`STATE OF MAINE
SPECIAL EDUCATION DUE PROCESS HEARING

Hearing #17.050H

Parent	)	
	)	
v.	)	**ORDER**
	)	
MSAD #1	)	
	)	
	)	

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. A due process hearing was held at the Maine District Court, 144 Sweden Street, Caribou Maine on May 15, 16 and 17, 2017 and at the Pine Tree Legal office at 39 Green St., Augusta on May 30, 2017. Present and participating throughout the hearing were: Hearing Officer David Webb, Esq; Elizabeth Boardman, Esq. and Courtney Beers, Esq., counsel to the Parent ("Parent"); [redacted] [redacted] Parent (present for hearing in Caribou only); Eric Herlan, Esq., counsel to MSAD #1 ("School"); and Denise Bosse, Director of Student Services, MSAD #1.

Witnesses:

Dr. Paul Johnson, Jr., Psychologist, BCBA

Wes Lavigne, school social worker for [redacted] School;

Denise Bosse, Director of Special Education, M.S.A.D. No. 1;

Megan Stanley, Director of Special Education, M.S.A.D. No. 45;

William O'Connell, Psychological Examiner;

Timothy McCue, M.S.A.D. No. 1 School Safety Officer;

Aaron Buzza, Driver Education Teacher, [redacted] School;

All witness testimony was taken under oath.

I. PROCEDURAL BACKGROUND

On March 1, 2017 the Parent filed a due process hearing request on behalf of her son, ("Student"). On May 2, 2017, a telephonic prehearing conference was held. Documents and witness lists were exchanged in a timely manner. A Prehearing Report and Order was issued by the Hearing Officer on May 2, 2017. On May 8, 2017 the Prehearing Report and Order was amended by agreement of the parties with regard to the admission of the Student's counseling records.

The Parent distributed 257 pages of documents (herein referenced as P-#) and the School distributed 776 pages of documents (herein referenced as S-#) at the prehearing conference and at the hearing, with the agreement of the parties. On May 24, 2017 an interim procedural order was issued to address issues relating to testimony received by the School's psychologist relating to the inadequacy of the placement options proposed by both the School and the Parent. Additional testimony and documentary evidence was received on May 30, 2017.

Following the hearing, both parties requested to keep the hearing record open until June 20, 2017 to allow the parties to prepare and submit closing arguments. Pursuant to an amended post hearing order issued on June 13, 2017, the closing arguments were limited to a maximum of 35 pages and reply briefs to a maximum of 10 pages, double spaced.

The School submitted a 35-page final argument memorandum and the Parent submitted a 35-page final argument memorandum. The record closed upon receipt of the

reply briefs on June 20, 2017. The parties further agreed that the hearing officer's decision would be due on July 6, 2017, which was extended by the Hearing Officer to July 10, 2017 due to the closure of Maine State Government between July 1, 2017 and July 4, 2017.

Stipulations:

Ms. Boardman has provided the following stipulated responses from the Parent to the written questions posed Mr. Herlan:

1. Counseling with Elizabeth Allen ended in the middle of April 2017. New counseling with Paul Johnson, Sr. started around May 10, 2017. Expected frequency is once a week for an hour.
2. The Student has not met the probation requirement for 20 hours of community service.
3. The Student has a referral appointment with his primary care physician on May 30th or June 7th to look into medication as recommended by Dr. Paul Johnson Jr.
4. The Student punched a door at home one time but not in response to a disagreement with his mother or brother.

The parties further stipulated that the Student's counseling records admitted in this hearing shall not become part of the Student's educational records.

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

1. Did the School fail to timely refer the Student for a special education evaluation during the time period of February 24, 2015 to the present?
2. If the answer to the preceding issue is in the affirmative, what is the appropriate remedy?

3. Did the School fail to develop an IEP prior to making a placement determination for the Student?

4. If the answer to the preceding issue is in the affirmative, what is the appropriate remedy?

5. Is the IEP and placement proposed by the School reasonably calculated to provide the Student with a FAPE in the least restrictive environment in which he can be appropriately served?

6. If the Student's IEP and placement were not reasonably calculated to provide a FAPE, what is the appropriate remedy under the IDEA?

III. FINDINGS OF FACT

1. The Student is [redacted] years old (d.o.b. [redacted]) and resides with his [redacted] (Parent) in [redacted], Maine. [Complaint].

2. The Student has been diagnosed with Persistent Depressive Disorder (Dysthymia), Insomnia, and Conduct Disorder. [P-34; Johnson testimony]. On January 26, 2017, he was determined eligible for special education and related services, under the category of Emotional Disturbance. [S-l89]

3. During the 2015-2016 School year, the Student attended [redacted] School as an [redacted]-grader. [S-9]. On May 4, 2016, the Student was involved in a serious physical altercation with another Student at a playground not located on school grounds. [S-189-192, S-27-28; Buzza Testimony]. The assault was observed by Aaron Buzza, a driver's education instructor who was driving with a student when he witnessed the assault. Mr. Buzza observed the Student to be repeatedly striking the other student who was face down in a fetal position. [Buzza testimony]. The Student ceased further physical contact when

Mr. Buzza intervened. [Buzza testimony]. The other student involved in the altercation required eye surgery as a result of his injuries. [S-15, 17].

4. As a result of this incident, the Student pled guilty to a charge of Class B Aggravated Assault and was placed on probation until age 18. [S-H 18].

5. Following this incident, school officials suspended the Student for 10 school days and referred the Student for a risk assessment. [S-7, 34].

6. The School offered the Student two hours a day of tutoring pending the completion of the risk assessment by William O'Connell, a school psychologist on contract with the School. [S-A-4-36]. As a result of the risk assessment, Mr. Connell recommended that the forensic evaluation be performed by Dr. Bruce Saunders. [S-31, O'Connell testimony]. Dr. Saunders was not available to conduct the assessment until September of the following school year. [S. Ex. 37.]

7. The School determined that the Student was not allowed to attend [redacted] School until Dr. Saunders' forensic psychological evaluation was completed. [Bosse testimony]. The Parent consented to the forensic evaluation on September 12, 2016. [S-42]. The School continued to offer two hours per day of tutoring to the Student pending the completion of the forensic evaluation. [Bosse testimony. [S-38-41].

8. Dr. Saunders conducted his forensic risk assessment on September 17, 2017 and wrote his report on September 19, 2016. [S-69 to 76]. The School received it on or about September 29, 2017. [Bosse testimony, S-F-53].

9. The School completed the Student's initial referral to special education on November 2, 2016 and held an IEP team referral meeting on November 7, 2016. [S-80-81; S-84 – 86].

10. At the November 7, 2016 meeting, the IEP team determined that the Student would receive special education evaluations and concluded that the Student should remain in the tutorial program during the evaluation process. [S-85]. The team also agreed to add social work to the programming being made available for the Student. [S-84 - 86]. The Parent signed consent for the evaluations at that meeting. [S-87, 88]. The School rejected the Parent's request that the tutoring be offered at [redacted] School, instead of at the [redacted] public library. [S-87, 88]. Lawyers for both the Parent and the School were present at this meeting. [S-87, 88].

