagnosed with Asperger's and being affectively distant and/or having difficulties with insight into affect and mood is a trait often associated with Asperger's. [The Student] also had observable difficulties putting his thoughts into words and needed extended time to organize his thoughts. His sentences often trailed off and it was necessary to provide prompts for him to complete the content of his thoughts.

[P-132-133].

- 52.** Dr. Butler confirmed the Student’s diagnosis of Asperger's Syndrome (autism spectrum disorder) and ADHD. [P-134]. She recommended that the Student share her evaluation with the coordinator/counselor for students with disabilities at his college and request appropriate educational accommodations. In addition, she recommended that the Student “consider seeing a counselor at his college to increase his social skills and develop enhanced coping skills needed for the transition to independent adult life functioning.” [P-133 & P-134].
- 53.** Dr. Sarah Howorth, an assistant professor of special education at the University of Maine, testified that students with autism tend to not do well in college because of their lack of social skills. [Howorth testimony at 206].
- 54.** In the fall of 2016, the Student began classes at ██████ Maine Community College (“█████”) for the 2016-2017 school year. The Student struggled academically during his first semester and was placed on academic probation after receiving very low grades in several of his classes. [P.168].
- 55.** In an email to Sue Reed on September 2, 2016, the Parent requested an impartial hearing based on Dr. Butler’s evaluation and his lack of placement in special education services. [P-138].
- 56.** An email to the Parent on March 1, 2017, Sue Reed noted that the last procedural safeguard notice sent to the Parents was on February 9, 2007. [P-145-P-146].

- 57.** On May 21, 2017, [REDACTED] academically dismissed the Student due to his poor grades, requiring that he sit out at least one semester before reapplying. [P-206.]
- 58.** The Student spent the 2017-2018 academic year out of school, working as a laborer for a biomass company in [REDACTED], Maine. [Parent testimony]. In March 2018, the Student was admitted to Acadia Hospital in Bangor, where he was diagnosed with major depressive disorder. [P-150]. [Parent testimony].
- 59.** In July of 2018, the Student was referred to Dr. Lora Stanchfield, a licensed psychologist specializing in clinical neuropsychology, to conduct an updated neuropsychological evaluation. [P-150]. While Dr. Stanchfield found the Student's overall neurocognitive abilities and intellectual abilities were in average range, she found that he had "below average to reduced verbal and nonverbal reasoning and concept formation abilities." [P-156, 158].
- 60.** Dr. Stanchfield also noted the Student's executive dysfunction and that his "[a]ttention functions decline with increased demand". [P-158]. She explained that "many of the challenges identified are consistent with this longstanding diagnosis of autism spectrum disorder." [P-159].
- 61.** Dr. Stanchfield also noted "other more subtle symptoms associated with Autism that will not be captured on standardized testing. . . . Specifically, his idiosyncratic thinking, inability to 'see' the big picture, difficulty abstracting and thinking ahead to see cause and effect, not understanding social norms and expectations, and missing social cues, combined with black-and-white thinking leading to deficient reasoning and problem-solving, task initiation, follow-

through, and completion deficits, among others, [that] will continue to hold him back.” [P-159].

62. Dr. Stanchfield recommendations included individual psychotherapy to help the Student develop better emotion regulation and other self awareness, as well as supports to develop better independent functioning at home and in the workplace. [P-160].

63. Dr. Howorth testified that she agreed with Dr. Stanchfield’s recommendations, noting that for the Student to be successful in college, he will need some sort of transition programming.” [Howorth testimony at 208-209].

64. Dr. Howorth noted that there are not “many research validated programs for adults for social skills direct instruction.” [Howorth testimony at 210]. Dr. Howorth recommended the Program for the Education and Enrichment of Relational Skills (PEERS), developed at UCLA through the Semel Institute for Neuroscience and Human Behavior. [Id]. Dr. Howorth testified that PEERS is the only program that is both research-based and validated by the National Institute of Mental Health. [Howorth testimony at 210]. Dr. Howorth noted that she is not aware of anyone in Maine who has been trained on the program. [Howorth testimony at 210].⁴ Dr. Howorth recommended training a facilitator and social coach for 16-weeks of skill acquisition and 16-weeks of generalization, plus academic tutorials to facilitate the Student’s reentry to [REDACTED]. [P-203; Howorth testimony at 214-219]. Dr. Howorth estimated that the costs for training a facilitator and coach in the PEERS program,

⁴ The UCLA PEERS Clinic website reveals that as of February, 2019 there are certified PEERS providers for young adults in Massachusetts and Vermont, but not in Maine.
<https://www.semel.ucla.edu/peers/young-adult-certified-providers-usa>

including expenses and related software for monitoring the Student's progress and PEERS skill training for the Student, was \$16,614. [P-203].⁵

Brief summary of the position of the Parent:

A local educational agency's Child Find duty is triggered when it has reason to suspect a disability, and reason to suspect that special education services may be needed to address that disability. Child Find requires identification and evaluation within a reasonable time after school officials are on notice of behavior that is likely to indicate a disability.

