

STATE OF MAINE  
SPECIAL EDUCATION DUE PROCESS HEARING

Foster Parents )  
 )  
v. ) Decision and Order  
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RSU No. 73 )

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This hearing was held and this decision is issued pursuant to Title 20-A M.R.S-A. § 7202 et seq., Title 20 U.S.C. § 1415 et seq., and accompanying regulations. The hearing was held on August 3, 5, and 7, 2020, via Zoom videoconferencing due to the state of emergency in Maine resulting from the COVID-19 pandemic. Present for the entire proceeding Atlee Reilly, Esq., counsel for the Foster Parents, (“Foster Parents”)<sup>1</sup>; , Foster Parent; Tammy Verreault, Director of Special Education for Regional School District (“RSU”) 73 (“District”); and Eric Herlan, Esq., counsel for the District. Attorney Benjamin Jones was present to help with technical issues and Attorney Milliana Zonarich was present as an observer. The District submitted 558 pages of documents and the Parents submitted 370 pages of documents.

Testifying at the hearing under oath were:

1. Audrey Bartholomew Ph.D., University of New England, Independent Evaluator
2. Susan Brousseau, LCSW, Community Health and Counseling Services
3. Michael Butler, Ph.D., Eastern Maine Counseling and Testing Services

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<sup>1</sup> This matter was filed by the Student’s Foster Parents. On October 21, 2020, the Hearing Officer received a Motion to Substitute a Party, explaining that the Student was transferred from the family to , who lives in Veazie, Maine and is the educational surrogate parents. The Student now resides in Veazie and is attending school in the Veazie school district. (Hearing Officer Exhibits 1, 2). Under the IDEA, the definition of "parent" includes natural, adoptive, or foster parents, legal guardians, and "individual[s] acting in the place of a natural or adoptive parent ... with whom the child lives." 20 U.S.C. § 1401(23).

4. \_\_\_\_\_, Foster Parent and IDEA Surrogate Parent
5. Sierra Foshay, District Special Education Teacher
6. Patrick St. Claire, District Elementary School Principal
7. Tammy Verreault, District Special Education Director

## **I. PROCEDURAL BACKGROUND**

- On February 20, 2020, the Foster Parents filed this due process hearing request (Case 20.068H), challenging the determinations made at the Individualized Education Plan (“IEP”) Team meeting on February 14, 2020. (P-A-56)<sup>2</sup>.
- Also on February 21, 2020, the District filed an expedited due process hearing request (Case 20.069XH). (P-A-72).
- On February 28, 2020, the Foster Parents filed a Motion to Dismiss 20.069XH and a Motion regarding stay-put. (P-A-82-138).
- On March 11, 2020, the Motion to Dismiss was denied. (P-A-159-176; S-434).
- On March 15, 2020, the District closed its schools due to the COVID-19 pandemic. (P-A-77).
- On March 16, 2020, a Motion to Postpone the proceedings was submitted and granted. (Id. P-A-181).
- On March 27, 2020, the District withdrew 20.069XH.
- On August 3, 5, and 7, 2020, a video hearing on the merits of this matter was held.
- On October 9, 2020, briefs and reply briefs were been submitted.
- On October 15, 2020, the Student transfers to a new school district.

## **II. STATEMENT OF THE ISSUES**

The issues to be determined are whether the District:

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<sup>2</sup> Reference to the record is as follows: Parent’s exhibits: P-page number(s); District’s exhibits: S-page number(s). Reference to the appendices begins with P or S, followed by the letters A, B, or C, followed by the page number(s) of each appendix. Reference to the transcripts is made by the name of the witness and the page number(s) of the transcript.

1. Failed to provide the Student with appropriate positive behavior interventions and supports during the 2019-2020 school year, as required by the Student's IEP<sup>3</sup>;
2. Failed to deliver the related services required by the Student's IEP during the 2019-2020 school year, through March 15, 2020 (including those in the amended IEP, dated May 28, 2019);
3. Changed the Student's placement (in October 2019) to an inappropriate and isolated tutoring placement without providing the procedural safeguards (manifestation determination and prior written notice) required by the IDEA;
4. Refused to implement the IEP developed and agreed upon at the IEP Team meeting on January 21, 2020;
5. Improperly used the expedited hearing procedures to effect a unilateral removal by insisting that the filings alone changed the Student's placement and altered stay-put rights;
6. Committed procedural violations (failing to have persons knowledgeable about the placement options at the IEP Team meeting; failing to make a clear and specific offer of placement; failing to consider all the factors required by the IDEA when making a placement decision; making a placement offer without knowledge of whether the placement was actually available; and predetermining the outcome prior to the meeting) at the IEP Team meeting on February 14, 2020, which significantly limited the ability of the Foster Parents to participate in the development of the IEP;
7. Denied the Student a free and appropriate public education ("FAPE") and access to the least restrictive environment, if the above allegations are found to be substantiated.

As noted in the Amended Prehearing Order, none of these issues raise concerns about the

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<sup>3</sup> The alleged violations occurred in the 2019-2020 school year, not the 2018-2019 school year as the prehearing report indicated.

service levels provided to the Student during the COVID-19 closures, from March 16, 2020, forward. There is also no present dispute about the IEP or placement for the upcoming 2020-2021 school year. This case involves actions and programming between September 12, 2019 and March 15, 2020.

### III. STATEMENT OF FACTS

1. (“Student”) is 11 years old ( ) and in 6th grade. is a state agency client and at the time of the due process hearing request was filed, resided with therapeutic foster parents, (“Foster Parents”), who lived in Jay, Maine, and was the educational responsibility of RSU 73. neighborhood school was Spruce Mountain Elementary School (“SMES”) in Jay, Maine.<sup>4</sup>
2. The Student is identified being eligible for special education and related services under the category of Multiple Disabilities. (S-211, 404). When was enrolled in the District, the identification of Multiple Disabilities included a Speech Language Impairment and Other Health Impairment (S-143).
3. The Student’s composite IQ scores are average to high average, with a low average processing speed score. (S-68). speech and language scores were average except for below average performance on pragmatic language skills. (S-18).
4. At a young age, the Student had developmental delays in social-emotional communication, cognitive skills, fine motor skills, and speech and language delays at 30 months. (P-37-40). In kindergarten, demonstrated severe articulation impairment and was provisionally diagnosed with Attention Deficit Hyperactivity Disorder (“ADHD”). (P-48, 64). Since then, has been diagnosed with Autism Spectrum Disorder (“ASD”), ADHD, and Adjustment Disorder with Anxiety. (P-5).

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<sup>4</sup> See footnote 1 regarding a change of placement when the Student was transferred to new foster parents on October 21, 2020.

5. The Student struggles with reading environment, understanding people's reactions to , and in reacting to others. ( , 29; Brousseau 216). Given traumatic past, placing hands on will escalate behaviors. (Brousseau 218).
6. The Student attended kindergarten (2014-2015) and the first half of 1<sup>st</sup> grade (2015-2016) in Brewer, Maine. (S-275). reportedly had several incidents of aggressive, physical behaviors toward teachers and students (hitting, punching, biting, stabbing with pencils). (*Id.*) was restrained on four occasions between September and October 2015. (*Id.*).
7. The Student was admitted to Acadia Hospital sometime between October 2015 and January 2016. (*Id.*).
8. In January 2016, the Student was transferred to the Bangor Regional Day Treatment program ("BRDT"). (*Id.*) At some point in this timeframe, residence changed from Brewer to Bangor (S-24). The Student remained at BRDT through 3<sup>rd</sup> grade and into November 2018 of 4<sup>th</sup> grade year. (S-275; P-5). The record indicates that the Student had been restrained or secluded under Chapter 33 a total of 126 times from February 11, 2016 through October 11, 2018. (S-277).
9. The Student attended BRDT for third grade. (S-24). The IEP stated that behaviors impeded learning that required behavioral interventions and supports. (S-25). The IEP reported that math skills were at grade level with direct instruction. (S-26). reading, fluency, and comprehension were below grade level ("Level D" on the Fountas and Pinnell reading scale versus grade level reading at "Level Q.") (S-26). writing was also below grade level. (S-26). By April 6, 2018, had made limited progress on IEP goals. (S-27).
10. The Student's functional performance was reported as challenging with respect to social skills. (S-28). The IEP stated that needed to improve ability to exhibit safe behaviors towards and others; refrain from bolting, running away, or hiding; and be able to follow directions and participate appropriately in tasks and activities. (S-28). also needed to improve ability to express frustrations, anger, and feelings of being overwhelmed, as

well as identify coping strategies and use appropriate language. (S-25). The IEP stated that exhibited aggressive and impulsive behaviors, and required multiple redirection prompts and assistance in the classroom. Goals were set to improve these areas of concern. (S-29-30). Specially designed instruction, Extended Year Services (“ESY”), and related services were included to support the Student. (S-31-32). Several supplementary aids and services were also included to support IEP goals. (S-31-32).

11. The IEP reported that the Student had a mild to moderate speech articulation impairment and pragmatic (social) language. (S-28). Goals, specialized instruction, and related services, as well as supplementary aid and services, were included in this IEP to address these areas of weakness. (S-28, 31-33).
12. The IEP indicated that the Student was not participating with non-disabled peers during any portion of the school day due to “emotional dysregulation, physical aggression and environmental destruction that impacts ability to fully access academic programming in the regular education setting.” (S-33).
13. The Student had made “limited progress” in functional goals by April 6, 2018. (S-28-30).
14. On April 16, 2018, Tim R. Rogers Ph.D., Eastern Maine Counseling and Testing Services, Inc., submitted results and recommendations for the Student based upon a psychological evaluation, that included cognitive, intellectual, and behavior assessments. (S-65). In summary, he found that the Student’s overall IQ fell in the Average range when compared to other children age; language skills were strongest area of function; also showed strong visual spatial skills relative to overall ability; showed weakness in processing speed and reasoning skills were similar to other children age. (S-76).
15. Dr. Rogers stated in assessment that the Student showed multiple symptoms of mood concerns, extraordinary issues with ADHD, and behavior challenges. Results of the assessment suggested that the Student showed many symptoms of ASD, including social communication sensory processing and behavioral rigidity. (S-76). stated that the results

tended to support the existing diagnosis of ADHD and suggested that ASD should be considered. It could not be firmly diagnosed because no parent data was available at the time of the assessment. (S-76).

16. Dr. Rogers included a wide range of recommendations for the Student's programming to address behavioral needs, including a review of behavior plan, visual supports, rule boards, social stories, instruction in Social Thinking, Zones of Regulation, and other cognitive supports. (S-76-77).
17. On November 20, 2018, the District Court issued a Preliminary Protection Order for the removal of the Student from biological parents and into the temporary custody of the State due to the immediate risk of harm to . (S-92). Thereafter, the Student was placed with temporary foster parents, who resided in South Paris, Maine (S-38).
18. Sometime in November or December 2018, the Student was enrolled in Paris Elementary School in the Oxford Hill School District, in RSU #17. (S-276). The IEP developed in January 2019 indicated that was in a self-contained setting and received specially designed instruction and several additional related services (occupational therapy, social work, speech and language, and transportation). (S-38, 46). had become a state-agency client by that time and was living with first set of foster parents in South Paris, Maine. (S-38, 96-99, 105).
19. Sometime in December 2018 or January 2019, the Student was admitted to the hospital twice due to behavior incidents. (S-112). DHHS guardian, Karen Manuel, reported to the District that the Student would be admitted to a residential facility at some point. (*Id.*) She also reported that at times, the Student needed to be restrained when behaviors would "spike" and escalate within seconds, endangering others around (*Id.*).
20. As of February 26, 2019, the Student met one of two reading goals, neither of the two writing goals, and one math goal. (S-34). The Student partially met three speech and language

goals. (S-36-37). The Student also met or partially met three of four behavior goals. (S-37, 44).