11. The additional evaluations were completed by Mr. O'Connell on January 6, 2017, and his report was issued on January 13, 2017. [S- 97.]. The Student's initial IEP team meeting was held on Jan. 26, 2017. [S-119]. Megan Stanley, Administrator for the [redacted] Day Treatment program ("[redacted] program"), was in attendance at this meeting. [S-119-120].

12. At the January 26, 2017 IEP team meeting, the team agreed that the Student qualified for special education under the category of an Emotional Disturbance based on depression and/or anxiety, which had adversely affected his educational performance. [S-122 to 125] The team deferred a decision on whether the Student had a specific learning disability until the Student had more

regular school attendance to see if his academic weaknesses were due to a processing disorder or gaps in learning. [S-122].

13. The Written Notice from the January 26, 2017 IEP team meeting also noted that the IEP Team proposed the following program options for team members to consider:

> Continued tutoring for two hours a day for five days a week at the [redacted] Public Library with continued weekly contact with one of the [redacted] School ("[redacted]") social workers, in conjunction with tutoring; Day Treatment in the [redacted] School System in the afternoon for five days a week; and two hours of tutoring at the [redacted] Public Library followed by Day Treatment in the [redacted] School System in the afternoon for five days a week with tapering down of tutoring as day treatment time increases.

14. The Written Notice from the January 26, 2017 IEP team meeting also noted

- "A new IEP will be drafted to reflect programming decisions. Goals will focus on executive functioning, math, emotions and attendance;
- that "the Team (excluding the mother and [the Student]) were in agreement that the severity of [the Student's] behavioral issues prevents him from being educated in the public school system at the current time." S-122;
- The Team agreed to "reconvene shortly to further discuss the proposed placements."

15. Diane Bosse testified that the Student's programming and support needs were discussed at the January 26, 2017 meeting and the subsequent meeting on February 10, 2017, including matters relating to the Student's academics,

behavior, functional goals, coping skills, attendance issues, and daily supports. [Bosse testimony]

16. At the end of this meeting, the Student became very upset, threw a water bottle, and abruptly left the meeting. [Bosse and O'Connell Testimony].

17. The IEP team reconvened on February 10, 2017 to continue discussion of the Student's placement, without agreement. [S-140]. At this meeting, the Parent affirmed her support for placement at [redacted], and stated that the Student has not had any problems in school since Pre-K. [S-141]. The written notice from this meeting states: "Mrs. Bosse and Mrs. Stanley will work cooperatively to develop an IEP to reflect academic and functional programming goals and considerations. Goals will focus on executive functioning, math, emotions, and attendance for the Day Treatment Program in [the] [redacted] School System." [S-140]. The team determined at the February 10, 2017 IEP team meeting that the Student would be placed at the [redacted] program. [Bosse testimony]. A copy of the completed IEP was provided to the Parent on April 25, 2017. [Bosse testimony].

18. The supplementary aids and services in the Student's IEP are: specially designed instruction, educational technician/BHP support (for 3 hours a day); contact with a school social worker (1 hour per day); and specialized transportation. [S-159;S-161].

19. The [redacted] program is located at [redacted] [redacted] School, a school of approximately 100 students in [redacted] Maine. [Stanley testimony]. [redacted] [redacted] School is a 15 minute drive from [redacted]. [Stanley

testimony]. The program serves [redacted] school (and other grade) students in three special education classrooms consisting of one resource room and two day treatment rooms. [Stanley testimony]. At the [redacted] program, there is one special education teacher who serves as the case manager and four educational technicians providing direct instruction and day treatment. [Stanley testimony]. All of the educational technicians are Behavior Health Professional ("BHP") trained, and all are level 2 or 3 educational technicians. [Stanley testimony]. Megan Stanley testified that she and her staff have weekly supervision with a licensed clinical social worker (LCSW), which includes data gathering and positive behavior support plans. [Stanley testimony]. In addition, there is a board certified behavior analyst (BCBA) under contract with the [redacted] program to provide behavior analysis as required. [Stanley testimony].

20. Barbara Bartlett, the Assistant Principal of [redacted] School, testified that the Parent communicated well with the School with regard to the Student's absences. [Bartlett testimony]. Ms. Bartlett noted that the reasons for the Student's absences in the [redacted] grade were explained as being related to the Student suffering from headaches and the flu, and "staying up too late." She testified that the Student told her that he would "rather play video games" than go to school. [Bartlett testimony].

21. In an IEP team meeting held on January 26, 2017, Ms. Bosse stated: "If you look at [the Student's] discipline report from the [redacted] school, basically what is there, and there isn't a huge amount of information there…but whatever incidents are there seem to be the normal [redacted] school kid thing…I don't feel

like doing a particular activity that day so I give a sassy response or I use a colorful word…there wasn't a lot of unusual discipline issues at the [redacted] school."

22. According to the June 8, 2016 Risk Assessment prepared by Mr. O'Connell, the Student had a two day suspension on October, 2012 due to fighting on the playground, swearing and pushing students in the classroom, and running from the classroom and slamming the door. While in [redacted] school, The Student had "nine written referrals in addition to the present referral with concerns including: violation of the hands-off policy, pretending to fight with another student in the hallway, refusing to comply; not giving his cell phone up to staff, swearing, unexcused absences, rudeness and disrespect to staff." [S-141].

23. Ms. Bartlett testified that no one raised depression issues with the Student until after the May, 2016 assault.

24. After the May, 2016 assault, the school also became aware that the Student was depressed and undertook a risk assessment with Bill O'Connell. [S-27]. On June 17, 2016, a meeting was held with School administrators and the Parent to discuss the findings of Mr. O'Connell's risk assessment. [S-B-2; Bosse testimony]. The group also considered Mr. O'Connell's recommendation for a forensic evaluation with Dr. Bruce Saunders to address homicidal risk and recidivism. [O'Connell testimony, S-31]. Dr. Saunders' evaluation was delayed to September, 2016 due to knee surgery, however the School did not attempt to contact another evaluator believing that Dr. Saunders was the most

qualified and also that he was willing to drive to [redacted]. [Bosse testimony].

25. Diane Bosse testified that in order to provide appropriate programming for the Student, the School would have to hire and train staff. Ms. Bosse also testified that currently [redacted] doesn't have an empty room where services could be provided to the Student, and that there are no funds available for additional services as the school budget has already been approved and validated. [Bosse testimony].

26. Paul Johnson, Psy. D., was hired by the Parent in April, 2017 to perform a psychological evaluation report, to make treatment recommendations and to determine conditions that the Student is likely to become aggressive. [P-23]. As a result of his evaluation, Dr. Johnson offered the following diagnosis for the Student: Persistent Depressive Disorder (Dysthymia); Insomnia and Conduct Disorder (Mild, due to truancy and rule breaking). [P-34]. Dr. Johnson noted in his report that he believed that the truancy was caused by depression and insomnia and that rule breaking is due in large part to situational circumstances. [P-34].