The evidence overwhelmingly demonstrates that the District has been on notice for years that the Student had a potentially qualifying disability that may require special education services. In contravention of its Child Find obligations, the District repeatedly found the Student ineligible for special education services, ignoring evaluation requests from his parents. At each of three evaluation conferences, the school district declined to conduct IDEA testing, apparently because it determined the Student's academic deficits to be insufficient to qualify him as IDEA-eligible.

The District also disregarded Dr. Grueneich's November 2014 evaluation and report where he notes that the Student did not have friends and was having "significant difficulties socially," resulting in bouts of depression due to his isolation. All of these conditions are related to educational performance, as explained in the *Mr. I.* decision.

Dr. Grueneich recommended that the District take action: "through directed peer

⁵ Dr. Howorth also testified that tutorial services in English and math "would be of some benefit" for the Student since he failed those classes in college. She estimated the costs of these tutorial services to be \$9,000 for 36 weeks of tutorial services. [P-203].

interaction, which involves providing the adolescent with explicit guidance (i.e., through prompting from an adult) on how to interact with peers during structured group activities.

The District's Child Find violations amounts to a denial of FAPE; it does not matter whether the student ultimately has been or, in cases like this, would have been determined to be IDEA-eligible. When there has been a fundamental violation of the IDEA's Child Find provision, there is no burden on the parent or student to prove what would have occurred had the Student been evaluated in a timely and appropriate manner.

The IDEA and current Maine special education regulations allow for a family to file a claim that seeks relief for events that occurred up to two years prior to the point in time at which they knew or should have known that a violation occurred. The key question is when the Parent "knew or should have known about the alleged action that forms the basis" of their Child Find claim.

Determining the "knew or should have known" date that triggers the limitations period in Child Find cases is more difficult than in other special education cases, because a Child Find claim is based on the chronic inaction of the school district, not some particular "alleged action" that violates the law at a single point in time. Accordingly, parents in child-find cases must be provided with more leeway as to when they "knew or should have known" that a district's pattern of inaction had reached the point that it could amount to an IDEA violation.

In the present case, it was not until the Parent and the Student received Dr. Butler's evaluation report, delivered to them after May 1, 2016, that they first had sufficient information to press the point that the Student's declining social and adaptive performance in high school was attributable to a failure to provide him with specially

designed instruction. Nothing in the evidence adduced at the hearing suggested that the Parent or the Student “knew or should have known” that the Student potentially had a factual basis on which to bring an IDEA Child Find claim against his school district, prior to receipt of Dr. Butler’s evaluation report in May 2016.

Additionally, both MUSER and the IDEA contain an exception to the limitations period that applies in this case. Under the relevant provisions, the timeline for requesting a due process hearing does not apply if the parent was prevented from filing a due process hearing request due to a school administrative unit’s withholding of information from the parent that was required to be provided to the parent.

In this case, that obligation was triggered at the 504 Team meetings held on February 4, 2016, and March 11, 2016, when the Parent requested that the Student be evaluated. The District’s obligation was further triggered when the Parent specifically asked the Superintendent for a copy of his procedural rights under the IDEA in an e mail dated January 27, 2016.

Even though Parents previously had received copies of the IDEA procedural safeguards years before in 2007, the due process procedures and limitations period in Maine changed in 2010. Accordingly, due to the District’s failure to provide the procedural safeguard notice, the Parent and Student were prejudiced insofar as they did not know how or when to request a due process hearing in a timely manner.

Brief summary of the position of the District:

To establish an entitlement to FAPE, a student must show not only that they have a disability, but that their disability adversely affects their academic performance, and by reason thereof, they need special education. In this case, the Parent has failed to

establish that the Student's autism adversely impacted his educational performance or that he needed specially designed instruction.

The District did not violate the child find standard. The Student's teachers were well-prepared to execute their child find responsibilities and to identify students who may need additional supports, including specially designed instruction. Additionally, the Student's IAP Team, comprised of the Parents, teachers, coaches and the District's 504 Coordinator, met multiple times throughout the Student's Junior and Senior years for the express purpose of determining the academic and social supports the Student needed.

The Parent has failed to meet its burden to prove that school officials "overlooked clear signs of disability," be "negligent in failing to order testing," or have "no rational justification for not deciding to evaluate". The facts of this case demonstrate that the Parent excused most of the Student's numerous absences, often explaining them as stomachaches or headaches, and expressing how difficult it was to get the Student up in the morning to go to school. No one reported to school officials that the Student seemed depressed until the group meeting on June 17, 2016, after the first risk assessment. At this point, the school acted quickly to address the possibility of a disability.

Even if there was a suspicion of a disability before June of 2016, any such disability did not adversely affect the Student's educational performance. The evidence establishes that the Student successfully completed all aspects of his high school education. Additionally, Maine's rules do not require immediate referral upon suspicion of a disability in the case of referral by school officials. Instead, schools are permitted first to undertake general education interventions.

The First Circuit decision in *Ms. S* has determined that a two-year statute of

limitations is effective, barring the Parent's claims prior to May 1, 2016. The triggering event, for purposes of the application of the statute of limitations, was the Parent's knowledge of the action that created the alleged injury to the Student rather than his understanding of the potential liability of the District. As such, the Parent should have known by 2011, when the IEP team determined he was ineligible for special education, that the decision not to place the student in special education could be injurious.