21. In late February 2019, the Student was admitted to the Calais Regional Hospital in Calais, Maine. (P-13; S-130). was discharged on May 7, 2019. (P-13).
22. On May 7, 2019, the Foster Parents were given temporary physical custody and were responsible for the Student's therapeutic foster care program. (P-9, 13). The Foster Mother is a therapeutic foster parent and a certified special education teacher. ( 30, 90). The Foster Parents reported that during stay with them, demonstrated aggressive behavior. (P-14). A treatment plan was initiated with them through Community Health and Counseling Services ("CHCS") (P-9-12, 13-20). The Student received mental health counseling from Susan Brousseau from CHCS and continued to do so throughout 2019 and 2020. (Brousseau 230-231).
23. The Foster Parents had resided in Chesterville, Maine, within the RSU 9 school district. (S-134). Upon placement with them, the Student was enrolled in that school district. (S-130, 134; P-13). This was third school placement during 4<sup>th</sup> grade. (S-137). began attending school three hours a day, based upon information from reports of significant behavioral needs. (S-136).
24. On May 24, 2019, RSU 9 conducted an IEP Team meeting and determined, among other things, that "a self-contained program addressing mental health and functional communication skills is appropriate for [the Student] in order for to make progress in education." (S-134-138). The IEP developed at this meeting called for 30 minutes per week of speech and language, 30 minutes per week of social work, monthly occupational therapy consult, and special education services throughout the day. The Student was also to be provided social stories, visual supports, a behavior plan, speech to text, and adult support to implement the behavior plan, provide differential enforcement and de-escalation strategies, and support the use of expected social thinking skills. The IEP called for the support of a behavior specialist to support the development and implementation of a behavior support plan. (S-155-157)



25. The Written Notice stated that the IEP Team concurred that the Student would be referred to a day treatment program given diagnosis of ADHD, substantial emotional trauma, and challenges coping and persevering through unpredictable events – all which required to have access to learning in a smaller group with structured, predicable events, including access to counseling as it impacts learning. (S-137). It was also agreed that would receive ESY for specially designed instruction. (S-135). Also, IEP was to include goals to address social cognitive and mental health deficits, a behavior specialist to support the development of a behavior intervention plan, and added accommodations focused on visual supports, pre-teaching, and classroom-based behavior systems.
26. RSU 9’s day treatment program was full during this period; therefore the Student was placed in a resource room setting with significant support. (S-208-209).
27. On July 10, 2019, an IEP Team meeting was held at the request of the Foster Parents. (S-170). The Written Notice indicates that Atlee Reilly, attorney from the Disability Rights Maine, was present, representing the Foster Parents. It indicated that the IEP Team agreed that the Student would be referred to RSU 9’s day treatment program at Cascade Brook School, rather than to an out-of-district day treatment program. (S-171-173). Also, it was agreed to provide one hour per month of BCBA consultation services; a speech/language evaluation; and a file review and observation to assess literacy, phonological processing, and written expression skills. (Id.). The Team also agreed upon changes in the frequency of specialized instruction and related services, and the addition of ESY instruction and services. (S-171-172).
28. The IEP Team also agreed to include additional IEP goals that would include the need for a Board Certified Behavior Analyst (“BCBA”) for 60 minutes a month during the school year, beginning August 28, 2019. (S-171). This was incorporated into the IEP. (S-127).
29. On September 6, 2019, the Foster Parents applied for the Student’s enrollment in RSU 73 after moving to Jay, Maine. (S-177).

30. The Student began school on September 12, 2019. (S-383; Foshay 264). Upon entry into the District and after an initial assessment, the District implemented the Student's IEP and placed in its behavior program with a Positive Behavior Support Plan ("PBSP"). (S-184-186). Behavior and vocabulary inventory tracking sheets were used starting on September 16, 2019. (S-194).
31. Ms. Foshay, the special education teacher, helped develop and ran the SMES behavior program called "Turning Points." (Foshay 246; S-452). Psychologist Michael Butler and Meaghan Swan, BCBA, contracted providers, also helped develop the program, which started during the 2018-2019 school year. (Foshay 246; Verreault 515-516). Ms. Foshay used the Skill Streaming Social Skills Curriculum. (*Id.*) Everyday, students worked through social skills with Ms. Foshay, the educational technicians, their peers, and occasionally the school's social worker, Jen Stone. (Foshay 253, 264). Ms. Stone would have a morning meeting with the student every day to process feelings and work on self-regulation. (Foshay 254, 264).
32. Ms. Foshay used a class-wide behavioral support plan where the students could earn stars for doing good things as a group, such as getting a good report from their specialist or working together on a game. (Foshay 254). When they completed their star chart, they would earn a class-wide reward, a movie day, or extra recess. (Foshay 254-255). Ms. Foshay used the Turning Point system, wherein students would earn tickets for good behavior and then receive a prize out of a prize box. (Foshay 263). She also used a class-wide crisis plan that she developed (Foshay 350). She did not develop one specifically for the Student until February 3, 2020. (Foshay 356; S-311). She also created a Positive Treatment plan at the same time, (S-313).
33. On September 13, 2019, Ms. Foshay issued the Student's individual behavior plan, based upon a file review from RSU 9. (S-184; Foshay 266-267, 275). At the time she drafted it, she believed that the plan was appropriate, given what she read from the file. (*Id.*) However, she changed it at some point after she got to know the Student better. (*Id.*)

34. On September 20, 2020, in the latter part of the school day, the Student became angry with another Student. Other students were removed from the room and the Student began destroying property. The Principal was called and a School Resource Officer (“SRO”) came to the room. The Student eventually settled down. Instead of having use the bus, the Foster Parents were contacted and they picked up the Student. (Foshay 283-284). Because it was the first incident had at the school, no disciplinary measure was taken. (Foshay 283).
35. On September 24, 2019, a Student Incident Report was issued. (S-203-204). The final report stated:
- (The Student) was asked to take a break because was angry. Instead ran to the corner and started pushing and throwing material. tried to hurt another student along with kicking punching and spitting on three staff members. also threatened to ‘kill’ staff by bringing a knife to school tomorrow. (S-203).
36. The official “Incident Report Under Maine DOE Rule Chapter 33” indicated that as a result of the Student’s behavior, a two-person “stability hold” and then seclusion were required to de-escalate the situation. (S-205). While engaging in the physical restraint, the Student kicked Ms. Foshay in the forehead and kicked two others in the jaw. (*Id.*, Foshay 289-290). The Student also hit head while trying to climb out of seclusion, but apparently was not injured. (*Id.*). The Student was thereafter dismissed and served a three-day suspension. (S-203, 208; Foshay 288-289).
37. On September 25, 2019, the IEP Team met for the first time since the Student entered the District. (S-207). The Written Notice indicated that there was a consensus that the Student should attend the self-contained behavior program at SMES for four and a half hours a day. (S-208). The Team agreed that speech and language goals would remain the same as indicated from the RSU 9 IEP, and that speech and language therapy would begin with Mrs. Ferrari, the District’s speech pathologist. (S-209). Mrs. Plourde, the District’s occupational therapist, had already started therapy with the Student and it was agreed that OT would be identified as a direct service, using the “Zones of Regulation” curriculum to support self-regulation and social emotional learning. (*Id.*) The IEP Team also agreed that given the behaviors already observed by Ms. Foshay, that PBSP would be reflected as an accommodation in the IEP.

(Id.). The Team also agreed that instead of having BCBA consultation on a monthly basis, it would be reduced to an “as needed” basis. (Id.). The Written Notice indicated that the IEP would go into effect on October 2, 2019. (Id.) The Student’s behavioral goals focused on following instructions, increasing appropriate communication with others, and increasingly having a “safe body.” (S-208).

38. The Team supported a placement test to develop math and reading goals. (S-208). It was noted that appeared to be at “Level M” in the Fountas & Pinnell level system, which indicated a late second grade reading level. (S-209). The Team agreed to keep the goal in IEP, but move it to “knowing and applying third-grade level phonics.” (Id.). The Team also agreed that writing goal was appropriate. The Team agreed to teletherapy with a speech pathologist and moving OT to a direct service. The Team also agreed to try having the Student ride the bus to school.

39. The Student’s final IEP included extensive academic and behavioral goals, 30 minutes of speech therapy, 30 minutes of occupational therapy, 30 minutes of social work services, and BCBA consultation services “as needed.” (S-211, 218). The Student was to receive 4.5 hours of specially designed instruction each day. was to participate with non-disabled peers 19% of the time. The IEP also continued to require the use of social stories, visual supports, a behavior plan, and speech to text, and would need adult support to implement the behavior plan, provide differential enforcement and de-escalation strategies, and support the use of expected social thinking skills. (S-211, 218)

40. On October 1, 2019, after the IEP Team meeting and prior to the implementation of the IEP on October 2, 2019, the Student had an episode of physically aggressive behavior in the special education behavior classroom. (S-221). The Incident Report indicated that the incident was precipitated by the Student’s frustration with direction to put away iPad with those of the other students, and desire to keep separate. (S-221). The Report stated that:

(The Student) began throwing objects and other students were moved to another room. followed them and was blocked while other students moved again. was alone in a room with one staff, a second observed outside. (The Student) began to hit and punch staff... The Student hit several times. The principal arrived and decided to seclude (the Student) in the

room. The School Resource Officer arrived and attempted to calm (the Student). He was punched as well. (The Student de-escalated on own after waiting at (sic) foster dad came to pick up. (S-221, 223).

41. The Student used a closed fist to hit and punch Ms. Foshay, and spit on her as well. (Foshay 294-295). Another staff member called the Principal, Patrick St. Clair, who had the Student secluded in the smaller behavior program “cool down” room. (S-221-222, 226; Foshay 295). The SRO was called to the room to attempt de-escalation, but the Student punched in the face. (S-226, *Id.*) The Student was isolated, but then ripped the handle off the door and tried breaking the glass in the door by throwing pieces of metal from the knob at it. (*Id.*) also spit on the Principal. (S-226; Foshay 296). Ms. Foshay received bruises to the legs that took weeks to heal. (Foshay 297). Thereafter, the Student received a 7-day suspension. (S-226).
42. At the beginning of the 2019-2020 school year, Tammy Verreault started as the new Special Education Director for the District. (Verreault 511-512). During the first week of October 2019, Ms. Verreault decided to institute the Town behavior program to replace the Turning Points program in the SMES behavior program. (Foshay 257-258). The model used a point-based system similar to the Turning Point’s tickets, and included reentry meetings if students were suspended. The transition to the new model was slowly implemented during the month of October. (*Id.*).
43. On October 21, 2019, the Student became aggressive with another student. When staff intervened, began hitting and kicking staff, throwing objects, and trying to bite staff. was secluded while calmed down. Thereafter, rejoined the class. (S-227-228)
44. On October 23, 2019, an incident occurred that led to the removal of the Student from the behavior program. (S-231-233). In the morning, the Student became frustrated with math work, threw book, and perseverated on ownership of a Pokémon card when Ms. Foshay used it as a bookmark. (S-232). Although calmed down briefly, began verbally “antagonizing” students. (S-231-232). The other students were moved out of the room and the Student was left in the room with Ms. Foshay. (S-231). The Student’s aggression began to escalate and started throwing objects, including scissors. (*Id.*, S-230). When staff attempted

to restrain the Student punched Ms. Foshay in the jaw, and tried to bite two other staff members. (*Id.*). Eventually, calmed down. (*Id.*). About 30 minutes later, the Student complained that missed break, began to yell, cornered another student, and began to laugh “hysterically.” (*Id.*). After other student was guided away, the Student picked up a lunch tray, held it up in a threatening manner, and then threw it. (*Id.*). was then secluded in the room during the escalation. (*Id.*). threw the tray at the window 20 times, eventually breaking the window glass. (*Id.*). When started punching the broken glass, the staff decided to use restraints to avoid from being cut by the glass. (S-232). During the restraint process, the Student punched Ms. Foshay in the left temple. (*Id.*). When she attempted to block punch, fell backward onto a hearing unit and scraped back. (*Id.*). The nurse was called and immediately came to the room, observing that the knee was bruised but not bloody. (*Id.*, S-233). The Foster Parents were called to come to the school. (*Id.*).