27. Dr. Johnson testified that the Student told him that the victim involved in the May 4, 2016 physical assault had provoked him by using racial slurs and had also hurt a smaller friend. [Johnson testimony]. Dr. Johnson didn't speak to others to confirm the Student's provocation reports. [Johnson testimony].

28. Dr. Johnson testified that based upon his evaluation, including the Student's results from the Millon Adolescent Clinical Inventory ("MACI"), there is

nothing to indicate that the Student wants to hurt people. [Johnson testimony]. Dr. Johnson testified that in addition to the Student's depression, he has poor sleep habits and becomes tired, has limited optimism and no energy which adds to his depression. Dr. Johnson does not believe that the Student is willfully defiant; rather that he "doesn't feel well" and is part of a subculture where aggressive behavior is the norm. [Johnson testimony].

29. Dr. Johnson is familiar with [redacted] program at [redacted] school taught by Lindy Bionske which he believes would be effective for the Student. [Johnson testimony]. Dr. Johnson described the students in the program as a "mixed group" but that they "remind him" of the Student. He testified that Ms. Bionske "knows when to intervene" and that she uses a behavior management/reward system that he believes would be effective for the Student. [Johnson testimony].

30. Dr. Johnson testified that the Student's record does not reflect that he has been involved in a lot of fights. In addition, the Student has demonstrated that he can remain stable and non-aggressive during assessments and during tutoring. [Johnson testimony].[1] Dr. Johnson therefore believes that the probability of the Student becoming severely dysregulated is low. [Johnson testimony, S-125].

31. Dr. Johnson testified that he believes that the Student's May, 2016 assault was a self-defensive/reputation defending situation and unless there are direct antecedents, he believes that the Student is unlikely to engage in similar behaviors. [Johnson testimony]. Dr. Johnson testified that he believes that the

[1] Allen Guerrette, the Student's tutor, reported in the January 26, 2017 IEP team meeting that although the Student only attended three out of 40 tutoring sessions, he was focused and worked the entire two hour period for the sessions he did attend. [S-125].

risk of violent or inappropriate behavior is greater for the Student outside of school, as a result of interactions with his peer group. [Johnson testimony].

32. Dr. Johnson testified that staff working with the Student should be trained in appropriate methods to address the Student in the event he becomes dysregulated. [Johnson testimony]. He believes that Lindy Bionske is well qualified to oversee his behavioral programming and to coordinate the data gathering process for the Student. [Johnson testimony].

33. Dr. Johnson also testified that the [redacted] program would "make school more attractive" to the Student, which could increase positive experiences for the Student outside of his peer group. [Johnson testimony].

34. Dr. Johnson testified that the Student needs medication for his depression and without it, programming for the Student will be more difficult. In addition, the Student should be involved with cognitive and dialectic therapy. [Johnson testimony, S-187]. Dr. Johnson noted that although the Student remains depressed and needs treatment, he has been stable at home for the past year and is not actively engaging in aggressive behavior. [Johnson testimony].

35. Dr. Johnson testified that BHP training involves a 40-50 hour course and that participants only need a high school diploma to qualify for BHP certification.

36. Wes Lavigne, the school social worker for [redacted] has known the Student since the [redacted] or [redacted] grade. [Lavigne testimony]. Mr. Lavigne testified that he saw the Student on an almost daily basis during the Student's [redacted] grade year after the Parent referred the Student to him following the Student's father's deportation. [Lavigne testimony]. Mr. Lavigne testified that although the

Student was "louder and testing limits", he had a good relationship with the Student who "opened up to him." [Lavigne testimony].

37. In November, 2016, Diane Bosse asked Mr. Lavigne to work with the Student by meeting with him during his tutoring time in the library on a weekly basis. [Johnson testimony, P-61]. Mr. Lavigne testified that although "safety crossed his mind" at his initial meeting, things turned out OK and he remains willing to work with the Student. [Lavigne testimony, P-242].

38. Mr. Lavigne testified that he also provides social work services for the [redacted] program. [Lavigne testimony]. Mr. Lavigne testified that in the [redacted] program teachers and educational technicians provide instruction to students with behavioral concerns. [Lavigne testimony]. Mr. Lavigne testified that the [redacted] program is more than a regular resource room, that there is also a "life skills component in addition to providing support in the academic and behavioral realms." [Lavigne testimony]. Mr. Lavigne testified that while there are approximately 30 students who use the space at some point during the day and it can be a heavily used space, not all 30 students use the room for the entire day and there are opportunities for smaller groups.

39. Ms. Bosse testified that the [redacted] program serves both special education and regular education students considered "at-risk" for not being successful. [Bosse testimony]. She testified that the [redacted] program is a "busy place" with a number of students "in and out" during the day. She

testified that the [redacted] program is not geared towards substantial therapeutic interventions. [Bosse testimony].

40. Ms. Bosse testified that the [redacted] program is staffed by Lindy Bionske who is a certified special education teacher in her 3rd year, two educational technician II's and an educational technician III. [Bosse Testimony]. Ms. Bosse testified that the educational technicians within the [redacted] Program provide 1:1 support to other students for the entire day. [Bosse testimony]. All of the [redacted] special education staff are safety-care trained. [Bosse testimony].

41. Ms. Bosse testified that the Wes Lavigne, the social worker for the [redacted] program, is also responsible to provide social work services for the entire student body of approximately 350 students at [redacted] School. [Bosse testimony]. Ms. Bosse also testified that there is not a board certified behavior analyst (BCBA) assigned to the [redacted] program. [Bosse testimony].

42. Barbara Bartlett, the Assistant Principal at [redacted] School testified that the Student's [redacted] grade reports do not indicate significant behavior issues. [Bartlett testimony]. The Student had more frequent absences than other students, which were mostly attributable to headaches, flu, and staying up too late. [Bartlett testimony]. The Student also told Ms. Bartlett that he would rather play video games than attend school. [Bartlett testimony]. The Parent was good about communicating regarding the Student's absences by either e-mail or text. [Bartlett testimony].

43. Ms. Bartlett made recommendations to the Student and Parent to improve the Student's sleep hygiene, e.g. limiting screen time after 9:00 p.m. [Bartlett testimony]. The Parent was open and receptive to her suggestions. [Bartlett testimony]. Neither the Parent or anyone on her team raised depression or other disability issues with regard to the Student or his absences. [Bartlett testimony].

44. Megan Stanley, the Special Education Director for MSAD 45 ([redacted] School) testified that the day treatment program at the school currently has a total of seven children, with one special education teacher and four educational technicians. [Stanley testimony].

45. Megan Stanley testified that her staff has specific training around behavioral health, positive behavior support plans, data collection, and appropriate interactions. [Stanley testimony]. All of the staff are certified BHP's, and all of the educational technicians are at level II or III. [Stanley testimony]. In addition, she and her staff have weekly supervision with a licensed clinical social worker. [Stanley testimony]. Students can work with a BHP trained educational technician in main stream settings. [Stanley testimony]. In addition, regular education teachers are actively involved regarding techniques and approaches that any one staff member may be using with a student so that all are using same language/reinforcement. [Stanley testimony].