The Parent's "withholding exception" argument with regard to the District's alleged failure to provide procedural safeguards in February of 2016 is without merit. At the February 2016 section 504 team meeting, it was clear to all parties that the Student's evaluations were being conducted not for developing an IEP but to provide up to date information to support the Student if he requested supports or accommodations in college or other post high school activities. There is no statutory requirement that written notice or notice of procedural safeguards be provided when educators and parents discuss whether to make a special education referral for a non-identified student and choose not to initiate the referral. The Parent's January 27, 2016 e mail was to ask specifically about his legal rights regarding an alleged violation of confidentiality, not with regard to his rights under the IDEA.

Even if the District was required to give the Parent notice of the IDEA procedural safeguards, the law is clear that any withholding must have actually caused the Parent to file an untimely complaint. In this case, the alleged withholding had no such impact on the Parent who had previously been made aware of IDEA procedural safeguards, had consulted with the Maine Department of Education, and had thoroughly researched dispute resolution procedures. The Parent's knowledge of his rights is further supported

by the consent to evaluate form that he signed on June 6, 2011, where he acknowledged the statement of procedural safeguards attached to the consent form.

IV. LEGAL STANDARD AND ANALYSIS

A. Burden of Proof

Although the IDEA is silent on the allocation of the burden of proof, the Supreme Court has held that in an administrative hearing challenging an IEP, the burden of persuasion, determining which party loses “if the evidence is closely balanced,” lies with the party seeking relief. *Schaffer v. Weast*, 126 S.Ct. 528, 537 (2005). As the Parent is challenging the District’s alleged failure to implement its Child Find obligations, he bears the burden of persuasion in this matter.

B. Statute of Limitations and Procedural Safeguard issue.

On July 30, 2018, the District filed a motion to dismiss the portion of the Parent’s complaint raising claims arising more than two years prior to the filing of their complaint. In denying the District’s motion to dismiss, I ruled that unless and until the *Ms. S.* case is overturned, the pre-existing four-year filing deadline from the date the Parents knew or should have known about the alleged action that forms the basis of the complaint was in effect at the time the Parent requested a due process hearing in this matter.

On February 15, 2019, the First Circuit Court of Appeals issued its ruling in *Ms. S. v. Reg’l Sch. Unit 72*, No. 17-2214 and No. 18-1004 (1st Cir. Feb. 15, 2019). In this ruling, the court held that Maine has established a two-year statute of limitations for due process complaints, overturning the Federal District Court ruling in *Ms. S. v. Regional Sch. Unit No. 2:13-CV-453-JDL*, 2017 WL 5565206, at 7-11 (D. Me. Nov. 20, 2016.)

Pursuant to an amended scheduling order dated February 20, 2019, both parties submitted updated briefs to address the statute of limitations issue as determined by the First Circuit in *Ms. S*.

The IDEA statute of limitations requires a parent to 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... (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 are substantially identical to the federal law MUSER §§ XVI.5.A.2, XVI.13.E.,F. The IDEA and MUSER also contain exceptions to this timeline if a parent was prevented from requesting the hearing due to:

- (i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or
- (ii) the local educational agency’s withholding of information from the parent that was required under this subchapter to be provided to the parent.

20 U.S.C. § 1415(f)(3)(D); *see also* MUSER § XVI.13.F.2.

The burden of proof lies on the family to show that the exception in part (ii) applied, which requires a “highly factual inquiry.” *J.L. v. Ambridge Area School District*, 2009 U.S. Dist. LEXIS 35403 at 14 (W.D. Penn. 2008).

Under both the state and federal law, therefore, a violation occurring earlier than

two years from the date of filing is actionable if the Parent did not know or have reason to know of the violation, provided that the filing occurs within two years from the date that Parent achieves actual or constructive notice of the violation. The key determinant is the point in time when the Parent knew or should have known about the alleged action that forms the basis of the complaint. *Swope v. Central York School District*, 56 IDELR 286 (M.D. Pa., June 21, 2011). It is from this point of knowledge that the two-year limitations clock begins. *Ms. S. v. Reg'l Sch. Unit 72*, No. 17-2214 and No. 18-1004 (1st Cir. Feb. 15, 2019).

The U.S. District Court in Maine defined the “action that forms the basis of the complaint” as the action that creates an injury done to the student, not to a family’s understanding of the potential liability of the school district.” *RSU 51 v. Doe* No. 2:12-cv-29-DBH, 2013 WL 357793 (D. Me. January 29, 2013).

In the present case, the action that forms the basis of the complaint is the School’s alleged failure to implement its Child Find obligations and to provide the Student with special education services.

Application of the statutory language to the facts of the case lead to a conclusion that the Parent knew or should have known of the District’s action that created an injury to the Student when the District failed to identify him as eligible for special education following the January 5, 2015 504 team meeting. The following evidence was submitted which supports the conclusion that the Parent knew or should have known that such a decision could be injurious to the Student:

- Dr. Grueneich’s November, 2014 neuropsychological evaluation report addressed the Student’s recent bullying incidents concluded that the

Student's "...symptoms of Asperger syndrome are having a significant impact on his functioning, as he has not been able to establish effective friendships, he is bullied by his peers, he engages in limited social interaction even with family members...." [P-39].