45. Later in the day on the October 23, 2019, Ms. Foshay began to feel groggy and dizzy. (S-233; Foshay 306). The nurse indicated that it could be a concussion and recommended that she see a doctor. (*Id.*). Ms. Foshay did not want to leave the students short-staffed, so she decided finish the day and came back the next day. (*Id.*).

46. The Student was thereafter suspended for four days. (S-236, 383; St. Clair 489).

47. The IEP Team met on October 29, 2019. At that point, the Student had been suspended for a total of 14 of 18 school days. (S-382-383). Prior to the meeting the Foster Parents inquired why the District’s BCBA or its psychologist were not invited to the meeting. (S-C-16). At the meeting the Team determined that the Student’s behaviors were a manifestation of the disability and ordered a functional behavior assessment (“FBA”). (S-234-237, 239; S-242; Foshay 311-12, 320; Verreault 530-33). The IEP Team concluded that the Student would be educated in a 1:1 tutorial setting for 6 hours a day, four days a week, in a school setting other than the SMES program, with the Student remaining at home on Wednesdays, by family choice. (*Id.*, S-236, 250). The IEP Team also concluded that school officials would review possible out-of-district placements to determine if there is a proper fit for the Student. (S-235). The Foster Parents agreed to do tours of available schools. (*Id.*, S-C-17).

48. The IEP Team concluded that even with 1:1 support in the SMES behavior program, it believed the Student would still not be safe. “The team considered providing (the Student) with a one-on-one education technician in current placement. This idea was rejected as (the Student) is already receiving a small teacher-student ratio (1:2) and has still been unsuccessful.” (S-236).
49. The IEP Team’s decision to tutor the Student was considered a temporary solution while the District looked for a proper out-of-district placement for the Student. (Foshay 312; Verreault 535-537). However, up until the time that the District closed due to COVID-19, it did not consider returning the Student back to the SMES behavior program. (Verreault 592). Ms. Foshay testified at the due process hearing that she did not believe she had the tools in her program to provide the Student with the proper behavioral interventions. (Foshay 312). She also acknowledged that there was a staffing shortage in the program. (Foshay 359-360).
50. The Foster Mother testified that no one at the meeting indicated that the Student could return to classroom and the family had to “argue to have the tutoring happen at the school building because originally we were told that the tutoring had to happen outside the school building for less hours.” 44). Ms. Verreault also testified that the District had been trying to hire an additional educational technician, but without success. (Verreault 541).
51. The Foster Parents signed a seven-day waiver because they believed that if they did not, the Student would not have been able to return to SMES behavior program after suspension. 43-44, 48, 115, 117-120; S-C-17).
52. On November 19, 2019, when the Student was in the behavior program classroom to eat lunch with other students, began throwing food when was not allowed to go out to recess. (S-264). This led staff to clear students from the room. When was not allowed to leave the room, began hitting staff, which led to staff closing the door for a seclusion. then threw an iPad across the room, breaking it. (S-264-267; P-102). The Foster Parents were called to pick up the Student from school. (S-268). was not suspended, since placement would continue to be in tutoring program.

53. On December 9, 2019, another incident occurred. (S-269-270, 270A, 270B 270C; S-A-12-14; S-C-29; P-103; Foshay 432-433). The Student was working with tutor when started acting “silly.” (S-A-9). When she said would need to leave the room, “cornered” her; told her not to leave the room, put hands on her biceps, and told her, “Don’t even try to call for help.” (*Id.*). When moved away and sat down, she texted Ms. Foshay, who was in the next room, to come into the room and talk to the Student. (*Id.*). When Ms. Foshay entered the room, the Student started throwing a coat hanger around the room and would not give it to her. When dropped it, she went to pick it up, and grabbed for it as well. She put her foot on it, accidentally stepping on a part of hand as well. At this point, threatened to kill her and chased her down the hallway, attempting to punch her multiple times. She directed back to tutoring room. then picked up scissors from that room and held them threateningly at Ms. Foshay. She closed the door for a seclusion. The Student then stabbed at the door window with the scissors, and then pounded on it with bookends. repeatedly said, “I am going to f\_\_king kill you,” and wrote the first letters of that phrase (“IAGTFKY”) on the door window. erased that statement and drew Mrs. Foshay hanging by a noose, stating “That’s you when I’m through with you.” The Student then attempted to climb out a window, and staff had to go outside to hold it closed. (*Id.*). was directed to erase the writing on the window and then started to de-escalate. (S-271A, C-32; P-104). It was also reported that during the incident, other students were scared and crying. (P-109).

54. The Student was suspended for one day from tutoring placement. (S-271A, S-C-27).

55. Ms. Verreault decided that the Student’s unsafe behaviors, including the use of scissors and the potential for serious harm, required that tutoring needed to be moved immediately from SMES to a conference room located in the District’s Central Office. (S-C-43, 45; Verreault 544; P-120). The Foster Parents had understood that tutoring was temporary based upon the manifestation determination that behaviors were a result of disabilities as determined by District staff at the IEP Team meeting on October 29, 2019, and therefore could not be suspended. (S-C-28, 35, 43). They therefore drove to the SMES on December 12, 2019,



for programming. (S-271, 272). The Student was thereafter transported to the Central Office building for tutoring. (*Id.*).

56. The Foster Parents inquired about an IEP meeting to discuss a change of setting before the Student's tutoring could take place at the Central Office. (S-C-45; Verreault 545). They were informed that the placement had not changed, only the setting for the tutoring. (S-C-43). An IEP meeting did not take place until after the holiday vacation, on January 21, 2020. (S-289).

57. On December 23, 2019, the Foster Parents visited the Spurwink Chelsea behavior program, an out-of-district placement. (S-272).

58. The District engaged Michael Butler, MS. Ed., MS.SP, NCSP, a school psychological service provider, to complete an "indirect" FBA, which was submitted on January 12, 2020. (S-274; Butler 415-416). The FBA was not a full one because he based his opinions upon interviews with District staff and file review, but was unable to speak to the Foster Parents. (Butler 415-416). He felt that the information from the Bangor program was significant to his understanding of the Student. (Butler 411-415). He summarized his conclusions as follows:

In summary, (the Student's) interfering behaviors have been remarkably consistent over time. The hypothesized purpose of these behaviors has also been consistent. It appears that (the Student) has considerable difficulty working in an educational setting - consistently. (The Student) has shown that, upon occasion, is able to work with staff and on educational content. Staff have noted that when is engaged, presents as a nice young man with the capacity to interact appropriately with peers and adults. The inability for (the Student) to maintain consistent appropriate behaviors does not appear to be solely based on behavioral interventions. It is this evaluator's hypotheses that (the Student's) underlying emotional status, given past history of reported trauma, significant caregiver changes, inconsistent educational programming, and multiple mental health diagnoses make it nearly impossible for to maintain appropriate emotional regulation within a public educational environment. Throughout educational programming behaviors have been significantly severe enough to warrant restraint, seclusion, and suspension. It may be that, even more important than educational instruction, is an intensive program of therapeutic counseling, in a restrictive, long term treatment center. It is suggested that once becomes emotionally able to cope with educational programming he may begin to be reintegrated, slowly, back into an educational program. (S-280).

59. In planning for the IEP Team meeting scheduled for January 21, 2020, related services were discussed with staff. On January 20, 2020, Melissa Plourde, OT provider, communicated with Ms. Foshay that the Student had not been receiving OT services since [redacted] started being tutored in October 2019. (P-243).
60. On January 21, 2020, the IEP Team met to review the FBA and address programming needs. The Foster Parents submitted written concerns to discuss. (S-289). Their main areas of concern included the District's decision to tutor the Student in a segregated setting despite a finding that the IEP determined that [redacted] behaviors were a manifestation of [redacted] disability; the results of the psychological evaluation and request for an independent evaluation; the inability to interact with [redacted] nondisabled peers; whether the behavior plan was appropriate; and whether the District was considering a specific out-of-district placement, given the recommendation made in the psychological evaluation. (S-289).
61. At this meeting, the IEP Team discussed an initial proposal to place the Student in a special purpose private day treatment program. (Verreault 553-54; Foshay 339-40). The Foster Parent present did not agree with this proposal. Ultimately, the IEP Team agreed to return the Student to the behavior program in the school setting. (Verreault 554; Foshay 296). While Ms. Foshay was not in favor of this approach, she did not raise her concerns. (Foshay 341).
62. During the meeting, Ms. Verreault decided she needed to contact her attorney for advice, given the vigorous discussion that was taking place. (Verreault 555). Upon her return to the meeting, she ultimately agreed with the option to return the Student to the SMES behavior program with the additional supports and related services. (*Id.*)
63. The Written Notice describing the decisions made at the IEP Team meeting indicated that the IEP Team agreed to pursue an additional independent behavior evaluation. (S-296; P-A-47).<sup>5</sup> The IEP team also agreed to have the Student's tutoring provided at SMES, even though [redacted] would not be interacting with [redacted] nondisabled peers. (S-298-299). The IEP was amended to indicate that the Student's placement would be in the SMES behavior program for 5.5 hours a

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<sup>5</sup> The Written Notice was submitted to the Parents on February 14, 2020. (S-295; P-A-46).

day, four days a week, while an evaluation was being undertaken. (*Id.*). The IEP Team agreed that the Student would not attend school on Wednesday, the fifth day. (*Id.*). The Team was concerned that the Student would “seriously disrupt mainstream classroom settings, given the behavior demonstrated when in the special education classroom.” The Team agreed that time in the mainstream setting “would be earned based on behavior, not guaranteed times.” (S-298). The Team included several modifications, accommodations, and related services in the Student’s IEP, including an hour per week of social work services, 30 minutes of BCBA consultation, one hour per week of occupational therapy, speech and language therapy, as well as behavior goals. (S-298; P-221). The Team also ordered occupational therapy, an increase in speech therapy, and consultation from a Board Certified Behavior Analyst.

64. The IEP Team agreed that the Student would return to the behavior program setting at SMES on January 30, 2020. (P-120). The District drafted and the Parent signed a Seven Day Waiver form, allowing the decision reached by the IEP team to be implemented the following day. (S-293-299).

65. After the IEP Team meeting, Ms. Verreault met with Superintendent Scott Albert and Principal Patrick St. Clair to discuss the IEP Team’s decision. (St. Clair 492). St. Clair had the expectation that the IEP Team would decide to keep [redacted] in tutoring while an out-of-district placement could be found. (St. Clair 482-483). They discussed their concern about potential safety issues if the Student returned to SMES and available options to avoid [redacted] return to the SMES setting. (P-202, 204, 207; Verreault 557-558; St. Clair 483, 492-93). After contacting the District’s attorney, it was decided that an expedited hearing request would be immediately filed in order to do a “reverse stay-put” for the purpose of preventing the Student physically returning to SMES. (Verreault 558; St. Clair 483, 492-93).

66. On January 22, 2020, Ms. Foshay commented to Craig Fallon, a contracted speech and language therapist, that the Student had not been receiving speech and language therapy all school year, and that [redacted] needed compensatory services for the time [redacted] had missed. (P-220).

67. On January 28, 2020, the Foster Parents received an email from Ms. Verreault stating that another IEP Team meeting was needed to discuss safety concerns. (P-161). The Foster Parents replied and inquired as to what safety concerns she was referring to, because they were not informed of any issues since the IEP Team meeting on January 21, 2020 (*Id.*, S-C-120). Ms. Verreault replied on January 29, 2020, that:

Since the decision was made we have received safety concerns from staff and administrators to the effect that implementing the placement is substantially likely to result in injury to the student, staff, or peers. We need to have a team meeting to assess those concerns further. I understand that scheduling a team meeting does not alter the Thursday start date. Can you meet next Wednesday at any time? I'm also willing to meet prior to that date if you are able and would sign a waiver that you are okay with not having a 7-day notice prior to holding this meeting. (P-161; S-C-118).