46. William O'Connell testified that the Student needs a strong therapeutic component in his programming in order to identify and process feelings before he loses control. [O'Connell testimony]. Mr. O'Connell believes that staff

working with the Student must have strong behavioral training using reinforcement and rewards. [O'Connell testimony].

47. Mr. O'Connell testified that the [redacted] program has a "dysfunctional" aspect due to the fact that some of the students in the program are receiving special education services and others are regular education students. [O'Connell testimony]. Mr. O'Connell testified that the [redacted] program could work for the Student with "lots of intervention" and that he believes that Lindy Bionske has the experience and training to provide effective services for the Student. Mr. O'Connell testified that he is concerned that the other staff within the [redacted] program don't have sufficient training to cope with the Student. [O'Connell testimony].

48. Mr. O'Connell believes that the Student needs to be placed in a residential or group home as the Student doesn't have resources to make decisions and that a greater structure needs to be imposed for the Student. [O'Connell testimony]. Mr. O'Connell did not mention his residential placement recommendation in his January 2017 psychological evaluation of the Student. [S-97]. Mr. O'Connell testified that he did not mention his recommended residential placement for the Student at the January, 2017 IEP team meeting but that when he told Superintendent Brian Carpenter and Denise Bosse that the Student needed a residential placement, Mr. Carpenter said that the School couldn't afford to place the Student in a residential program. [O'Connell testimony]. Mr. O'Connell believes that the Lighthouse program in Mars Hill could be an appropriate placement for the Student. [O'Connell testimony].

49. Mr. O'Connell believes that the [redacted] program is "highly inadequate" for the Student. [O'Connell testimony]. Mr. O'Connell testified that he believes that the physical space at the [redacted] program is inappropriate for the Student and that the dynamics of several of the current students in the program, who were not attending school, would create a difficult situation for the Student. [O'Connell testimony]. Mr. O'Connell also believes that the [redacted] program is inadequate due to the absence of a strong male presence to intervene in the event that the Student becomes dysregulated, based in part on the fact that the Student is [redacted] and weighs approximately [redacted] pounds. [O'Connell testimony].

50. Mr. O'Connell testified that he spoke to victim of the Student's physical assault in May, 2016. [O'Connell testimony]. Mr. O'Connell testified that both the Student and the victim had been insulting to each other and that the victim had used racial epithets against the Student, the Student's brother and father, including: "Mexican broccoli picker", "gay" and "faggot." [O'Connell testimony]. The victim had also threatened the Student with violence. [O'Connell testimony].

51. Mr. O'Connell believes that it is possible to cobble together a program for the Student at the [redacted] program, and such a program would be preferable to placing the Student at the [redacted] program. [O'Connell testimony]. Mr. O'Connell testified that the [redacted] program will likely need additional educational technicians. [O'Connell testimony]. Mr. O'Connell testified that additional advantages to the [redacted] program

include the fact that teachers are carefully selected and there is a social worker and a drug and alcohol counselor working at the school. [O'Connell testimony]. Mr. O'Connell also testified that [redacted] School is preferable to the [redacted] program insofar as it has a full time safety officer and a "large" assistant principal who would be available to intervene in the event the Student has a significant behavior incident. [O'Connell testimony].

52. Mr. O'Connell testified that the Principal at [redacted] would be less able to intervene as he recently suffered a heart attack. [O'Connell testimony].

IV. SUMMARY OF THE PARTIES' ARGUMENTS

Brief summary of the position of the Parent:

The School committed a procedural violation when it failed to refer the Student for a special education evaluation despite having sufficient knowledge to suspect that he may qualify for special education services. The Student's educational experience from the [redacted] grade to present constitutes sufficient knowledge for the School to have made a special education referral. These include: low and failing grades, an extremely high number of absences for multiple years in a row, failure to meet grade level proficiency standards, and an outward appearance of depression. Any of these items alone should trigger a School employee to make a special education referral. The School's child-find obligations are specifically triggered for "...children who have the equivalent of 10 full days of unexcused absences or 7 consecutive school days of unexcused absences during the school year..." MUSER, IV(2)(A).

Additionally, the School committed a major procedural violation by failing to have

a developed IEP prior to determining that the Student required an out-of-unit placement. Though the School discussed possible goal categories prior to the placement determination, an IEP requires a written document. This violation stripped the Parent of her right to meaningfully participate in the development of the Student's IEP and the placement decision. Without an IEP, the Parent was unable to assess the Student's goals and required services in relation to potential placements. Had the placement determination been made based on the IEP that was provided on April 25, 2017, an out-of-unit placement would not have been justified. These includes: specially designed instruction, educational technician/BHP support, contact with a school social worker, and specialized transportation. None of these features are unique to the [redacted] program and are already available within the [redacted] program. There is no indication that a "therapeutic" environment is necessary in order for the Student to access his education nor is there indication that his behavioral needs are so strong that related goals cannot be worked on within his home district setting

A major consideration for the Team is providing an education "as close as possible to the child's home" and that "the child is educated in the school that he or she would attend if non-disabled." MUSER, X(2)(B). All of the Student's goals and required supplementary aids and services are able to be provided within the [redacted] School's [redacted] Program. Supplementary aids and services must be provided within each level of the continuum and placement in a more restrictive setting should only be considered when those services fail to provide necessary support. There is a legal obligation to exhaust the continuum, beginning at the least restrictive end, before a more restrictive placement is determined.

Brief summary of the position of the School:

The School argues that it did not violate the child find standard. The Parent must prove that school officials "overlooked clear signs of disability," be "negligent in failing to order testing," or have "no rational justification for not deciding to evaluate." *Bd. of Educ. of Fayette County v. L.M.,* 478 F.3d 307, 313 (6th Cir. 2007). The Parent excused most of the Student's numerous absences, often explaining them as stomach aches or headaches, and expressing how difficult it was to get the Student up in the morning to go to school. No one reported to school officials that the Student seemed depressed until the group meeting on June 17, 2016, after the first risk assessment. At this point, the school acted quickly to address the possibility of a disability.

Maine's rules do not require immediate referral upon suspicion of a disability in the case of referral by school officials. Instead, schools are permitted first to undertake general education interventions. MUSER IV.2(E)(2). In the present case, the School did not expel the Student after his violent attack on another student. Instead, the School arranged tutoring, and after reviewing the O'Connell risk assessment, arranged a more in-depth assessment of the Student's circumstances.

Additionally, the IEP document need not be prepared and agreed upon before the placement is discussed or decided. Maine rules state that the IEP document itself need not be provided to the parents until 21 school days after the meeting where its terms are broadly discussed. MUSER IX.3(G). No decision was made on placement at the first meeting, and it does not appear that anyone is asserting the contrary.

Maine rules call for the student to have a written IEP within 30 days of being

found eligible for special education. MUSER IX.3(B)(3). Yet the parent in this case did not provide consent for the Student's eligibility and entry into special education until March 27, 2017. Under state and federal rules, a child is not in special education until such consent is provided; nor can a school in any way address a failure to provide this initial consent. *See* MUSER V.1(A)(4)(b)(ii); 34 C.F.R. § 300.300(b)(3). As a result, the School did not provide the parent with a written IEP until April 25, 2017.