- Dr. Grueneich recommended directed peer interaction and prompting from an adult with explicit guidance on how to interact with peers during structured group activities. [P-41].
- At the January 5, 2015 meeting, the District failed to add the specific instruction recommended by Dr. Grueneich's report and rather added an accommodation to the 504 Plan requiring "close monitoring" and with specific direction given by staff for required interactions.
- At this meeting, the Parent stated that he felt "that [the Student's] right to a free, appropriate public education are being violated." [S-226].
- The Parents were aware that District's previous responses to the Student's social and peer interactions within his 504 plan were ineffective, especially in light of the increased frequency and severity of bullying being directed towards the Student. [Parent testimony].

Although the family may not have fully appreciated that these facts could potentially be the basis of a due process hearing request, the facts inevitably lead to the conclusion that the parents "knew or should have known" that the decision not to place the student in special education in January 2015 could be injurious. Accordingly, the Parent was required to assert his Child Find claims against the District by January 5, 2017, unless an exception to the statutory and regulatory language applies, as discussed

below.

As noted, federal and state law have carved out exceptions to the time restrictions on filing a complaint when a local educational agency withholds information from the parent that was required to be provided. 20 U.S.C. § 1415(f)(3)(D); *see also MUSER* § XVI.13.F.2.

Pursuant to 34 C.F.R. § 300.504 and MUSER Appendix 1, a copy of the procedural safeguards available to the parents of a child with a disability must be given to the parents only one time a school year, except that a copy also must be given to the parents:

- (1) Upon initial referral *or parent request for evaluation*;
- (2) Upon receipt of the first State complaint under §§ 300.151 through 300.153 and upon receipt of the first due process complaint under § 300.507 in a school year;
- (3) In accordance with the discipline procedures in § 300.530(h); and
- (4) *Upon request by a parent.* (emphasis added).

In this case, the Parent made several requests that triggered the District's obligation to provide the required procedural safeguard notices:

- On January 27, 2016, the Parent e-mailed the Superintendent to ask for a copy of his procedural rights under the IDEA: "Please advise [the Student's mother and me] of our rights in regards to violations of IDEA Part B. . . ." [P-107, 108].
- The February 4, 2016 504 team meeting minutes reflect that the Parent requested that the Student be evaluated and that the Parent "might

request a referral to special education services.”⁶

- The 504 team meeting held on March 11, 2016 determined that testing was necessary to “obtain the Student’s present level of intellectual and academic functioning and to rule in / rule out the presence of depression, to assess his current ADHD symptoms, and to assess his adaptive functioning.” [S-93 at 287]. It was determined that the Student would receive testing and evaluations consisting of “a classroom observation, rating scales as determined necessary by the examiner for ADHD/and any needed emotional behavior scales, academic testing, cognitive testing, and any projective testing/interviews needed.” [S-93 at 287].
- On September 2, 2016, in an email to Sue Reed, the Student’s father requested an impartial hearing based on Dr. Butler’s evaluation and his lack of placement in special education services. [P-138].

An email from the District’s special education director on March 1, 2017 confirms that the last procedural safeguard notice sent to the Parents was in February of 2007. [P-145 & P-146].

The District argues that it was clear to all parties that the evaluations were being conducted not for purposes of developing an IEP for the final months of the Student's senior year, but to provide up to date information to support the Student if he requested supports or accommodations in college or other post high school activities. The District

⁶ the Parent testified that he did request a special education referral, and although the minutes were incorrect, he was prevented from correcting the mistaken document as he was involved in a serious automobile accident shortly after this meeting and was unable to notify the District about this error in the minutes. [Parent testimony].

also argues that that Parent's request for the procedural safeguard notice was only for guidance on a breach of confidentiality issue, not to pursue a claim relating to a denial of a FAPE for the Student.

This argument is without merit. 34 C.F.R. § 300.504 and MUSER Appendix 1 requires the procedural safeguard notice be sent to a parent upon that parent's request for evaluation or request for procedural safeguard notice, without regard to *why* the Parent may be requesting the evaluation or a copy of his procedural safeguard notice. This stands to reason. Parents, by not having such notice, are at a disadvantage to knowing the full spectrum of their rights under the IDEA and MUSER. The record therefore supports a finding that the District failed to provide the family with a notice of procedural safeguards as required by 20 U.S.C. § 1415(d)(1)(A); 34 C.F.R. § 300.504; and MUSER Appendix 1.