68. The Foster Parent replied that she wanted to review the concerns prior to scheduling a meeting in order to prepare for it. (P-166, 230). The Student had not violated the Student Code of Conduct, was not suspended, or referred for expulsion at any time between January 21 and 29, 2020. (St. Clair 492; 70). Later in the day, the Foster Parent received a phone call from the Superintendent directing her not to send the Student to school the following day. (69).

69. On January 29, 2020, the District requested an expedited due process hearing request (Case No. 20.060XH) because it believed that returning the Student to the SMES behavior program carried a substantial likelihood of injury to , other students, and District staff. (S-424; P-A-7-17; S-C-112). The result of filing the hearing request would be to return the Student to the tutorial program in the Central Office setting. (S-432). The Parents filed a motion to dismiss the hearing request and a motion to enforce the IEP Team's agreed-upon placement in the behavior program at SMES. As a result of this hearing request, the Student remained in the tutorial placement had previously been attending during the pendency of the due process hearing procedures.<sup>6</sup>

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<sup>6</sup> The District, through its attorney, asserted that "during the course of the expedited hearing, [the Student] would remain in the tutorial placement previously was in, rather than in the proposed return to the behavior program. Consequently, beginning tomorrow (Thursday), and until the hearing officer addresses the matter, [the Student's] placement will be the tutorial placement had been attending, rather than the proposed return to the behavioral program." (P-A-7-15).

70. Between the IEP Team meeting in January 2020 and the District's hearing request, the Student did not violate the Student Code of Conduct. did not receive a suspension and was not referred for expulsion. (St. Clair 492).
71. On January 29, 2020, the District filed its expedited hearing request. (P-A-7; A-18-21). On January 30, 2020, the Foster Parents submitted a Motion to Dismiss for that request to the Department of Education (P-A-1). On February 6, 2020, the Foster Parents filed a Cross Claim to have the Hearing Officer enforce the IEP that was agreed upon on January 21, 2020. (P-A-25; P-A-35).
72. On February 14, 2020, an IEP Team meeting was held. At that meeting, the IEP Team heard input from persons involved with the Student. The District described the Student's past aggressive behaviors and the fear that could cause harm to and others if returned to SMES. (P-A-124). Representatives from CHCS attended the meeting and reported that therapy had been successful for Student and that was not showing aggressive behaviors at home. (*Id.*). The District proposed to place the Student in a behavior program at a special purpose private school. (P-A-123). The Foster Parents' attorney, who attended the meeting, stated that the Student had a right to be in public school and that the recommended new interventions had not been used. (*Id.*). He also stated that additional recommendations might emerge from the independent evaluation that had been agreed upon by the IEP Team. (*Id.*) While there still was no viable out-of-district placement found, until a program was found, the District offered to have the Student continue to be tutored 6 hours a day at the Central Office, which was its IAES for the Student. (*Id.*). would also have one hour of social work and OT per week to address social and emotional needs. (*Id.*)
73. On February 20, 2020, the District withdrew Case 20.060XH<sup>7</sup> based upon the decision of the IEP Team on February 14, 2020 and before a decision on the Motion to Dismiss was heard. (P-A-53). The Hearing Officer found that the hearing request was moot and the Cross-Claim should be refiled as a separate due process hearing request. (P-A-70).

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<sup>7</sup> Case 20.060XH was filed in January 2020 after the IEP Team made a decision to return the Student back to the SMES behavior program. This case was withdrawn after the IEP Team meeting on February 14, 2020, when the IEP Team agreed (without Foster Parents' support) to keep the Student in the IAES.

74. Also on February 20, 2020, the Parents filed this due process hearing request (Case 20.068H), challenging the determinations made at the IEP Team meeting on February 14, 2020. (P-A-56). As part of the request, the Parents expressly asserted the Student's stay-put rights, which was a return to the SMES behavior program, as had been initially agreed upon by the IEP Team at its meeting on January 21, 2020. (P-A-53-56).
75. Also on February 21, 2020, the District filed another expedited due process hearing (Case 20.069XH), arguing that a return to the SMES behavior program risked substantial injury to the Student and others. (P-A-72). On February 28, 2020, the Foster Parents filed a Motion to Dismiss the expedited due progress hearing, which was denied March 11, 2020, by the Hearing Officer. (P-A-159-176; S-434.)
76. Between September 12, 2019 and October 31, 2020, when [redacted] was moved to the tutoring placement, the Student was enrolled in the SMES behavior program for 32 days, but was suspended for all or part of at least 14 days during this period. (S-382; Verreault 613).
77. During the Student's time in the SMES behavior program, the program was understaffed and the structure of the program was in transition. (Bartholomew 137, 144-45; Foshay 249, 263, 360-62, 390; Butler 441; St. Clair 491; Verreault 522, 524, 541). The District had difficulty hiring qualified staff for the behavior program. (Verreault 524). The program had one special education teacher and one educational technician for six students needing to work on social skills. (Verreault 529). Ms. Verreault believed that the District could not provide a program that the Student needed and believed that [redacted] needed a therapeutic setting. (Verreault 537). Ms. Verreault understood that tutoring was not a replacement for a full program. (Verreault 538).
78. The District's intent was to have the tutoring placement be the Student's IAES until the Student was placed in an out-of-district behavior program; however, no appropriate program became available during the school year. (Foshay 372-73; Verreault 538, 587, 592, 598).
79. Between September 12, 2019 and March 15, 2020, when the District closed due to the COVID-19 pandemic, the District did not use the BCBA consultation services included in the

Student's IEP to address the Student's behavior (Bartholomew 186; Foshay 357, 368, 387; Butler 440; Verreault 570, 612).

80. Between September 12, 2019, and January 21, 2020, the District did not provide the related services that were required in the Student's IEP, including social work, speech and language, occupational therapy. (P-125; Bartholomew 159; Foshay 376-77, 390; Verreault 547, 548, 550, 590). The District's tutoring program for the Student "placed no meaningful demands" on . (P-A-13). The District acknowledged that no meaningful academic demands on the Student were made during tutoring in an effort to avoid escalation and conflict. (P-A-13). Tutors working with the Student were neither informed about nor provided with the Student's behavior plan. (Bartholomew 157-58).
81. On March 15, 2020, the District closed its schools due to the COVID-19 pandemic. During the interim period of school closure, the District engaged the services of its BCBA, Meaghan Swan, who developed a plan, similar to the one created on January 21, 2020, to return the Student to in-person instruction.<sup>27</sup> (Verreault 603).
82. In the early spring 2020, Dr. Audrey Bartholomew, Education Department Chair, University of New England, was engaged to perform an independent evaluation of the Student's behavioral patterns and to provide behavioral interventions strategies and recommendations for future planning. (S-384; P-28). She submitted her evaluation on March 15, 2020 (S-384). Based upon her understanding of the Student's disabilities and functional patterns, Dr. Bartholomew suggested possible function of behaviors. (S-390). She suggests that work refusal could be a function of desire to avoid tasks that are confusing above instructional level or not engaging. (Id.) She comments that non-compliance with directions, that sometimes result in destructive behaviors, may be a function of a desire to obtain preferred items or activities. (Id.). She also poses that the Student's inappropriate exchanges with others, including threats and teasing, may be a function of a need to obtain attention from staff and peers. (Id.).
83. Dr. Bartholomew's evaluation included many recommendations for preventing, teaching, and responding to the Student's behaviors. (S-390-394). It included suggestions for high-level

antecedent interventions, with a plan to fade them (S-391). She also recommended ideas on how to teach and reinforce replacement behaviors. She believed that the teaching method used for this should be as formalized as those used to teach reading and writing. (S-391-392). Dr. Bartholomew also recommended long-term strategies and a full FBA to confirm or negate her hypothesized functions and recommendations. (S-392). She also recommended that the school use a “team-based” approach which includes all service providers and teachers, as it was clear to her that staff were working in “silos” to support the Student. (S-393). She stated, “Whatever tools and strategies (the Student) is taught to acquire around self-regulation, self-advocacy, and self-management, should include multiple expert opinions from the team and be consistent through day.” (*Id.*)

84. Dr. Bartholomew also included a transition plan if the Student reentered the SMES behavior program, including a plan for consistent consultation between the classroom teacher, BCBA, and Director of Special Education. (S-394-395).
85. The IEP Team met on May 24, 2020 to review a behavior plan drafted by Meaghan Swan, BCBA, and decide on programming. (S-422). Ms. Swan contacted the Ms. Brousseau, LSW, the Student’s outside mental health therapist, and asked her to attend the IEP meetings and help plan the Student’s programming, (Brousseau 230-231). The Team members concurred that the Student could enter the behavior program at Spruce Mountain Middle School for the 2020-2021 school year. (*Id.*) The Team felt that because would be in a new building with new teachers and students, the Student could get a fresh start with new IEP, reentry plan, behavior plan and crisis plan. (S-421-422; Verreault 562-63; Foshay 349-50).
86. Dr. Bartholomew and Mr. Butler both believed that proper implementation and provision of related services and supports, such as social work services, starting at the beginning of the year would have decreased the Student’s challenging behaviors, and that use of a data-based behavior plan would have led to a reduction in behaviors. (Bartholomew 192, 200; Butler 454).
87. On October 7, 2020, the Student was unenrolled in the District’s school system.



88. On October 21, 2020, the Student was placed in a new therapeutic foster home with new foster parents, who reside in Veazie, Maine. (Hearing Officer Exhibit 1). The District no longer has educational responsibility for the Student. (Stipulation).

#### **IV. POSITION OF THE PARTIES**

**ISSUE 1:** Whether the District failed to provide the Student with appropriate positive behavior interventions and supports during the 2018-2019 school-year, as required by the Student’s IEP

##### Foster Parents’ Position

The Foster Parents argue that the District failed to provide the agreed-upon related services as required when [redacted] first enrolled in September 2019 after the District amended the IEP. It asserts that BCBA consultation services were never engaged for the Student during September at neither the rate of 60 minutes nor on an “as needed” basis after September 2019, despite behaviors exhibited by the Student that clearly warranted it. In addition, the Foster Parents argue that the District failed to provide other related services, including social work, speech and OT, all of which were required by the Student’s IEP and all of which should have been used to provide supports that could have positively impacted [redacted] behaviors.

The Foster Parents also cite the staffing problems acknowledged by the District that impacted the delivery of these services. In addition, it claims that a lack of training for staff also hampered the delivery of behavioral supports. It states that neither of the Student’s tutors had seen [redacted] behavior plan. It argues that the District relied on program-wide interventions and crisis planning rather than the individualized planning the Student needed, and conducted a functional behavioral assessment after the Student had been removed from school, which they claim was inadequate. They believe that the District failed to collect useful antecedent data regarding the Student’s behaviors, making it difficult to develop appropriate responses. It suggests that District staff and providers operated in silos rather than working together to provide the services and supports the Student needed.

The Foster Parents argue that had the District provided appropriate behavioral interventions and supports, challenging behaviors would have decreased and would have been less likely to be subjected to an extended change in placement.

### District's Position

The District argues that the Student's IEP developed by RSU 9 did not specifically include BCBA services, citing the IEP effective March 5, 2019, and thereafter amended on May 29, 2019, and July 11, 2019. It also asserts that the IEP developed after the Student arrived in the District, implemented on October 2, 2019, did not include BCBA consultation services. While the District acknowledges that the District's IEP Team discussed these services, they were apparently not incorporated into the IEP, therefore, it was not required that they be implemented by the District upon the enrollment of the Student.

The District argues that it implemented various behavioral supports and interventions while the Student attended school. It cites the IEP dated September 25, 2019, which refers to a behavior plan and the use of the Zones of Regulation methodology, as well as supplementary aids and services, including the behavior plan and adult support to implement the plan and the provision of reinforcements. It points to the related services in the IEP, including speech, occupational therapy, and social work. It states that Ms. Foshay developed and implemented a behavior plan, with implementation support from Mike Butler, and that the Student received OT instruction using the Zones of Regulation. The District states that Ms. Foshay also provided social skill instruction. (Foshay 253).