The Parent waived any "predetermination" claim by not raising it as an issue in this case. Even if the Parent didn't waive her predetermination claim, there is no basis for such a finding in the instant case. While Federal law prohibits a completed IEP from being presented at the IEP Team meeting or being otherwise forced on the parents, school evaluators may prepare reports and come with pre-formed opinions regarding the best course of action for the child as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions. *Regional School Unit No. 21*, 111 LRP 8384 (SEA Me. Nov. 17, 2010).

At both of the IEP team meetings in which placement was discussed, the Parent was represented by counsel who was well involved in the placement discussions and made no objection to the process being followed in the team discussions. Both the Parent and the School had strongly held opinions about the Student's level of need. The Parent strongly wanted him back at [redacted] School. The school participants seemed generally to believe that the Student was too dangerous to be in [redacted] School, as supported by the evaluations received by the School.

As a result of the Student's complex needs, demonstrated in part by his violent attack on another student last year, the IEP team made the correct decision to place the

student in the much more structured, therapeutic placement found in M.S.A.D. No. 45 at [redacted] School, rather than in any of the placements that exist at [redacted]. The [redacted] program has well trained and experienced personnel, low student teacher ratios, heavy coordination among providers, and easy availability of experienced social worker services as part of the team. The [redacted] program is not structured to implement the Student's goals or to offer the level of teaming needed to provide structured behavioral interventions and instruction in the remediation of behavioral skills to improve the Student's behaviors. Schools need not duplicate or "cobble together" highly specialized and expensive programs in each school building that can be more efficiently delivered in a centralized location elsewhere.

V. LEGAL STANDARD AND ANALYSIS

A. Burden of Proof

Although the IDEA is silent on the allocation of the burden of proof, the Supreme Court has held that in an administrative hearing challenging an IEP, the burden of persuasion, determining which party loses "if the evidence is closely balanced," lies with the party seeking relief. *Schaffer v. Weast,* 126 S.Ct. 528, 537 (2005). As the Parent is challenging the IEP, she bears the burden of persuasion in this matter.

B. The School did not violate its child find obligations under the IDEA.

Maine's child find obligation is set forth in MUSER IV.2, which requires schools to maintain and implement policies to ensure that children who are in need of special education and related services are identified, located, and evaluated at public expense.

MUSER IV.2(A) (2015); *see also* 34 C.F.R. § 300.111(a). The federal rules note, that child find also must include children who are suspected of being a child with a disability under § 300.8 and in need of special education, even though they are advancing from grade to grade. 34 C.F.R. § 300.111(c).

The Sixth Circuit Court of Appeals required a showing that school officials must have "overlooked clear signs of disability," be "negligent in failing to order testing," or have "no rational justification for not deciding to evaluate." *Bd. of Educ. of Fayette County v. L.M.*, 478 F.3d 307, 313 (6th Cir. 2007); *see also Regional Sch. Dist. No. 9 Board of Educ. v. Mr. and Mrs. M.*, 53 IDELR 8 (D. Conn. 2009); *A.P. v. Woodstock Bd. of Educ.*, 572 F. Supp. 2d 221, 225 (D. Conn. 2008).

In *J.S. and A.G. v. Scarsdale Union Free School District*, the District Court for the Southern District of New York noted as follows with regard to a school's child-find obligations:

> Because the Parents are faulting the District for not evaluating J.G. in a timely manner, the Court must focus on what the District knew and when. … The evidence does not suggest that J.G.'s decline in November and December 2007 was so different from what had happened the previous year that the District should have known that the Parents' interventions would not have worked, or should have known that J.G. needed services to recover.

J.S. and A.G. v. Scarsdale Union Free School District 826 F. Supp. 2d 635, 58 IDELR 16, District Court, Southern District of New York (2011)

As the Third Circuit court of appeals noted in *D.K.; v. Abington School District:*

> Child Find does not demand that schools conduct a formal evaluation of every struggling student... A school's failure to diagnose a disability at the earliest possible moment is not per se actionable, in part because some disabilities "are notoriously difficult to diagnose and even experts disagree about whether [some] should be considered a disability at all."

D.K.; v. Abington School District 696 F.3d 233, 59 IDELR 271, U.S. Court of Appeals, Third Circuit (2012), citing *A.P. ex rel. Powers v. Woodstock Bd. of Educ.,* 572 F. Supp. 2d 221, 226 (D. Conn. 2008).

In the present matter, the referral record from November 2, 2016, indicates that the Student missed 89 days of school during the 2015-2016 school year. [S-35; S-80-81]. In addition, he missed most of the tutoring that was offered to him after his suspension in May, 2016 [S-80].

While the Student's absenteeism is significant, the evidence in the record is not compelling to suggest that the School should have known that the Student was potentially disabled. Barbara Bartlett, the Assistant Principal of [redacted] School testified that the Parent communicated well with the School with regard to the Student's absences. [Bartlett testimony]. Ms. Bartlett noted that the reasons for the Student's absences in the [redacted] grade started with headaches and the flu, and "staying up too late." She testified that the Student told her that he would "rather play video games" than go to school. Ms. Bartlett testified that no one raised depression issues with the Student until after the May, 2016 assault. The record reflects a series of e-mail correspondence between the parent and school documenting similar excuses for the Student's absences that relate to factors other than a disability.[2]

The Parent also argues that the Student's low grades and "outward appearance" of depression should have triggered a special education referral. First, the Student's absenteeism undoubtedly had a negative impact on his grades. [S-33]. Accordingly, the Parent's argument that the School should have attributed his low grades to a disability is

[2] S-I-73. he was "having more fun out of school than in school." S-I-115. he "sleeps well when I want and I eat when I feel like it." S-102. He stays up all night long "engaging in video games and watching YouTube videos." S-101, 102.

not convincing. While it is certainly likely that the Student has been depressed for some time, the evidence does not support a finding that there were obvious signs prior to the group meeting on June 17, 2016, after the first risk assessment. [S-B-3; Bartlett testimony]. Even the Parent, who regularly communicated with the School about the Student's non-attendance, identified reasons such as the Student "not feeling well", or having a "bump on his head after showing off to a friend". [S-F1,3,5,6,8-12; Bartlett testimony].

As the School points out, Maine's rules do not require immediate referral upon suspicion of a disability in the case of referral by school officials. Instead, schools are permitted first to undertake general education interventions. MUSER IV.2(E)(2).