The record also supports a finding that the District's failure to provide such notice was causally related to the Parent's delay in filing his complaint. Prior to initiating the instant case, the Parent last received a procedural safeguard notice in 2007, which is confirmed by e-mail correspondence between the Parent and the Special Education Director.⁷ The Parent persuasively argued that his lack of understanding or knowledge about the filing deadlines was related to his delay in filing. As noted in the *Ms. S.* case, the statute of limitations for filing due process complaints shifted from four years to two years in 2010, which understandably led the Parent to believe that he was not required to file his complaint within the two-year time period recently confirmed by the First Circuit ruling in *Ms. S.*

⁷ An email from RSU 31's Special Education Director on March 1, 2017 confirms that the last safeguard notice sent to the Parent s was in 2007. *P-145 & P-146*

The District also argues that the Parent understood his rights and responsibilities with regard to filing a due process claim since he had previously received procedural safeguard notices or information from advocates. This argument is also without merit, as noted in *El Paso School District v. Richard R.*, 567 F. Supp.2d 918 (W.D. Tex. 2008), where a district court declined to impute knowledge of due process rights to a family who had received statements of procedural safeguards in the years past but not at the point at which the family requested that the student be referred for special education. *Id.* at 948 (holding that when a school district failed to provide written notice of procedural safeguards, it denied the parents' knowledge necessary to request a due process hearing).

As such, Parent met his burden of demonstrating that he did not earlier receive procedural safeguards and the exception in the statute of limitations applies. *See J.L. ex rel. J.L. v. Ambridge Area Sch. Dist.*, No. 06-cv-1652, 2008 WL 2798306, at 10 (W.D.Pa. July 18, 2008). The Parent may pursue his claim that the District failed to refer, evaluate, and identify the Student from the period of January 2014 to the date that the Student graduated in June, 2016.

C. The School violated its child find obligations under the IDEA and MUSER.

The IDEA imposes an affirmative obligation on schools to ensure that "[a]ll children with disabilities ... regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated. 20 U.S.C. § 1412(a)(3).

Maine's Child Find obligation is set forth in MUSER IV.2, which requires schools to maintain and implement policies to ensure that children who are in need

of special education and related services are identified, located, and evaluated at public expense. MUSER IV.2(A) (2017).

In *C.G. v. Five Town Comm. Sch. Dist.*, 2007 WL 494994, 25 (D. Me., Feb. 12, 2007), *aff'd* 513 F.3d 279 (1st Cir. 2008), the First Circuit Court of Appeals held that a "Child-Find duty is triggered when the state or [local educational agency] has reason to suspect a disability, and reason to suspect that special education services may be needed to address that disability." *Id.*, citing *Dep't of Educ. v. Cari Rae S.*, 158 F. Supp. 2d 1190, 1194 (D. Haw. 2001) (citations and internal punctuation omitted). Federal regulations specify that a state's Child Find policies also must include children who are suspected of being a child with a disability under § 300.8 and in need of special education, even though they are advancing from grade to grade. 34 C.F.R. § 300.111(c).⁸

The U.S. District Court in Hawaii in *Dep't of Educ. v. Cari Rae S.*, 158 F. Supp. 2d 1190, 1194 (D. Haw. 2001) held that a school district deprived a student of a FAPE by failing to identify her for eligibility after numerous incidents or "warning signs" of an emotional impairment. In *Cari Rae S.*, the court held that the student's 79 absences and numerous behavioral referrals during her ninth-grade year should have alerted the district to a possible emotional impairment.

⁸ § 300.8 *Child with a disability* means a child evaluated in accordance with §§ 300.304 through 300.311 as having an intellectual disability, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as "emotional disturbance"), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services.

The *Cari Rae S.*, court noted that the threshold for "suspicion" is relatively low, and that the inquiry was not whether or not she actually *qualified* for services, but rather, was whether she should be *referred* for an evaluation. *Id.*⁹

In *W.B. v. Matula*, 67 F.3d 484, 501, the Third Circuit Court of Appeals held that a jury could reasonably find a violation of a school district's child find obligations where a school failed to conduct an evaluation within six months after the personal observations of teachers and the receipt of information from parents provided notice of the student's likely disability *W.B. v. Matula*, 67 F.3d 484, 501 (3d Cir. 1995).

MUSER §VII.2 requires a finding that "a child with a disability shall have one or more of the disabilities listed in this section."¹⁰ In the present case, the

⁹ The District's Child Find obligation exists independent of the parental right to request a referral, so the Parent's failure to request a referral during eleventh grade is independent of the District's Child Find obligations under the IDEA. *Z.J. v. Board of Education of the City of Chicago, District No. 299*, 2018 WL 4616347 (N.D. Ill. Sept. 26, 2018)

¹⁰ MUSER VII.2(A) defines Autism as follows

(1) Definition. **Autism** means a developmental disability significantly affecting verbal and non-verbal communication and social interaction, generally evident before age three that adversely affects educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.

The term does not apply if a child's educational performance is adversely affected primarily because the student has an emotional disability, as defined in Section VII of this rule.

A child who manifests the characteristics of autism after age three could be identified as having autism if the criteria in paragraph one of this section is satisfied. [34 CFR 300.8(c)(1)(i-iii)]

Autism is defined as one of the "pervasive developmental disorders" which includes: PDD, PDDNOS, Asperger's Syndrome, Autistic Disorder, Rett's Syndrome, and Childhood Disintegrative Disorder.

...