The District argues that Student's IEP was implemented when programming changed to tutoring for 6 hours per day, four days a week. had 1:1 services through all parts of school day, with the generation of extensive data gathered by the tutor on a daily basis.

The District argues that even if there were difficulties in providing the IEP's related services, these efforts fell short of the "materiality" standard for a FAPE violation.

**ISSUE 2:** Whether the District failed to deliver the related services required by the Student’s IEP during the 2019-2020 school-year (including those in the amended IEP, dated May 28, 2019)

Foster Parents’ Position

The Foster Parents argue that the District failed to implement the Student’s IEP by failing to provide its related services, including BCBA consultation services, speech and language services, occupational therapy, and social work.

They argue that the District failed to implement the IEP by not ensuring that staff working with the Student were trained to implement behavior plan, not using social stories to address social skills, and failing to provide specialized instruction in the tutoring setting.

The Foster Parents argue that singularly or cumulatively, the stated alleged failures were material and therefore represent a failure to provide a FAPE to the Student.

District’s Position

The District argues that while the Student was in the behavior program at SMES, the Turning Point methodology was used to support a behavior intervention support system with a small student/staff ratio, and stated that Mike Butler, the District’s behavior specialist, provided regular support.

The District acknowledged that while there may not have been the desired level of staffing, efforts were made in October 2019 to hire an additional educational technician to assist in the classroom, but to no avail. The District argues, however, that having two staff for six students was a fairly strong student/teacher ratio. The District also noted that Ms. Foshay, who provided the direct instruction in the behavior program, was trained in crisis interventions and was also a trainer for others in those interventions.

The District also argues that the behavior plan developed by Ms. Foshay was adapted to the Student's needs, as she understood them at the time. The District states that she is the one who implemented it, along with Mr. Butler, intertwining the Turning Points behavior methodology into the Student's programming.

Specifically, the District describes the type of behavior programming that Ms. Foshay used, including the identification of escalating issues before a crisis erupted, redirection of behavior if possible, targeting behaviors they were working on, and rewarding positive behaviors with tickets and prizes. The District also noted that Skills Streaming Social Skills, a social skills instruction methodology, included working in a group setting every day for 20 minutes to address feelings and issues at home, as well as self-regulation skills. The District claims that the student group worked together, which allowed them to earn stars and rewards.

The District acknowledged that while the staff believed the class-wide behavior program, along with IEP, was a good program for the Student, it did not work for other students, and the staff. Until [redacted] was removed to the tutoring setting in the Central Office, [redacted] aggressive and hostile physical behaviors continued.

The District acknowledged that there were gaps in the provision of related services, including social work services, speech and language services, and occupational therapy. It noted that the IEP dated September 25, 2019, included provisions to provide the Student with a behavior program. It claims that it did so, with adult support, using the Turning Point program.

The District also argues that all related services were provided to the Student once [redacted] began specialized instruction with [redacted] tutor. The District further argues that even if there were minor difficulties in providing the related services, they did not rise to a material failure in providing a FAPE to the Student.

**ISSUE 3:** Whether the District changed the Student's placement (in October 2019) to an inappropriate and isolated tutoring placement without providing the procedural safeguards (manifestation determination and prior written notice) required by the IDEA

## Foster Parents' Position

The Foster Parents acknowledge that the behaviors exhibited by the Student in September and October 2019 violated the District's Code of Student Conduct, but maintain they were manifestations of disability. They assert that the District never presented them with an option to return the Student to placement once the IEP made that determination, but were led to believe that tutoring was the only way to get the Student any educational services. They therefore assert that their consent was not appropriately obtained.

They also suggest that the District's actions in this regard were disciplinary and geared toward keeping the Student out of placement. The Foster Parents argue that the District effectively prevented them from meaningfully participating in the decision-making process to such an extent that it resulted in a denial of FAPE for the Student.

The Foster Parents argue that in advance of the IEP Team meeting on October 26, 2019, the District had already decided to change the Student's placement to tutoring, citing the addition of an administrator who was present at the meeting to show a "united front" about the placement, citing email communications between staff members. They urge that this was a material procedural violation and significantly impaired the Foster Parents' ability to participate in the IEP process, resulting in the denial of a FAPE.

The Foster Parents also urge that even if the conduct of the District was found to be proper, the "interim" tutoring placement became inappropriate when it lasted for at least five months, and would have continued but for the school closures caused by the pandemic.

Finally, the Foster Parents claim that the tutoring placement was not appropriate even as a short term measure, because it did not address the Student's social and emotional needs. They point out that did not receive social work, occupational therapy, or the appropriate behavioral interventions and supports, nor any specially designed instruction, while in the tutoring setting. They stated significant educational harm mounted after months of isolated tutoring.

### District's Position

The District argues that because the Student's behaviors were a manifestation of disability, the IEP Team, including the Foster Parents, agreed to provide specially designed instruction in a full-day tutorial placement, delivered by two special educators and supervised by Ms. Verreault, the District's special education director.

The District further asserts that the placement was reasonable and allowable, considering the impact on staff and students by a Student exhibiting injurious behaviors, citing MUSER.

**ISSUE 4:** Whether the District refused to implement the IEP developed and agreed upon at the IEP Team meeting on January 21, 2020

### Foster Parents' Position

The Foster Parents argue that the District violated the IEP, amended on January 21, 2020, because the District never returned the Student to former placement in the SMES behavior program. The Foster Parents assert that the reason was due to the District's legal intervention by filing an expedited hearing request in order to halt the implementation of the IEP and rely on the stay-put provisions of the IDEA. The broader question for the Foster Parents is whether this legal tactic, which it asserts caused the failure to provide a FAPE to the Student, is permissible under the IDEA. It asserts that it is not, and argues accordingly under Issue 5.

### District's Position

The District also believes that Issue 4 is resolved by analyzing whether it was proper to use the expedited hearing procedures to effect a unilateral removal of the Student to change placement.

**ISSUE 5:** Whether the District improperly used the expedited hearing procedures to effect a unilateral removal by insisting that the filings alone changed the Student’s placement and altered stay-put rights

Foster Parents’ Position

The Foster Parents acknowledge that the issue of whether the Student would have presented a substantial likelihood of injury to or others is not before the Hearing Officer, nor whether the District may file for an expedited hearing. Rather, the Foster Parents argue that under the circumstances of this matter, the District’s use of the expedited hearing procedures was improper. The Foster Parents argue that the expedited hearing process is only available in the context of a violation of a Student Code of Conduct and the application of general disciplinary procedures.

The Foster Parents argue that the expedited hearing procedures were not available to the District because at the time of filing, the Student had not violated the Student Code of Conduct and had not been subjected to generally applicable disciplinary procedures. At that point in time, there was no additional conduct on the part of the Student that would have been the subject of a suspension, expulsion, or a manifestation determination.

The Foster Parents highlight the stay-put language in the IDEA, that when an expedited hearing request has been filed by a school district, “...the child shall remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period provided for in paragraph (1)(C), whichever occurs first..”<sup>8</sup>

The Foster Parents note that the “time period” referenced above is governed by the relevant disciplinary procedures applicable to children without disabilities, citing 20 U.S. C. § 1415(k)(1)(C). The Foster Parents argue that by implication, applying disciplinary procedures relevant to all children is a condition precedent for invoking the “different statement of the stay-put” that the District relies upon in its decision to file for an expedited due process hearing. They assert, therefore, that the District improperly invoked the stay-put language of the IDEA.

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<sup>8</sup> 20 U.S.C. § 1415(k)(4).

## District's Position

The District argues that despite the determination by the IEP Team to return the Student to the SMES program, its administration (the Superintendent, Principal, and Special Education Director) concurred that there was substantial likelihood of injury to \_\_\_\_\_ or others if the Student returned to the SMES behavior program. It asserts that based upon this sincere belief, it took legal action to prevent such a result by filing an expedited hearing request, which, by force of law, invoked the IDEA's stay-put regime and kept the Student in the tutoring placement ordered by the IEP Team on October 29, 2019.

The District urges that it did not initiate the expedited hearing procedures to merely seek the benefit of the stay-put provision as it applies to expedited hearings. It argues that the IDEA provides language regarding what actions a school district can take, at any time, if it believes that there is a substantial likely of injury if the Student remains in \_\_\_\_\_ current placement. The District argues that a manifestation determination is not necessary for a school district to request such relief from a hearing officer. The District argues that it did not unilaterally take it upon itself to change the Student's placement, but instead, initiated legal action pursuant to the language of the statute.

The District's withdrawal of both expedited hearing requests was based upon legitimate changes in the circumstances of the Student's programming. It states that it withdrew case 20.060XH because the IEP Team reached a decision on February 14, 2020 to continue the IAES while an out-of-district placement was secured. It states it withdrew case 20.069XH due to the closure of the District because of COVID-19.

The District urges that it was justifiable to file an expedited hearing request to ensure the safety of all individuals, staff and students, despite the lack of a disciplinary incident or manifestation determination.

**ISSUE 6:** Whether the District significantly limited the ability of the Foster Parents to participate in the development of the IEP at the IEP Team meeting on February 14, 2020, by:



1. Failing to have persons knowledgeable about the placement options at the IEP Team meeting;
2. Failing to make a clear and specific offer of placement;
3. Failing to consider all the factors required by the IDEA when making a placement decision;
4. Making a placement offer without knowledge of whether the placement was actually available; and
5. Predetermining the outcome prior to the meeting

### Foster Parents' Position

The Foster Parents argue that the IEP Team meeting held on February 14, 2020 failed to provide the Foster Parents with any meaningful information about a day treatment program that the District was proposing for the Student. It asserts that at the time, the District knew that there was no appropriate availability anywhere and did not invite representatives from any program to provide information about a particular program. The Foster Parents argue that the District's proposed placement was made merely to protect itself from potential legal liability, because they understood that continuing tutoring was not a long-term option.

The Foster Parents also argue that because the District knew it could not offer a specific program to them at the IEP Team meeting on February 14, 2020, it predetermined the outcome of the IEP Team meeting by having the IEP continue to keep the Student being tutored in the Central Office. In that regard, the Foster Parents argue that the District, in effect and intentionally, did not go into the meeting with an open mind about the Student's programming, but instead, engineered the end result. As such, the Foster Parents argue that by not providing important information at that IEP Team meeting, the District did not provide them with a meaningful way to participate with respect to the long-term planning for the Student's programming, therefore violating the IDEA.

### District's Position

The District argues that it did not fail to provide a meaningful opportunity for the Foster Parents to participate in the IEP Team meeting on February 14, 2020. It notes that at the time, there was a pending due process hearing and a stay-put was in effect, so no placement changes would have

occurred even if there was an opening in an appropriate program, unless the parties agreed. It also notes that both parties' attorneys were present at this meeting and discussed visitations at the Spurwink Chelsea program to determine if it would be appropriate. The District asserts that the IEP Team was only discussing the type of placements that would be appropriate, not making a decision on an actual, available placement. The District explains that once a possible placement was identified, the Team would reconvene, invite a program representative, and decide whether to move forward with it.

The District asserts that it proposed tutoring as the IAES because a day treatment program was not yet available.

The District also argues that it did not predetermine the outcome of the meeting despite the fact that its staff strongly believed that the Student would have seriously hurt or others if returned to the SMES behavior program. It claims that the IEP Team agreed to have an independent assessment performed by a person recommended by the Foster Parents' attorney, and that this is evidence that the District was willing to consider a variety of options going forward.

**ISSUE 7:** Whether the District denied the Student a free and appropriate public education and access to the least restrictive environment, if the above allegations are found to be substantiated

The Foster Parents argue that based upon the District's alleged violations, either singularly or together, the District failed to provide the Student with a FAPE in the least restrictive environment. The District argues that it has complied with the IDEA in every facet of this matter.