In the present case, the record supports a finding that the School undertook reasonable interventions to address the Student's disability. At the June 17, 2016 meeting the group reviewed the results of Mr. O'Connell's assessment and reviewed services and supports available to the Student. [S-B-2; Bosse testimony]. The group also considered Mr. O'Connell's recommendation for a forensic evaluation to address homicidal risk and recidivism. [O'Connell testimony, S-31]. The group then ordered Dr. Saunders' evaluation, which was delayed to September, 2016 due to knee surgery.[3]

In sum, the Parent has not met her burden to prove that the School overlooked a clear sign that the Student was depressed or that his absences were caused by a disability. While there was some delay with the assessment process and the ultimate referral to special education didn't occur until November 2, 2016, the record supports a finding that

[3] The School did not attempt to contact another evaluator believing that Dr. Saunders was the most qualified and also that he was willing to drive to [redacted]. [Bosse testimony].

the School made reasonable interventions to evaluate the Student with regard to the areas identified.[4]

C. The School did not make a placement determination prior to developing the Student's IEP.

The Maine Unified Special Education Regulations specifically provide that an IEP Team "must initiate and convene an IEP meeting to develop an Individualized Education Program for the child before deciding to place a child with a disability in an out-of-unit placement." MUSER IX.3(H). This section further provides:

> 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. MUSER IX.3(H)

In the present case, the evidence supports a finding that the IEP team appropriately *initiated and convened* an IEP meeting to develop an Individualized Education Program for the Student on January 26, 2017. [S-122]. The Student, the Parent and the Parent's attorney attended this meeting. [S-126-127]. At this meeting, the issue of the Student's placement was discussed, in addition to his evaluation results and other programming needs including academics, behavior, functional goals, and daily supports. [S-122-127; Bosse testimony]. The notes from this meeting state that "the Team (excluding the mother and [the Student]) were in agreement that the severity of [the Student's] behavioral issues prevents him from being educated in the public school system at the current time." [S-122]. The Written Notice from this meeting also noted that the IEP

[4] I find that the School's offering of tutorial services to the Student was appropriate pending the evaluation and IEP determination process under the terms of MUSER X.2.A§ 4; *M.S.A.D. No. 37*, 43 IDELR 133 (SEA Me. 2004).

Team proposed the following program options for Team members to consider: Continued tutoring for two hours a day for five days a week at the [redacted] Public Library with continued weekly contact with one of the [redacted] social workers...; Day Treatment in the [redacted] School System in the afternoon for five days a week; and two hours of tutoring at the [redacted] Public Library followed by Day Treatment in the [redacted] School System in the afternoon for five days a week with tapering down of tutoring as day treatment time increases. [S-122].

The Written Notice further noted that the team agreed to "reconvene shortly to further discuss the proposed placements…[and that] a new IEP will be drafted to reflect programming decisions. Goals will focus on executive functioning, math, emotions and attendance." [S-122].

The Parent was also present with counsel at the February 10, 2017 IEP team meeting when the IEP team made a determination to place the Student the at the [redacted] program. [S-142]. The Written Notice from this meeting states that "Mrs. Bosse and Mrs. Stanley will work cooperatively to develop an IEP to reflect academic and functional programming goals and considerations. Goals will focus on executive functioning, math, emotions, and attendance for the Day Treatment Program in [the] [redacted] School System." [S-140].

The School developed a draft IEP following the February 10, 2017 meeting, a copy of which was presented to the Parent on April 25, 2017. [Bosse testimony]. The Parent's disagreement with the School's placement determination was noted in the Written Notice from this meeting [S-140].[5]

[5] Although MUSER does not require that the School provide a written IEP to the parent before it discusses or determines placement, it must send a complete copy of the Individualized Education Program to the

The Parent's argument raises the issue of predetermination, namely that the School predetermined the Student's placement before convening the IEP team meetings.[6]

In *N.L., v. KNOX COUNTY SCHOOLS;* The U.S. Court of Appeals for the Sixth Circuit held as follows with regard to predetermination:

> the regulation prohibits a completed IEP from being presented at the IEP Team meeting or being otherwise forced on the parents, but states that school evaluators may prepare reports and come with pre-formed opinions regarding the best course of action for the child as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions. Accepting the fact that the meetings at issue took place, they do not constitute a substantive harm because the conclusions drawn at the meetings were not a final determination in light of the mother's active participation in the formal IEP Team meeting. While we doubt that the meetings and the assessment report even constitute technical violations of IDEA procedures, we need not determine this issue here as no substantive harm has been shown.

N.L., v. Knox County Schools; 315 F.3d 688, 103 LRP 1697, (U.S. Court of Appeals, Sixth Circuit, January 16, 2003).

In *Cooper v. District of Columbia* the U.S. District Court for the District of Columbia held that a mother's predetermination claim was weakened as a result of

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parent within 21 school days from the IEP Meeting where the IEP was developed. MUSER IX.3(G).[5] The School provided a copy of this IEP to the Parent on April 25, 2017. [Bosse testimony]. The School argues that since the parent did not provide consent for the Student's eligibility and entry into special education under MUSER V.1(A)(4)(b)(ii) until March 27, 2017, it was not required to provide a copy of the IEP within the 21 day period following the IEP team meeting. The Parent, of course, had provided consent for the Student to be evaluated. For purposes of this decision, I need not address whether the notice provisions of MUSER IX.3(G) applies even if Parents haven't signed consent for special education services as any procedural violation is de minimis and did not deprive the Student of a FAPE because it did not preclude the Parent meaningful participation in the development of the Student's IEP. 20 U.S.C. § 1415(f)(3)(E)(2); *Roland M.*, 910 F.2d at 994 (holding that strict scrutiny of procedural integrity of IEPs must be tempered by fairness and practicality).

[6] The School objected to the Parent's "predetermination" argument since it was not specifically raised in the hearing request, it should not now be allowed. MUSER XVI.13(D), cited by the School, precludes the party requesting the due process hearing from raising issues at the hearing that were not raised in the due process *hearing request* filed under Sec. 300.508(b), unless the other party agrees otherwise. The School's argument on this point is overruled as the Parent, although not specifically using the term "predetermination", put the School on notice of this issue insofar as she did identify as an issue: "whether the School failed to develop an IEP prior to making a placement determination for the Student."

evidence that showed she was "actively engaged" in every IEP meeting about her son's IEP. In *Cooper*, the court affirmed the hearing officer's dismissal of the mother's predetermination claim and noted:

> The IDEA guarantees parents of disabled children the opportunity to participate in decisions regarding their child's evaluation and placement...Procedural inadequacies that "seriously infringe upon the parents' opportunity to participate in the IEP formulation process ... clearly result in the denial of a FAPE...The HO correctly determined that [the school] committed a procedural violation when it decided to transfer R.C. to Eastern before finalizing the June 2013 IEP.... This misstep is not, however, fatal because it did not preclude plaintiff's meaningful participation in R.C.'s education. Indeed, plaintiff attended all of the IEP and LRE meetings discussing R.C.'s potential transition... At each meeting, plaintiff had substantial input into the IEP baselines, annual goals, special education and related services requirements that the MDT developed on behalf of R.C...While plaintiff objects to R.C.'s ultimate placement, her disagreement does not constitute exclusion from the decision-making process. To the contrary, the record indicates that plaintiff was actively engaged in each of the MDT meetings precipitating R.C.'s transition…

Cooper v. District of Columbia, 77 F. Supp. 3d, 64 IDELR 271 (U.S. District Court, D.C. 2014)

In the present case, it is evident that the School came to the January and February 2017 IEP team meetings with pre-formed opinions about the best placement for the Student. [S-122, 142; Bosse Testimony]. The Parent, however, was present and had the opportunity to make objections and suggestions with regard to the Student's placement and programming. At each meeting, the Parent had input into the Student's annual goals and related services requirements discussed at the meetings. [S-122, 142]. The record therefore supports a finding that the School appropriately included the Parent in the discussion at the January 26, 2017 IEP team meeting before deciding to place the Student in the [redacted] program at the February 10, 2017 meeting.