MUSER VII.2(E) defines an "**emotional disturbance**" as:

- (1) *Emotional Disturbance* means a condition which exhibits one or more of the following characteristics over a long period of time and to a marked degree that adversely affects the child's educational performance:
- (a) An inability to learn that cannot be explained by intellectual, sensory, or health factors;
 - (b) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
 - (c) Inappropriate types of behaviors or feelings under normal circumstances;
 - (d) A general pervasive mood of unhappiness or depression;
 - (e) A tendency to develop physical symptoms or fears associated with personal or school problems.

Student’s diagnosis of autism spectrum disorder and ADHD supports a finding that his relevant qualifying conditions include “autism”, “emotional disturbance”, or “other health impairments” MUSER VII.2 (A), (E), (J).

The District argues that the Parent failed to establish that any child find obligation exists with respect to the Student because his autism did not adversely affect his educational performance. While educational performance “is more than just academics” it is also the case that the IDEA does not cover “problems truly distinct from learning problems.” *Mr. I ex rel. L.I. v. Maine School Admin. Dist. No. 55*, 480 at 11 *citing Gonzalez v. P.R. Dep’t of Educ.*, 254 F.3d 350, 352 (1st Cir. 2001); *see also Rome Sch. Comm. V. Mrs. B.*, 247 F.3d 29, 33 n. 3 (1st Cir. 2001).

The issue of whether a condition adversely affect a child's educational performance was addressed in *Mr. I v. Maine Sch. Admin Dist. 55*, 416 F. Supp. 2d 147 (2006), *aff’d* 480 F.3d 1 (1st Cir. 2007). The *Mr. I* court overturned a hearing officer’s ruling that a school district has no obligation to address social and emotional needs “where there are no academic needs.” *Id.* at 164.

In *Mr. I*, a child with Asperger’s disorder (autism spectrum disorder) was making progress academically but struggled socially with her peers. The *Mr. I* court referred to Maine’s state curriculum goals when addressing the student’s educational performance and noted that Maine’s regulations do not limit concerns about deficient

...

MUSER VII.2(J.) defines “**Other health impairment**” as having limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that is due to chronic or acute health problems, such as asthma, attention deficit disorder, attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, or sickle cell anemia, Tourette Syndrome and adversely affects the child’s educational performance. [34 CFR 300.8(c)(9)]...

social and communication skills to only those that impact academic performance.”

Id. In support of its ruling, the court noted that these goals “are directly concerned with social needs in subjects ranging from English language arts to career preparation.” *Mr. I* at 159. The *Mr. I* court held that “any adverse effect on educational performance, however slight” was sufficient as the deficits fit within the content areas mandated by Maine law. *Id.* at 163.¹¹

Federal regulations do not define the phrase “adversely affects ... educational performance.” Instead, “each State [gives] substance to these terms.” *J.D. ex rel. J.D. v. Pawlet Sch. Dist.*, 224 F.3d 60, 66 (2d Cir. 2000); see also 20 U.S.C. § 1401(8) (free appropriate public education provided to students with disabilities must “meet the standards of the state educational agency”).

Maine has chosen to define “educational performance” broadly. Under Maine’s regulations, the term “academic area” includes communication skills, i.e., skills that may be implicated by an autism spectrum disorder. Maine’s current Accountability Standards set verbal and nonverbal communication goals that remain directly concerned with social needs in subjects ranging from English language arts to career preparation.¹²

¹¹ **Educational Performance.** *Educational performance means performance in those academic and functional areas (as defined in Section II(15) Functional Performance) including, but not limited to, those areas that are being assessed through the local SAU’s own curriculum. MUSER II.10 (2017) Functional Performance.* **Functional Performance.** *Functional performance means how the child demonstrates his/her skills and behaviors in cognition, communication, motor, adaptive, social/emotional and sensory areas. MUSER II.15. (2017)*

¹²The Maine Federal, State and Local Accountability Standards, 05-071 chapter 131 provide, in relevant part, that a student shall initiate and participate effectively in a range of collaborative discussions (one-on-one, in groups, and teacher-led) with diverse partners on grades 11–12 topics, texts, and issues, building on others’ ideas and expressing their own clearly and persuasively, and:

- a. Come to discussions prepared, having read and researched material under study; explicitly draw on that preparation by referring to evidence from texts and other research on the topic or issue to stimulate a thoughtful, well-reasoned exchange of ideas.
- b. Work with peers to promote civil, democratic discussions and decision-making, set clear goals and deadlines, and establish individual roles as needed.
- c. Propel conversations by posing and responding to questions that probe reasoning and evidence;

While there is evidence of the Student’s social struggles over many years,¹³ the Student’s social struggles took on a heightened significance during his sophomore year, when he was the victim of two different bullying/harassment incidents.¹⁴

At a 504 team meeting on February 12, 2014 the parents expressed concern that the Student was engaging in “shut in” behavior at home, appeared short-tempered, and was talking even less than usual. [S-67 at 214]. The Student’s pediatrician, Dr. Clough,

ensure a hearing for a full range of positions on a topic or issue; clarify, verify, or challenge ideas and conclusions; and promote divergent and creative perspectives.

d. Respond thoughtfully to diverse perspectives; synthesize comments, claims, and evidence made on all sides of an issue; resolve contradictions when possible; and determine what additional information or research is required to deepen the investigation or complete the task.