## **V. LEGAL FRAMEWORK**

Congress enacted the IDEA to ensure that all children with disabilities are provided a free appropriate public education ("FAPE") and that the rights of disabled children and their parents are protected. 20 U.S.C. § 1400(d)(1)(A)-(B). The general prerequisite to a state's receipt of federal funds to provide public education is the provision of a FAPE in the least restrictive educational environment

("LRE" or "least restrictive environment") to all disabled children residing within the state pursuant to the Individuals with Disabilities Education Act ("IDEA"). 20 U.S.C. §§1412(a)(1), (5). See *Arlington Central School Dist. Bd. of Ed. v. Murphy*, 548 U.S. 291, 295, 126 S. Ct. 2455, 165 L.Ed.2d 526 (2006). A FAPE consists of an educational program "that emphasizes special education and related services designed to meet the unique needs" of each child. 20 U.S.C. §1400(d)(1)(A), by affording "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability." 20 U.S.C. §1401(29). By also requiring that education and related services be provided in the least restrictive environment, Congress sought to ensure that children with disabilities are educated alongside non-disabled students "[t]o the maximum extent appropriate," so that "special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes ... cannot be achieved satisfactorily." 20 U.S.C. § 1412(a)(5)(A). See also MUSER X.2(B); *Ms. S. v. Regional Sch. Unit 72*, 829 F.3d 95, 113 (1st Cir. 2016).

A FAPE includes both "special education" and "related services." 20 U.S.C. §1401(9). "Related services" are the support services "required to assist a child ... to benefit from" that instruction. 20 U.S.C. §§ 1401(26), (29). A state covered by the IDEA must provide a disabled child with such special education and related services "in conformity with the [child's] individualized education program." 20 U.S.C. §1401(9)(D).

The IEP is the "centerpiece of the IDEA's education delivery system for disabled children." *Honig v. Doe*, 484 U.S. 305, 311 (1988). When determining whether a school district has offered a FAPE to a child with a disability, hearing officers and judges must assess whether the educational program set out in the IEP appropriately meets the child's needs. When determining the appropriateness of an IEP, the "[a]ctions of school systems cannot be judged exclusively in hindsight. An IEP is a snapshot, not a retrospective." *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992 (1st Cir. 1990). The delivery of a FAPE includes the duty to implement a student's IEP. See 20 U.S.C. § 1401(9); see also MUSER II.13 (2017). If a school unit fails to fully implement a student's IEP, the adjudicator must determine whether the failure was "material," and if material, an appropriate remedy. *Ms. M. v. Falmouth Sch. Dep't*, 2016 WL 3072250, \*3 (D. Me. 2016), vacated on other grounds, 847 F.3d 19 (1st Cir. 2017).

The IDEA imposes additional procedural and substantive requirements with regard to the IEP. See, e.g., *Roland M., supra.* at 987-88 (1st Cir. 1990). For example, parents have the right to be part of the IEP “team” along with the teachers and other educational professionals charged with formulating a child's particular IEP. 20 U.S.C. § 1414(d)(1)(B); *Lessard, supra,* 518 F.3d at 23. The purpose behind such procedural safeguards is to “guarantee parents both an opportunity for meaningful input into all decisions affecting their child's education and the right to seek review of any decisions they think inappropriate.” *Pihl v. Massachusetts Dep't of Educ.,* 9 F.3d 184, 187 (1st Cir. 1993).

Under the IDEA, the denial of a FAPE may be shown if the procedural inadequacies, a) impeded the child's right to a FAPE; b) significantly impeded the parent's opportunity to participate in the decision-making progress regarding the provision of a FAPE to the parent's child; or c) caused a deprivation of educational benefits. 20 USC §1415(f)(3)(E)(ii).

### 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).

## **VI. CONCLUSIONS**

**ISSUE 1:** Whether the District failed to provide the Student with appropriate positive behavior interventions and supports during the 2019-2020 school year, as required by the Student’s IEP<sup>9</sup>

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<sup>9</sup> The alleged violations occurred in the 2019-2020 school year, not the 2018-2019 school year as the prehearing report indicated. Also, as noted in the Hearing Officer’s Amended Prehearing Order, none of these issues raise concerns about the service levels provided to the Student during the COVID-19 closures, from March 16, 2020, forward. There is also no present dispute about the IEP or placement for the upcoming 2020-2021 school year. In other words, this case involves actions and programming between September 12, 2019 and March 15, 2020.

I find that the District failed to implement certain positive behavior interventions and supports during portions of the 2019-2020 school year, through March 15, 2020. The record reflects that the Student started school in the District on September 12, 2019. At that time, the IEP in place was the one developed by RSU 9, amended on July 11, 2019. It included the following related accommodations and services:

1. A behavior plan
2. Supplemental services, including
  - a. adult support to implement the behavior plan;
  - b. a behavior specialist.
3. BCBA Consultation – 1 time per month for 60 minutes

RSU 9 had contracted with Tami Sanborn, BCBA, prior to the Student's transition to the District. (S-142). She completed several observations and consultation sessions in May and June 2019 in order to develop a behavior plan. (S-173). In her report, she hypothesized that the Student's "triggers" included understanding and following the rules for an activity or game, and the presence of a trusting relationship with adults. (*Id.*). In July 2019, the IEP Team agreed to move BCBA services from a supplemental service to a related service, with a goal of addressing increasing independence and successful emotional regulation. (S-172). Once the Student transitioned into the District, the District's IEP Team reviewed the IEP. (S-208). The RSU 9 IEP was in effect from the time the Student started school in the District on September 12, 2019 until October 2, 2019, when the District's new IEP became effective.

#### September 12 – October 2, 2019

Between September 12 and October 2, 2019, the Student was noticeably struggling to regulate behaviors in the SMES behavior program. had two incidents requiring restraints, one on September 24, 2019 and the other on October 1, 2019. While Ms. Foshay had drafted and amended a Positive Behavior Plan on September 13, 2019, with advice from the District's behavior specialist, Mr. Butler, neither of them reached out to the BCBA from RSU 9 or Meaghan Swan, the BCBA who contracted with the District in developing the SMES behavior program. I find that a BCBA was needed early in the Student's transition to the District in order to help refine behavior interventions, which may have reduced the level of the Student's aggressive behaviors.

### After October 2, 2019

On September 25, 2019, the IEP Team decided to change the frequency of BCBA consultation to an “as needed” basis and maintained the same levels of all other related services that impacted behavioral interventions, supports, and skills development. (S-209). This IEP became effective on October 2, 2019. (S-125). Despite the serious nature of the Student’s behaviors, there is no evidence that the District consulted a BCBA at any point from October 2, 2019 until mid-2020. Likely topics to discuss would have included the Student’s continuing challenging behaviors and how to proceed; the lack of staffing in the SMES behavior program; and what related services could be in the IAES the SMES and thereafter when was moved to the Central Office. I find that these were points in the Student’s programming when a BCBA was needed, as stated in IEP. The result of not seeking advice from a BCBA more likely than not resulted in the Student’s continuing assaultive and threatening behaviors, including causing injury to staff, threatening harm with objects (including scissors), and traumatizing other students.

As acknowledged by Ms. Foshay, Mr. Butler, and Ms. Verreault, the District did not provide the proper behavior interventions and supports that the Student needed in order to remain safe and keep others safe. I find that the failure to consult with a BCBA and use appropriate behavior interventions was a violation of the Student’s IEP. While the District staff believed early on that the Student needed to be placed in an out-of-district behavior program, as it came to pass, the staff was able to use the services of Meaghan Swan, BCBA, to draft a new behavior plan, crisis plan, and reentry plan in mid-2020 that the IEP Team, the Foster Parents, and the District believed would work. Clearly, this should have happened in the beginning of the school year.

**ISSUE 2:** Whether the District failed to deliver the related services required by the Student’s IEP during the 2019-2020 school year, through March 15, 2020 (including those in the amended IEP, dated May 28, 2019)

September 12 – October 2, 2019

I find that the District failed to deliver certain related services listed in the Student’s RSU 9 IEP. This is undisputed. The RSU 9 IEP, which followed the Student into the District, included direct speech and language (“S/L”) therapy and consultation services; occupational therapy (“OT”); social work services; BCBA consultation services; and transportation services (smaller vehicle with a Parent and/or aide). (S-126-127). Other than some OT and transportation services, no S/L therapy, social work, or BCBA consultation services (as discussed above) were provided to the Student.

After October 2, 2019

The Student’s IEP developed by the District, effective October 2, 2019, required direct S/L therapy, OT, social work services, and BCBA consultation “as needed.” (S-218). I find that only some OT was provided after October 2, 2019, but was discontinued on October 29, 2019, when the Student was moved to in-school tutoring. Thereafter, no related services were provided to the Student until they were reconstituted in the amended IEP, dated January 21, 2020, with the exception of social work services. Social work services were included in the IEP, but were never delivered. I also find that Special Education Director Verreault’s offer of compensatory education to the Student’s Foster Parents in letter, dated her June 5, 2020, acknowledged the omission of all of these related services during the 2019-2020 school year, up until the District closed due to the COVID-19 pandemic.

**ISSUE 3:** Whether the District changed the Student’s placement (in October 2019) to an inappropriate and isolated tutoring placement without providing the procedural safeguards (manifestation determination and prior written notice) required by the IDEA.

The IDEA requires that if a disabled student either has been moved to an IAES or has been suspended for more than 10 days as a result of behavior, and thereafter if a manifestation determination finds that the conduct was due to the student’s disabilities, the school district “shall” return the student to the placement from which he/she was removed, unless the parent(s) and the

Local Educational Agency (“LEA”) agree to a change of placement as part of the modification of the behavioral intervention plan. 20 U.S.C. §1415(k)(1)(F)<sup>10</sup>; 34 C.F.R. 300.530(f)(2).<sup>11</sup>

I find that the District properly conducted a manifestation determination on October 29, 2019. The IEP Team, including the Foster Parents, reached consensus that the Student’s ongoing conduct was a manifestation of disability.

A determinative issue is whether the Foster Parents, after it was found that the Student’s behavior was a manifestation of disabilities, knew that the decision on placement depended upon their agreement to move the Student to a different placement. Without their agreement, the Student should have been placed back into the SMES behavior program with additional supports and interventions. Parents have the right to be part of the IEP “team” along with the teachers and other educational professionals charged with formulating a child's particular IEP. 20 U.S.C. § 1414(d)(1)(B); *Lessard, supra*, 518 F.3d at 23. They are guaranteed under the IDEA to have an opportunity for meaningful input into all decisions affecting the Student’s education. *Pihl v. Massachusetts Dep’t of Educ.*, *supra* at 9 F.3d at 187.

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<sup>10</sup> F. Determination that Behavior Was a Manifestation

If the SAU, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child’s disability, the IEP Team must—

(1) Either—

(a) Conduct a functional behavioral assessment, unless the SAU had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the child; or

(b) If a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior; and

(2) Except as provided in paragraph (G) of this section, return the child to the placement from which the child was removed, unless the parent and the SAU agree to a change of placement as part of the modification of the behavioral intervention plan.

<sup>11</sup> However, the statute allows a school district to make temporary unilateral decisions about placement if a student with (or without a disability):

(1) Carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function under the jurisdiction of a SEA or an LEA;

(2) Knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of a SEA or an LEA; or

(3) Has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of a SEA or an LEA.

20 U.S.C. §1415(k)(1)(G); 34 C.F.R. 300.530(f)(2)(g).



The focus of the October 2019 IEP Team meeting should have been either to conduct an FBA or, if an FBA already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior; AND return the Student to the SMES behavior unless the Foster Parents and the District agreed to the change of placement as part of the modification of the behavioral intervention plan. Instead, the District did not plan on doing an FBA or amend behavioral intervention plan, but unilaterally chose to remove the Student from the SMES behavior program and place in tutoring while an out-of-district placement could be found.