D. The placement proposed by the School is not reasonably calculated to provide the Student with a FAPE in the least restrictive environment in which he can be appropriately served.

The disagreement between the Parent and the School centers around the proposed placement in the Student's IEP. There is no substantive disagreement regarding the services or the goals described in the Student's IEP.

There is a two-part standard for determining the appropriateness of an IEP and placement. First, was the IEP developed in accordance with the Act's extensive procedural requirements? Second, was the IEP reasonably calculated to enable the child to receive "educational benefits"? *See Board of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley ("Rowley"),* 458 U.S. 176, 206 (1982); *Lessard v. Wilton-Lyndeborough Coop. Sch. Dist.,* 518 F.3d 18, 27 (1st Cir. 2008). "Adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP." *Rowley*, 458 U.S. at 205.

The Supreme Court recently explained its *Rowley* standard by noting that educational programming must be "appropriately ambitious in light of a student's circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives." *Endrew F. v. Douglas County School District RE-1*, 2017 WL 1066260 (Mar. 22, 2017).

The Least Restrictive Environment (LRE) requirement reflects the IDEA's preference that "[t]o the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled." *See* 20 U.S.C. §1412(a)(5); *A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315, 330 (4th Cir. 2004). MUSER §VI.2.I provides that the School

Administrative Unit has the ultimate responsibility to ensure that a student's placement is in the LRE:

> To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, shall be educated with children who are not disabled, and special classes, separate schooling, or other removal of students with disabilities from the regular educational environment shall occur only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. Each SAU must ensure that a continuum of alternate placements is available to meet the needs of children with disabilities for special education and related services. The continuum required must include the alternative placements in the definition of special education under 34 CFR 300.39 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with the regular class placement. [34 CFR 300.115]
>
> MUSER §X.2.B [20 USC 1412(a)(5) and 34 CFR 300.114]

The First Circuit Court of Appeals has declared that determinations about least restrictive programming are unavoidably part of the determination of an "appropriate" program for a student. See *Lenn v. Portland School Committee,* 998 F. 2d 1083, 1090 n.7 (1st Cir. 1993) (questions about least restrictive programming are "an integral aspect of an IEP package (and) cannot be ignored when judging the program's overall adequacy and appropriateness."). The educational benefit and least restrictive environment requirements operate in tandem to create a continuum of educational possibilities. *Roland M. v. Concord Sch. Comm.,* 910 F.2d 928, 993 (1st Cir. 1990). Supplementary aids and services must be provided within the regular classroom and placement in a more restrictive setting should only be considered when those services cannot be achieved satisfactorily. MUSER §X.2.B.[7]

The School argues that the services for the Student cannot be achieved

[7] I find no authority to support the Parent's argument that there is a specific legal obligation to exhaust the continuum, beginning at the least restrictive end, before a more restrictive placement is determined.

satisfactorily for the Student at [redacted] and that it should not be required to "cobble together" a more sophisticated program to address the Student's needs when an existing more appropriate program is available at the [redacted] School District. In making this argument, the School cites *M.S.A.D. No. 37,* 43 IDELR 133 (SEA Me. 2004) and *Surry Sch. Dep't,* 52 IDELR 209 (Me. SEA 2009).

In *M.S.A.D. No. 37* a Maine hearing officer upheld an IEP determination to place a student in a special education self-contained classroom for students with emotional disabilities, with one-on-one instruction. *M.S.A.D. No. 37,* 43 IDELR 133 (SEA Me. 2004). In *M.S.A.D. No. 37,* the student had received years of special education and supportive services within the public school, in a range of restrictive settings, where it was determined that appropriate educational progress was not made. *Id.* In *M.S.A.D. No. 37,* the hearing officer rejected a parent's request to have the child placed within a school district that both parties agreed did not have programs that were appropriate to the needs of the student.

In *Surry,* the hearing officer upheld a school's decision to place a child in a nearby private day treatment program based on the child's significant disabilities, including blindness, cognitive delays, hearing loss, mental retardation, a seizure disorder and other issues. *Surry Sch. Dep't,* 52 IDELR 209 (Me. SEA 2009). The hearing officer in *Surry* noted that the complexities of the child's needs required highly skilled providers with a very well-coordinated program, and that such a program could not reasonably be made available in a public school setting. *Id.*

Without question, there are aspects of the [redacted] program with its smaller staff/student ratios and availability of trained staff that could provide a different, and

perhaps a more ideal program for the Student. However, as the First Circuit court stated in *Lenn v. Portland Sch. Comm.* 998 F.2d 1083, (1st Cir. 1993) the law does not promise perfect solutions to the vexing problems posed by the existence of learning disabilities in children and adolescents. *Id* at 1086. The Individuals with Disabilities Education Act (IDEA) sets more modest goals: it emphasizes an appropriate, rather than ideal, education; it requires an adequate, rather than optimal, IEP. Appropriateness and adequacy are terms of moderation. *Id*. at 1089.

In the present case, the evidence supports a finding that the Student's IEP is reasonably calculated to provide the Student with educational benefits at the [redacted] program within the [redacted] School District. Specifically, the proposed IEP identifies the following supplementary aids and services: specially designed instruction, educational technician/BHP support for 3 hours a day, contact with a school social worker for one hour per day, and specialized transportation. [S-159-S-161].

Ms. Bosse testified that there are currently educational technicians within the [redacted] Program providing 1:1 student support for the entire day. Wes Lavigne, the [redacted] social worker who provides social work services for the [redacted] program, testified that he had a "good relationship" with the Student whom he has known since the [redacted] or [redacted] grade. [Lavigne testimony]. Mr. Lavigne testified that he was readily available to provide additional assistance to the Student, as he was when called upon by Ms. Bosse last fall. [Lavigne testimony; P-61]. The educational technicians currently working at [redacted] have experience working with students with behavioral needs, utilizing a behavior management/reward system. [Johnson testimony]. All of the [redacted] special education staff are safety-care trained. [Bosse testimony]. Although [redacted] does

not currently have the same number of BHP trained staff, BHP training and certification requires only 50 hours of training and is available to individuals with a High School diploma. [Johnson testimony].

The two experts in this case, Dr. Johnson and Mr. O'Connell, both spoke highly of Lindy Bionske, the special education teacher for the [redacted] program. [Johnson, O'Connell testimony]. Dr. Johnson described the students in the program as a "mixed group" but that they "remind him" of the Student. He testified that Lindy Bionske "knows when to intervene" and that she uses a behavior management/reward system that he believes would be effective for the Student. [Johnson testimony].

While the Student's violent physical assault on May 4, 2016 was alarming, the record does not indicate that this type of behavior is a pattern for the Student. In an IEP team meeting held on January 26, 2017, Diane Bosse stated: "If you look at [the Student's] discipline report from the [redacted] school, basically what is there, and there isn't a huge amount of information there…but whatever incidents are there seem to be the normal [redacted] school kid thing…I don't feel like doing a particular activity that day so I give a sassy response or I use a colorful word…there wasn't a lot of unusual discipline issues at the [redacted] school."