1.3 College and Career Readiness Anchor Standards for Speaking and Listening

The College and Career Readiness (CCR) anchor standards... and grade-specific standards are necessary complements—the former providing broad standards, the latter providing additional specificity—that together define the skills and understandings that all students must demonstrate.

Comprehension and Collaboration

1. Prepare for and participate effectively in a range of conversations and collaborations with diverse partners, building on others’ ideas and expressing their own clearly and persuasively.
2. Integrate and evaluate information presented in diverse media and formats, including visually, quantitatively, and orally.
3. Evaluate a speaker’s point of view, reasoning, and use of evidence and rhetoric.

Presentation of Knowledge and Ideas

4. Present information, findings, and supporting evidence such that listeners can follow the line of reasoning and the organization, development, and style are appropriate to task, purpose, and audience.
5. Make strategic use of digital media and visual displays of data to express information and enhance understanding of presentations.
6. Adapt speech to a variety of contexts and communicative tasks, demonstrating command of formal English when indicated or appropriate.

The Maine Federal, State and Local Accountability Standards, 05-071 chapter 131.

¹³ In the 2010 end of year teacher reports, the Student’s ELA teacher Mrs. Cormier noted that her “big concern is [the Student’s] “lack of peer interaction” S-44 at 142. Jeanne Reed, the school nurse stated: “I seldom see him interacting with his peers, he is usually alone. I have known [the Student] since kindergarten and his demeanor appears to have changed.” [S-44 at 143]. In a 504 IAP dated November 19, 2010 the District amended the Student’s seventh grade 504 Plan to state, that “[t]eachers will prevent the Student from socializing solely with staff and kindly redirect him to peers, [and that staff would] look for the teachable moment to instruct [the Student] on social skills required for the specific situations.” [S-47 at 150].

In a written notice dated May 23, 2011, the Student’s 504 team referred the Student for an IDEA evaluation, due to “performance below grade level expectations in the areas of written expression and complex oral expression. [S-52 at 161].

¹⁴ in October, 2013, one of the Student’s teammates on the soccer team videotaped the Student while he was using the toilet in the boys’ locker room. In February of 2014, another student put trash in the Student’s locker. [P-205; Parent testimony].

testified that after these bullying incidents, the Student became “quieter than ever,” and would say “everything is fine, school is fine...He didn’t want to complain”.

In November of 2014, Dr. Clough referred the Student to Dr. Grueneich for a neuropsychological evaluation to provide an updated assessment of his cognitive and behavioral functioning and to make recommendations regarding treatment planning. [P-31-41]. In his evaluation, Dr. Grueneich wrote that, since the bathroom videotaping, [the Student] had not used the bathroom while at school and had refused to change in the locker room during soccer season. [P-31]. Dr. Grueneich concluded that the Student’s “...symptoms of Asperger syndrome are having a significant impact on his functioning, as he has not been able to establish effective friendships, he is bullied by his peers, he engages in limited social interaction even with family members....” [P-39]. With regard to treatment options, Dr. Grueneich noted:

Dealing with the Student’s problems with peer interaction is admittedly difficult, particularly since there are logistical problems in getting access to relevant interventions. Perhaps the most practical way to address his social difficulties is through directed peer interaction, which involves providing the adolescent with explicit guidance (i.e., through prompting from an adult) on how to interact with peers during structured group activities. [P-41].

The District presented witnesses to rebut the Parent’s evidence regarding the social concerns impacting the Student. However, I did not find the testimony of several of the District’s key witnesses probative with regard to the issue of the Student’s social interactions at school. Linda McCullen, one of the Student’s teachers, testified that she didn’t “notice” the Student’s anxiety in class. On cross examination, she testified that she was aware that other students were “talking about the bathroom video” and that the Student was “quiet and reserved”. [McCullen testimony at 549-50]. Ms. McCullen also

rated the Student in the 13th percentile of the Vineland socialization scale. [P-115 & P-116; P-118].

In addition, the Student's soccer and basketball Coach, Jeremy Durost, testified that while he didn't directly observe the Student's teammates excluding or bullying the Student, he acknowledged that there were things that went on that he didn't see, including the bathroom videotaping incident, the hallway locker incident and the incident when the Student's hat was taken on the team bus during in the Student's 10th grade year.

The weight of the evidence supports a finding that the Student's deficient social and communication skills negatively impacted his educational performance. The Parent has proven by a preponderance of the evidence that the District had reason to suspect that special education services may be needed to address the concerns regarding the Student's social challenges and "warning signs" of a possible emotional impairment. *C.G. v. Five Town Comm. Sch. Dist.*, 2007 WL 494994, 25 (D. Me., Feb. 12, 2007), *aff'd* 513 F.3d 279 (1st Cir. 2008)

As the District points out, MUSER does not require immediate referral upon suspicion of a disability in the case of referral by school officials. Instead, schools are permitted first to undertake general education interventions. MUSER IV.2(E)(2). In this case, the record supports a finding that the District had such opportunities. Beginning prior to the 2010-2011 school year, the District undertook general education and Section 504 interventions including the Student's participation in a friendship group, accommodations to help the Student with accuracy and organizational issues and efforts to redirect the Student to peers. [S-38 at 127; S-47 at 150].