While there was vigorous debate with the Foster Parents at the IEP Team meeting about whether the Student should go back to the SMES behavior program or to an out-of-district placement, I find that the Foster Parents did not understand that if there was a disagreement about an out-of-district placement at that meeting, then the District had no choice but to return the Student to the SMES behavior program with additional supports and other behavioral interventions. It is undisputed that the Foster Parents did not want the Student to be tutored for any length of time.

The Foster Parents argue that despite their agreement to have the Student placed in in-school tutoring, the District did not inform them that the Student should have been placed back into the SMES behavior program because behaviors were found to be a manifestation of disabilities. I find that to be true. The District had an obligation to give the Foster Parents the proper information about the result of a manifestation determination in order to properly participate in the discussion. If they understood that the District was obligated to return the Student to the SMES behavior program, they may not have gone along with a different placement. They also would have had an opportunity to file a due process hearing request asking a hearing officer to put the Student back into the SMES behavior program, the last agreed-upon placement.

I find that the District failed in its obligation to inform the Foster Parents that it was required to place the Student back in the behavior program unless they agreed to a different placement. Once the Foster Parents disagreed with the tutoring placement, then the District had two choices: 1) file for an injunction or expedited hearing (see below); or 2) unilaterally remove the Student to an IAES for 45 days, basing its decision on the Student's use or possession of a weapon, such as scissors, or

documenting that the Student had caused “serious bodily injury” as defined in the statute. It chose neither option.

**ISSUES 4 and 5:** Whether the District refused to implement the IEP developed and agreed upon at the January 21, 2020 IEP Team meeting; and whether the District improperly used the expedited hearing procedures to effect a unilateral removal by insisting that the filings alone changed the Student’s placement and altered stay-put rights

These two issues are inextricably intertwined and must be analyzed together. Essentially, the Foster Parents allege that the District improperly used the expedited hearing due process procedures to enjoin the IEP’s decision, on January 21, 2020, to place the Student back into the SMES behavior program. The act of filing a request for an expedited hearing request, by force of law, required the Student to “stay put” in the tutoring placement. The Foster Parents argue that the District’s expedited due process filing was an improper attempt to keep the Student physically out of the school while it was searching for an out-of-district placement. It argues that the District was prohibited from using the expedited hearing process in this manner because it is limited to circumstances involving an appeal of a manifestation determination.

The stay-put presumption requires the student to stay in his/her IEP placement during the pendency of a due process proceeding. *Olu-Cole ex rel. M.K. v. E.L. Haynes Pub. Charter Sch.*, (D.C. Cir. 2019) 930 F.3d 519. The relevant IDEA language on stay-put is found at 20 U.S.C. § 1415(j) and (k). See also; 34 CFR 300.530 and MUSER XVII – Discipline of Children with Disabilities. There are two categories of the stay-put requirement under the IDEA’s procedural due process language. First, during the pendency of regular due process proceedings, unless the school district and the parents otherwise agree, a student shall remain in the student’s then-current educational placement. 20 U.S.C. § 1415(j). The other form of a stay-put placement is the IAES. The statute states that school personnel may consider any unique circumstances on a case-by-case basis when determining whether to order a change in placement for a child with a disability who violates a code of student conduct. 20 U.S.C. § 1415(k)(1)(A). The statute allows school personnel to remove a student with a disability, if the student violates a code of student conduct, from the current placement to an appropriate IAES or other setting,

or suspend the student for not more than 10 school days (to the extent such alternatives are applied to children without disabilities). 20 U.S.C. § 1415(k)(1)(B).

As stated above, if a student is suspended for more than 10 days because of the student's conduct, then the IEP Team must meet and determine whether the conduct was a manifestation of his/her disability. 20 U.S.C. § 1415(k)(1)(E). If the conduct is determined to be a manifestation of the student's disability, then certain actions must be taken, including returning the student to the placement from which the student was removed, unless the parents and LEA agree to a change of placement as part of the modification of the behavioral intervention plan. 20 U.S.C. § 1415(k)(1)(F)(i-iii).<sup>12</sup> The statute is clear that the decision to remove a student to an IAES "shall be" determined by the IEP Team. 20 U.S.C. § 1415(k)(2).

The statute allows either the parents or a school district to request a hearing regarding issues of a placement, including whether maintaining a student's placement is substantially likely to result in injury to the student or others. 20 U.S. Code §1415(k)(3)(A) states the following:

(3) Appeal

(A) In general

The parent of a child with a disability who disagrees with any decision regarding placement, or the manifestation determination under this subsection, or a local educational agency that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or to others, may request a hearing.

In *Honig v. Doe*, 484 U.S. 305 (1988), the Supreme Court, interpreting the stay-put provision under the IDEA, stated that while Congress stripped schools of the unilateral authority to exclude disabled students, particularly emotionally disturbed students, it did not leave school administrators powerless to deal with dangerous students. It stated that school officials could obtain relief only with

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<sup>12</sup> There are only three exceptions to the requirement of returning the student back to the placement the student was in prior to the removal to an IAES. School personnel may remove a student to an IAES for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the student's disability if the student: (i) carries or possesses a weapon to or at school, on school premises, or to or at a school function under the jurisdiction of a State or local educational agency; (ii) knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency; or (iii) has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency.

the permission of the parents or through the courts if they wanted to by-pass administrative procedures:

While many of the EHA's procedural safeguards protect the rights of parents and children, schools can and do seek redress through the administrative review process, and we have no reason to believe that Congress meant to require schools alone to exhaust in all cases, no matter how exigent the circumstances. The burden in such cases, of course, rests with the school to demonstrate the futility or inadequacy of administrative review, but nothing in § 1415(e)(2) suggests that schools are completely barred from attempting to make such a showing.  
*Id.* at 327.

Therefore, the Court in *Honig* never stated that school districts were prevented from using administrative processes, it merely stated that if they wanted to get immediate relief from the courts that they could do so, but must show the futility of going through administrative processes.

The Office of Special Education and Rehabilitative Services (“OSERS”) interpreted the Court’s view that school personnel can request removals of students through due process actions as well as through the courts. In June 2009, it stated that “school authorities may use the relevant discipline provisions related to short-term and long-term removals, *including seeking a hearing to remove the student to an interim alternative educational placement if maintaining the current placement is substantially likely to result in injury to the child or others.*” (Emphasis added).<sup>13</sup> (Office of Special Education and Rehabilitative Services, Questions and Answers on Discipline Procedures (revised June 2009)). Also, a Report to Congress, generated by the Congressional Research Services on the IDEA and dated July 30, 2018, stated as follows:

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<sup>13</sup> Question B-1: What options are available for school personnel when a student with a disability commits a serious crime, such as rape, at school or at a school function? Answer: Under most State and local laws, school personnel must report certain crimes that occur on school grounds to the appropriate authorities. The IDEA regulations, under 34 CFR §300.535(a), do not prohibit the school or public agency from reporting crimes committed by students with disabilities. In addition, where such crimes constitute a violation of the school’s code of student conduct, school authorities may use the relevant discipline provisions related to short-term and long-term removals, including seeking a hearing to remove the student to an interim alternative educational placement if maintaining the current placement is substantially likely to result in injury to the child or others. To the extent that such criminal acts also result in an injury that meets the definition of “serious bodily injury,” the removal provisions of 34 CFR §300.530(g) would apply. The definition referenced in 34 CFR §300.530(i)(3) currently reads: As defined at 18 U.S.C. 1365(h)(3), the term serious bodily injury means bodily injury that involves— 1. A substantial risk of death; 2. Extreme physical pain; 3. Protracted and obvious disfigurement; or 4. Protracted loss or impairment of the function of a bodily member, organ, or mental faculty. Certain Federal cases have held that rape met this definition of serious bodily injury because the victim suffered protracted impairment of mental faculties. The current definition of the term “serious bodily injury” in 18 U.S.C. 1365(h)(3) can be found on the U.S. House of Representatives Web site at <http://uscode.house.gov/download/pls/18C65.txt>. (<https://www2.ed.gov/policy/speced/guid/idea/discipline-q-a.pdf>).

If a child with a disability commits an action that would be subject to discipline, school personnel have several immediate options. These include:

- Removing a child from his or her current placement to another setting or suspension for up to 10 school days;
- Placing the child in an interim alternative education setting for up to 45 school days for situations involving weapons or drugs, or if the student has inflicted serious bodily injury of another person while at school; and
- Asking a *hearing officer* to order a child to be placed in an interim alternative educational setting for up to 45 school days if the *hearing officer* determines that maintaining the current placement of the child is substantially likely to result in injury to the child or others.

(Congressional Research Service, R41833, <https://crsreports.congress.gov> (updated July 30, 2018).

Hearing officers have often decided issues related to a school’s filing of an expedited hearing to change the placement of a dangerous student. See *Arcadia Unified Sch. Dist.*, 119 LRP 3402 (SEA CA 01/18/19); *Rialto Unified Sch. Dist.*, 114 LRP 1023 (SEA CA 11/19/13); *El Segundo Unified Sch. Dist.*, 117 LRP 41921 (SEA CA 09/20/17) (The school district filed a hearing request to establish that maintaining the current educational placement of the student was substantially likely to result in injury to Student or others; and its proposed placement was an appropriate for Student for not more than 45 days); and *In re: Student with a Disability*, 117 LRP 20580 (SEA IL 04/06/17) (finding that a first-grader's gun gestures toward staff members, kicking and biting of staff members, and verbal threats to shoot or hurt her peers justified placing her in an IAES). *Quincy Pub. Schs.*, (SEA MA 1/31/2020), 76 IDELR 21, 120 LRP 3640 (The school district asked a hearing officer, pursuant to 20 U.S.C. § 1415(k)(3)(B)(ii)(II), to order a change of placement for student because there was nothing more that it could do to support the student. “The statute authorizes a Hearing Officer to order a change in placement of a child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of such child is substantially likely to result in injury to the child or to others.”)

Therefore, whenever a parent or school district pursues an expedited hearing, subsection 20 U.S.C. § 1415(k)(4) displaces the general stay-put requirement under 20 U.S.C. § 1415(j). *Olu-Cole ex rel. M.K. v. E.L. Haynes Pub. Charter Sch.*, 930 F.3d 519, 525 (D.C. Cir. 2019). Instead, the student shall remain in the IAES pending the decision of the hearing officer, unless the parent and the school district agree otherwise. *Olu-Cole ex rel. M.K. v. E.L. Haynes Pub. Charter Sch.*, 930 F.3d

519, 525 (D.C. Cir. 2019). However, the hearing officer has the limited authority to extend the interim placement by "not more than 45 school days if [she] determines that maintaining the current placement ... is substantially likely to result in injury to the child or to others." *Id.*, 20 U.S.C. § 1415(k)(3)(B)(ii)(II).

I find that the incident on December 9, 2019 continued to risk serious injury to the Student and others and warranted an expedited hearing request. The Student was engaged in violent behavior, including threatening District staff with scissors, physically injuring staff, and threatening to kill staff.<sup>14</sup> This level of conduct was not only a violation of the District's code of conduct, but it could have resulted in a criminal complaint. I find that the alleged facts at the time showed sufficient cause to warrant the filing of an expedited hearing request to determine whether it was substantially likely that the Student's return to the SMES behavior program would result in injury to or others, and whether the IAES should be maintained for an additional 45 days.

While the District was free to file for a *Honig*-type injunction in federal court, ample guidance from the Department of Education and case law support access of school districts to the expedited hearing process under these circumstances. That is what the District did, contrary to the Foster Parents' view that the District's action was, in effect, a unilateral maneuver to continue the IAES without parental permission.

Therefore, by force of law, the stay-put placement was the IAES. Even if the result of the expedited hearing request was that it was not an appropriate IAES, I find that the basis for the filing itself was a legitimate concern for the safety and welfare for students, staff, and the Student, and that the stay-put placement would still have been the IAES until the determination on the merits was issued. I therefore find no procedural violation on this issue.