Dr. Johnson testified that the Student's assault was a "self-defensive/reputation defending situation" and unless there are direct antecedents, he believed that the Student is unlikely to engage in similar behaviors.[8] [Johnson testimony]. Dr. Johnson testified that the Student's record does not reflect that he has been involved in a lot of fights and

[8] There is insufficient evidence to support the School's argument that the Student's non-compliance with the terms of his probation suggests an increased risk of confrontational or violent behaviors.

that his assessment revealed nothing to indicate that the Student has violent propensities towards others. Dr. Johnson testified that the Student's cooperative behavior during assessments and on the occasions that he does attend tutoring shows that he can remain stable and non-aggressive. Dr. Johnson believes that the risk is greater for the Student outside of school, as a result of his peer group and the culture associated therewith. [Johnson testimony].

Dr. Johnson also testified that he believes that the [redacted] program would "make school more attractive" to the Student, which could reinforce positive experiences for the Student outside of his peer group. As the Student's attendance and truancy has been an ongoing issue, there is a certain level of fruitlessness to order the Student to attend school at a placement where he has expressed a strong objection. While there is no guarantee that the Student's attendance at [redacted] will be any better, both the Parent and Student have expressed a strong preference to attend [redacted], and as members of the IEP team, their wishes must also be taken into consideration. MUSER §§V1.2(I) and IX.3.C(1)(b). [Student remarks, January 26, 2017 IEP S-appendix G.].

Although the evidence suggests only a slight risk that the Student will be involved in another violent incident, the consequences of such an event could be catastrophic based on the Student's strength and size and the circumstances of the May 4, 2016 assault where the Student continued to inflict blows on a helpless victim. [O'Connell testimony; Buzza testimony]. With regard to this risk, I find that Mr. O'Connell's testimony compelling with regard to the presence of a full-time safety officer and an assistant principal of large stature both of whom would be available in the building to intervene in the event the Student has a significant behavior incident. [O'Connell testimony]. There

is further evidence that the Student will respond to assertive male intervention: At the time of the assault, the Student promptly discontinued hitting the victim and walked away in response to Mr. Buzza's shouting at him to "get off". [Buzza testimony].

Although the [redacted] program is close to the police station, it does not have a safety officer in the building and there are fewer staff available to intervene to protect other students or staff in the event that the Student is involved in another similar physical assault.[9] [Stanley testimony, O'Connell testimony].

In determining the educational placement of a child with a disability, *MUSER* § X.2.B further specifies that public agencies must ensure that the child's placement -

(1) Is determined at least annually;
(2) Is based on the child's IEP; and
(3) Is as close as possible to the child's home;
(c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled;
(d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and
(e) A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum.

34 CFR § 300.116; 20 U.S.C. 1412(a)(5)

In the case of *McLaughlin v. Holt Pub. Schs. Bd. of Educ.*, 320 F.3d 663 (6th Cir. 2003), cited by the School, the 6th Circuit Court of Appeals addressed the issue of placing the child as close to home as follows:

> …we reiterate that these two regulations should be read, as their plain language indicates, to provide that a child should be educated in the neighborhood school (the school he or she would attend if not disabled) except when the goals of the child's IEP plan require a special education placement not available at that school, and in a situation when placement elsewhere is required, the geographic proximity of schools that offer that placement to the child's home should be

[9] While de-escalation techniques and safety care trained staff are of course the preferred response to aggressive behavior, the Student's physical size and the nature of the assault on May 4, 2016 suggest that the additional elements of support at [redacted] will minimize risk to other students and staff.

> considered. *See Hudson,* 910 F. Supp. at 1304; *accord Flour Bluff Indep. Sch. Dist. v. Katherine M. by Lesa T.,* 91 F.3d 689, 693-94 (5th Cir. 1996) (emphasizing that the consideration of proximity is not a presumption that a disabled student attend his or her neighborhood school); *Murray,* 51 F.3d at 929; *Barnett v. Fairfax County Sch. Bd.*, 927 F.2d 146, 153 (4th Cir.1991).

As noted above, the evidence supports a finding that the Student's IEP can be achieved within the [redacted] program within the [redacted] School District. Accordingly, it is appropriate to consider the location of [redacted], being closer to the Student's home, as part of my placement determination.

In its post-hearing brief, the School also points to a comment in the Federal Register with regard to student behavior and the risk of injury to others as a factor in the placement decision:

> Although the Act places a strong preference in favor of educating children with disabilities in the regular classroom with appropriate aids and supports, a regular classroom placement is not appropriate for every child with a disability. Placement decisions are made on a case-by-case basis and must be appropriate for the needs of the child. The courts have generally concluded that, if a child with a disability has behavioral problems that are so disruptive in a regular classroom that the education of other children is significantly impaired, the needs of the child with a disability generally cannot be met in that environment. However, before making such a determination, LEAs must ensure that consideration has been given to the full range of supplementary aids and services that could be provided to the child in the regular educational environment to accommodate the unique needs of the child with a disability. If the group making the placement decision determines, that even with the provision of supplementary aids and services, the child's IEP could not be implemented satisfactorily in the regular educational environment, that placement would not be the LRE placement for that child at that particular time, because her or his unique educational needs could not be met in that setting.

Federal Register, Vol. 71, No. 156, at 46589 (Aug. 14, 2006).

In the present case, there is no evidence that the Student has exhibited behavior in the classroom that is "so disruptive" that the other children in the classroom are

unable to learn. Ms. Bosse stated at the January 26, 2017 IEP meeting that the Student's behavior history in school was typical for his age and "normal [redacted]-school-kid thing." (S-appendix G-1:16). I likewise conclude that the evidence does not support a finding that the student should be residentially placed. [10]

Accordingly, I conclude that the [redacted] Program at [redacted] School is the least restrictive placement for the Student. Other than the issue of the Student's placement as addressed herein, I find that the IEP developed at the February 10, 2017 IEP team meeting is reasonably calculated to be appropriately ambitious to provide the student with demonstrable and meaningful educational benefits.

ORDER

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

1. The Student shall be placed in the [redacted] Program at [redacted] School. All other aspects of the Student's special education programming shall be pursuant to the February 10, 2017 IEP;
2. The School did not improperly determine the Student's placement prior to the February 10, 2017 IEP team meeting; and
3. The School did not violate the Student's "child find" rights.

Dated: July 10, 2017

David C. Webb, Esq.
Hearing Officer

[10] Mr. O'Connell, the School's psychologist, recommended a residential placement for the Student, such as the Lighthouse program in Mars Hill, due to the Student's higher level of need and the risk of his possible "lethality and criminality". [O'Connell testimony]. Mr. O'Connell testified that he did not mention his "recommended" residential placement for the Student at the January, 2017 IEP team meeting.[10] Ultimately, he testified that the [redacted] program at [redacted] School, with some modifications, could meet the Student's needs and would be preferable to placing the Student at the [redacted] program. [O'Connell testimony].