D. Remedy

The Parent and Student are entitled to a remedy for the District's failure to provide a FAPE from the period of January 5, 2014 (two years prior to the date that the District failed to provide a procedural safeguard notice to the Parent) to the Student's graduation in June 2016. This remedy must be in the form of equitable relief. *Pihl v. Massachusetts Dep't of Educ.*, 9 F.3d 184, 188-89 (1st Cir. 1993).

The remedy of compensatory education is available only where a student's substantive rights, as in the present case, are affected by a school district's non-compliance with the IDEA. "Accordingly, '[a] procedural violation is actionable under the IDEA only if it results in a loss of educational opportunity for the student, seriously deprives parents of their participation rights, or causes a deprivation of educational benefits." *D.K.; v. Abington School District* 696 F.3d 233, 59 IDELR 271, U.S. Court of Appeals, Third Circuit (2012).

In *Pihl v. Mass Dep't of Education*, the First Circuit Court of Appeals held that "a student who fails to receive appropriate services during any time in which he is entitled to them may be awarded compensation in the form of additional services at a later time." 9 F3d 184, 198 (1st Cir.1993). The *Pihl* Court explained, "[t]he nature and extent of compensatory education services which federal courts have recognized varies according to the facts and circumstances of a given case." *Pihl*, 9 F.3d at 188, n. 8.

An award of compensatory educational services is designed to place a Student in the same position he would have occupied, had the District complied with the IDEA. *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 24 (D.C. Cir. 2005). An award of compensatory education should be fact-specific, depending on the child's needs. *Reid*,

401 F.3d 516 at 524; *Pihl*, 9 F.3d at 188 n.8. *See also*, *Mr. I. ex rel. L.I. v. Me. Sch. Admin. Dist. No. 55*, 480 F.3d 1, 25 (1st Cir. 2007); *Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13, 31 (1st Cir. 2006).

The Parent requests that the remedy to the Student be in the form of reimbursement for the Program for the Education and Enrichment of Relational Skills (PEERS), developed at UCLA through the Semel Institute for Neuroscience and Human Behavior. The PEERS program was recommended by the Parent's expert witness, Dr. Sarah Howorth, who provided credible testimony that PEERS is the only such program for adults that is both research-based and also validated by the National Institute of Mental Health. [Howorth testimony at 210]. Dr. Howorth is not aware of anyone in Maine who has been trained in this program, and therefore she recommended the provision of training of a facilitator and social coach at UCLA in California who can then deliver a 16-week skill acquisition and skill generalization program to the Student.¹⁵ [Howorth testimony at 214-219]. From the evidence presented at hearing, I find that this remedy is appropriate to compensate the Parent and the Student.

ORDER

After consideration of the evidence presented during this due process hearing, **it is hereby ORDERED that:**

1. The District failed to provide procedural safeguard notice to the Parent in January 2016 which resulted in the Parent's failure to timely file his complaint against the District.
2. The District violated the Student's Child Find rights resulting in a denial of a free, appropriate public education for the Student from the period of January 5, 2014, (two years prior to the date that the District should have provided procedural safeguard notice to the Parent), to the Student's

¹⁵ Dr. Howorth also recommended academic tutorials in math and English to facilitate the Student's reentry to ██████ Maine Community College. The Parent, however, did not sufficiently establish that the District violated its Child Find obligations with regard to the Student's educational performance in English or math. Therefore, I decline to award further tutorial services for the Student in these subject areas.

graduation in June 2016.

3. The District shall provide compensatory educational services to the Student and Parent in the form of:
 - i. Payment for three days of PEERS training for a facilitator and social coach at the UCLA PEERS training facility or other agreed facility at the customary rate for such training as determined by the training provider;
 - ii. Travel, airfare, lodging, and meal reimbursement for the facilitator and social coach to obtain the aforementioned training;
 - iii. Two PEERS manuals to be used by the facilitator and social coach;
 - iv. PEERS Skill Acquisition Sessions for the Student for three hours per week of facilitation for 16 weeks and four hours for initial and post-program evaluation at a rate not to exceed \$75/hour and two hours per week for a total of 32 hours of social coaching at a rate not to exceed \$25/hour;
 - v. PEERS Skill Generalization for 16 weeks, with social coaching and monitoring by facilitator for one hour per week of facilitation at a rate not to exceed \$75/hour for a total of 16 total hours and three hours per week for a total of 48 hours of social coaching at a rate not to exceed \$25/hour;
 - vi. ADOS-2 Software Kit for Assessment (unless the District currently has access to such software that may be utilized by the Student and trainers);
 - vii. The Parent shall provide bills for these expenses to the District so that it may pay for these expenses directly, unless the parties otherwise agree.

Dated: March 15, 2019



David C. Webb, Esq.
Hearing Officer