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<sup>14</sup> A hearing officer approved an IAES finding that using scissors to threaten others qualified as a weapon under the IDEA. *Pottstown Sch. Dist.*, 118 LRP 27959 (SEA PA 05/11/18), *aff'd*, *Aponte v. Pottstown Sch. Dist.*, 76 IDELR 38 (E.D. Pa. 2020).

The Foster Parents' argument that the District is limited to filing an expedited hearing only to appeal a manifestation determination is misplaced. While they are correct in their citation of the disciplinary procedures under 20 U.S.C. § 1415(k)(1)(C) and (4), these sections do not contain limitations on the District's options in obtaining relief under extreme circumstances. Granted, the word "appeal" clearly refers to an appeal of a manifestation determination. However, even the Court in *Honig, supra*, suggested that a school district could go to the courts and request an injunction under very serious circumstances that do not involve a manifestation determination. The Court did not expressly limit a school district's legal options in this regard. As stated above, the Department of Education clarified this interpretation by explaining that school authorities may use the relevant discipline provisions related to short-term and long-term removals, including seeking a hearing to remove the student to an interim alternative educational placement, if maintaining the current placement is substantially likely to result in injury to the child or others. Therefore, a manifestation determination is not required under these extreme circumstances.

I do not have the authority to determine whether maintaining the Students' current placement was substantially likely to result in injury to the Student or others because that issue is not before me. However, I find that the District had the discretion to ask for such a determination by a hearing officer, given the serious nature of the Student's behaviors.

**ISSUE 6:** Whether the District committed procedural violations (failing to have persons knowledgeable about the placement options at the IEP Team meeting; failing to make a clear and specific offer of placement; failing to consider all the factors required by the IDEA when making a placement decision; making a placement offer without knowledge of whether the placement was actually available; and predetermining the outcome prior to the meeting) at the IEP Team meeting on February 14, 2020, which significantly limited the ability of the Foster Parents to participate in the development of the IEP

This issue concerns whether the District failed to provide the Foster Parents with a meaningful opportunity to participate in the decision-making process at the IEP Team meeting on February 14, 2020.

The IDEA requires that parents be an essential part of any group making the placement decision. 34 CFR 300.116 (a)(1); 34 CFR 300.501 (c); and 71 Fed. Reg. 46,585 (2006). They must receive notice of all meetings where the district proposes to initiate, determine, or change placement. 34 CFR 300.503. Pursuant to 34 CFR 300.501, MUSER outlines specific procedures for IEP Teams to follow when there is a change in placement being considered. MUSER IX.3.H. states as follows:

H. IEP Requirements in Out-of-Unit Placements.

Before an IEP Team decides to place a child with a disability in an out-of-unit placement, it shall initiate and convene an IEP meeting to develop an Individualized Education Program for the child. The IEP developed will reflect the Team's program design to meet the child's needs and will include goals for the child's growth in the areas of concern. The IEP Team shall discuss and document the program components of a placement that will support the IEP developed at this meeting. If the placement is known, a representative of the placement shall be involved in this meeting. If a representative cannot attend the meeting, the IEP Team shall attempt to use other methods, such as individual or conference telephone calls, to ensure participation by the receiving placement. If the placement is not known, another IEP Team Meeting shall be held to discuss the child's program at the new placement, including the representative of the private school or facility. If the representative cannot attend, the SAU must use other methods to ensure participation by the private school or facility, including individual or conference calls pursuant to 34 CFR 300.325(a)(2). The SAU will locate a facility and finalize the child's placement. Any appropriate out-of-unit placements shall be as close to the child's home as possible. The IEP Team will reconvene 30 days subsequent to placement to review the IEP and make any revisions required. In the interim, the IEP that has been developed for a child's current setting shall be utilized while the proposed placement is located and finalized.

Understanding that the Foster Parents have included several allegations of procedural violations regarding the IEP Team meeting on February 14, 2020, each allegation will be discussed separately.

Did the District fail to have a person knowledgeable about the placement options at the IEP Team meeting held on February 14, 2020?

It is apparent from MUSER IX.3.H that an IEP Team must create an IEP detailing the types of instruction and related services before an out-of-district placement is actually agreed upon. That is what the IEP Team did in this matter. The Written Notice outlined what a program in a special purpose private school would look like. It stated:



- 1) District proposed placement in private special purpose behavior program to include:
  - At least weekly BCBA involvement to review data and adjust behavior plan
  - Data gathering in all areas of need;
  - Low student teacher ratio;
  - Staff well trained in behavior intervention skills, preferably BHP level of training as well as special education teacher;
  - Social skills training throughout the day, as well as structured training 2-3 times a week;
  - Social work services at least weekly, plus access to a social worker for debriefing after crises;
  - Team meetings among providers to coordinate delivery, at least weekly;
  - Sufficient staff backup by trained personnel to assist with crises;
  - In house support for staff to address emotional impact for staff from behavior crises;
- 2) District proposed interim alternative educational setting to cover any delay in placement as a result of due process: 6 hours of tutoring a day in central office, and 1 hour of social work service and one hour of occupational therapy a week, in each case to address social and emotional needs.  
(S-329).

I find that the IEP Team was not at the appropriate phase of the decision-making process to discuss the out-of-district options. The District was not required to have persons knowledgeable about a particular placement option at the IEP Team meeting because it was premature. Once the IEP Team put together the program, then it could discuss viable options for out-of-district placements at a later meeting. The Written Notice indicated only that Spurwink Chelsea should be visited but the staff did not think it was appropriate. No actual placement being offered. Therefore, I find that the allegation lacks merit.

Did the District fail to make a clear and specific offer of placement?

I find no violation regarding this issue. As stated above, in the meeting held on February 14, 2020, the IEP Team was designing the IEP program and was not ready to offer a specific placement. I find that the allegation lacks merit.

Did the District fail to consider all the factors required by the IDEA when making a placement decision?

The Foster Parents did not contest any of the factors making up the IEP's programming. Therefore, I find that the District considered all factors required by the IDEA by offering programming in IEP, to be provided at an out-of-district placement to be decided by the IEP at a different IEP Team meeting.

Did the District make a placement offer without knowledge of whether the placement was actually available?

As stated about, while the District did make an offer to provide the Student's programming at an out-of-district setting, it was not required to offer a specific placement at that time. MUSER IX.3.H.

Did the District predetermine the outcome prior to the meeting?

Predetermining the outcome of an IEP Team meeting occurs when school district members of the IEP team unilaterally decide a student's placement in advance of an IEP Team meeting. For example, in *Deal v. Hamilton County Board of Education*, 42 IDELR 109 (6th Cir. 2004), *cert. denied*, 110 LRP 46999, 546 U.S. 936 (U.S. 2005), when parents requested that the district fund an applied behavior analysis program, the IEP team refused and indicated that its policy prevented it from considering a program other than the one in which it had invested. During IEP Team meetings, the district allowed the parents to voice their opinion and present evidence regarding an appropriate program for their son, but it already had decided on placement and educational methodology.

The difference between "preparation" and predetermination is illustrated by the district's willingness to listen to the parents' concerns at the IEP Team meeting. In *P.F. and S.F. v. Board of Educ. of the Bedford Cent. Sch. Dist.*, 67 IDELR 148 (S.D.N.Y. 2016), the IEP team's failure to modify the IEP, despite the parents' evidence that the program was far too advanced for the New York student, convinced the District Court that the district did not take the parents' concerns into account.

Team members must enter the IEP team meeting with an open mind and must meaningfully consider the parents' input. *See, e.g., R.L. and S.L. v. Miami-Dade County Sch. Bd.*, 63 IDELR 182 (11th Cir. 2014); and *H.B. v. Las Virgenes Unified Sch. Dist.*, 52 IDELR 163 (C.D. Cal. 2008), *aff'd*, 54 IDELR 73 (9th Cir. 2010, *unpublished*) (holding that the superintendent's announcement at the start of an IEP Team meeting, that the team would discuss the student's transition to public school, showed that the district predetermined the student's placement). To “avoid a finding of predetermination, there must be evidence the IEP team member have an open mind and might possibly be swayed by the parents opinions and support for the IEP provisions they believe are necessary for their child ... a state can make this showing by, for example, evidence that it ‘was receptive and responsive at all stages’ to the parents’ position, even if it was ultimately rejected. But those responses should be meaningful responses that make it clear that the state had an open mind about and actually considered the parents’ points.” *59 M.C. v. Antelope Valley Union High Sch. Dist.*, 858 F.3d 1189, 1199 (9th Cir.2017).

I do not find that the outcome of the IEP Team meeting on February 14, 2020, was predetermined by District staff, despite the rejection of the Foster Parents’ request to have the Student returned to the SMES behavior program. The placement decision was still being considered regarding an out-of-district option. Also, the status of a due process hearing request was still pending and therefore the IAES was still in a stay-put status. However, it is apparent from the Written Notice that the Student’s IEP was amended to include very important related services over and above what had been in IEP. While these were to be provided in an out-of-district placement, to be determined, they were over and above the services that had been in prior IEP. This included at least weekly BCBA involvement; data gathering in all areas of need; staff well trained in behavior intervention skills, preferably BHP level of training; social skills training throughout the day, as well as structured training 2-3 times a week; social work services at least weekly, plus access to a social worker for debriefing after crises; and team meetings among providers, at least weekly, to coordinate delivery. The level of services was significantly increased from the prior IEP, and new ones were added.

The Foster Parents did not object to any of the programming that was offered. While the Foster Parents raised the issue of the specific setting in which the Student could be placed, the District

was prepared to offer viable options at which the program could be implemented. It was not required to do so under MSUER IX.3.H, as stated above.

Therefore, I find that that the District did not predetermine the outcome of the meeting.

**ISSUE 7:** Whether the District denied the Student a free and appropriate public education and access to the least restrictive environment, if the above allegations are found to be substantiated

I find that the District denied the Student a FAPE, failing to provide related services should have been receiving while in the IAES. As determined above, the Student did not receive social work services, S/L therapy, OT, and BCBA consultation services at various times during the 2019-2020 school-year, up until March 15, 2020.<sup>15</sup> I find that the Student missed the delivery of services as follows:

- 9 total hours of speech therapy
- 9 total hours of social work
- 6.5 total hours of OT
- 9 total hours of BCBA consultation services

I find that these were material omissions from the Student's programming and resulted in the denial of a FAPE.

#### **ANCILLARY ISSUE:** Hearing Officer Jurisdiction

The District and the Foster Parents understand that the Hearing Officer does not have jurisdiction to determine matters that are not within the confines of the IDEA.<sup>16</sup> Therefore, this

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<sup>15</sup> The day the District closed because of COVID-19.

<sup>16</sup> B. Authority of Hearing Officer

(1) A hearing officer under §300.511 hears, and makes a determination regarding an appeal under paragraph (A) of this section.

(2) In making the determination under Paragraph (B)(1) of this section, the hearing

decision does not address issues that may have been raised concerning violations of the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, the Maine Human Rights Act, and Maine and U.S. Constitution.

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officer may-

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

## VII. ORDER

1. The District shall provide compensatory education, on an hour-for-hour basis, the before the end of the 2020-2021 school-year:
  - a. Speech and language therapy – 9 hours
  - b. Social Work Services – 9 hours
  - c. Occupational Therapy – 6.5 hours
  - d. BCBA consultation services – 9 hours
2. The District shall provide staff training on the rules and regulations regarding discipline as it relates to manifestation determinations and IAES options, as well as the extent of the provision of a FAPE required while in an IAES. This training must occur within 60 days from the date of this decision and order.

It is so ORDERED.

A handwritten signature in cursive script, reading "Sheila Mayberry", is written over a horizontal line. A vertical line is drawn to the right of the signature, extending from the top of the horizontal line to the bottom of the signature.

Sheila Mayberry, Hearing Officer  
November 8, 2020