

State of Maine
SPECIAL EDUCATION DUE PROCESS HEARING
15.066X — Parent and Parent v. Lewiston School Department

Representing the Parents: Courtney Beer, Esq. and Kimberly Trombley

Representing the District: Nathaniel Bessey, Esq.

Hearing Officer: Sheila Mayberry, Esq.

This hearing was held and this decision was issued pursuant to the Individuals with Disabilities Education Act (“IDEA”), 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 July 16, 2015, in Lewiston, Maine. Present for the proceedings were: Parent (“Mother”); Courtney Beer, Esq. and Kim Trombley, Esq., counsel for the Parents; Jill Hastings, Director of Special Education for the Lewiston School Department (“School”); Nathaniel Bessey, Esq., counsel for the School; and Sheila Mayberry, Esq., Hearing Officer.

Testifying at the hearing were:

- Mother
- Christine Charest – Licensed Marriage and Family Therapist
- Daniel Dorsky – Physician’s Assistant
- Ryan Hayes – School’s Social Worker
- Jill Hastings – School’s Special Education Director
- Leigh Lardieri – Special Education Supervisor for School’s xx school
- Jake Langlais – Principal for School’s xx school
- Robert Thompson – Special Education Teacher

All testimony was taken under oath.

I. PROCEDURAL BACKGROUND

On June 15, 2015, the mother and the father (“Parents”) requested an expedited due process hearing regarding their child (“Student”).

On July 9, 2015, a prehearing conference was held in Lewiston, Maine. Both parties agreed to have documents submitted into the record marked as joint exhibits.¹ 282 pages of documents were accepted into the record.

At the close of the testimony, both parties requested to keep the hearing record open until July 31, 2015 for the submission of closing memoranda. The School submitted a 23-page closing argument and the Parents submitted a 30-page closing argument. The Parents requested that its memorandum be resubmitted to include citations to the record, which it had not yet received. The request was granted. The Parents' memorandum was received on August 4, 2015, at which time the record was closed. The parties and the Hearing Officer further agreed that the decision would be due on August 14, 2015.

II. THE ISSUES

The issues in this matter are as follows:

1. Whether the School committed procedural violations under the Maine Unified Special Education Regulations ("MUSER") when it refused the Parents' request to consider information from the Student's outside providers.
2. If so,
 - a. Whether the procedural violations interfered with the Parents' ability to meaningfully participate in the IEP Team meeting.
 - b. Whether the procedural violations caused the IEP Team to incorrectly conclude that the Student's conduct in question was not a manifestation of the Student's disability. If so, what shall be the remedy?
3. Whether the Student's conduct in question was a manifestation of the Student's disability. If so, what shall be the remedy?

III. SUMMARY OF THE FACTS

1. This case involves the Student, a xx-year-old boy (d.o.b xx/xx/xxxx) who lives with his Mother in Lewiston, Maine. (Hearing Request form; Mother's testimony)
2. Since an early age, the Student has had a long history of behavioral difficulties and has previously been diagnosed with autism, oppositional defiance disorder ("ODD"), Mood Disorder NOS, Attention Deficit Hyperactivity Disorder ("ADHD") and difficulties with executive function. (Jt. Ex. 3). He was previously hospitalized for aggressive and out-of-

¹ All joint exhibits are notated as "Jt. Ex."

control behavior. (Jt. Ex. 3). His parents separated when he was about a xx old. (*Id.*). His mother remarried. He has three siblings (one who died in about 2008). (*Id.*). There is a history of domestic violence in the family. (Jt. Exs. 3, 9, T. Charest).

3. The Student began Head Start at age xx. He was moved into a special education program at Sandcastle Preschool shortly thereafter. In xx, he had a shortened day, and then moved to special education services in the public school setting. At ages xx and xx, evaluations documented poor social skills, aggression, destructiveness, hyperactivity, and ADHD. (Jt. Ex. 9) In 2009, when his behavior in the public school setting became violent and unmanageable, he was referred to the Renaissance School, a special purpose day treatment school. (Jt. Exs. 3, 7, 9).
4. The Student has been diagnosed under the category of Emotional Disturbance for purposes of receiving special education and related services. (Jt. Exs. 4, 5, 10, 11, 13, 14, 15, 22, 24).
5. While at the Renaissance School, the Student engaged in major property destruction, peer provocation, and self-vindicating behaviors. (Jt. Exs. 7, 9). At times, his behaviors became significant enough to require hospitalization. (Jt. Ex. 7). He received psychiatric services from Dr. Schenk, who prescribed psychotropic medications. (Jt. Ex. 9).
6. While at the Renaissance School, he received special education, related services, and behavioral supports under the category of Emotional Disturbance. (Jt. Ex. 4). He also received social work services, extended school year (“ESY”) services, and specialized transportation. (*Id.*).
7. A psychological evaluation performed in 2012 by Kathryn Graff Low, Ph.D. indicated that the Student had low average to average intellectual ability, with some cognitive processing problems that made him inefficient. Behavioral assessments suggested that the Student had significant problems with executive function, attention, and self-regulation, both at home and at school. Based on multiple behavioral measures, he was diagnosed

with ADHD (H-I type), ODD, and appeared to have symptoms of generalized anxiety. (Jt. Ex. 3).

8. The narrative of a Written Notice, generated from an IEP meeting on March 14, 2013, indicated that the IEP Team had identified the Student's behaviors and triggers that resulted in his aggression and unsafe behaviors. The Team also indicated that he did not always follow directions or take ownership of his actions, and needed to be restrained 34 times the prior year. The Team felt that his unsafe behaviors seemed to be increasing and that he had been hurting staff. He required seclusion when he became unsafe. The Team indicated that the Student misperceived social situations and did not appear to have remorse for his actions. It was noted that, even while functioning at the highest level of the school's behavior program, he could suddenly lose control. He also needed individualized transportation, since it was no longer safe for other students to ride with him. The Team noted that his behavior improved during the spring and summer. (Jt. Ex. 5).
9. During the 2012-2013 school year, the Renaissance School reported 10 incidents in which the Student required seclusion due to his aggressive, physical behaviors. (Jt. Ex. 6).
10. As a result of his significant behaviors during the 2012-2013 school year a detailed functional behavior assessment ("FBA") was performed in June 2013 by Gretchen L. Jefferson, Ph.D., a Senior Behavior Analyst from Woodfords Family Service. (Jt. Ex. 7). His targeted behaviors included physical behaviors, such as aggression, bolting, and property destruction. His verbal behaviors include self-harming statements (e.g., "I wish I was dead."); peer provocation; arguing; disrupting; demanding; and self-vindicating statements. Combined verbal and physical conduct included non-compliance, bullying, and mood lability (frequently shifting in an emotional state). (Jt. Ex. 7). The FBA indicated that the primary function of the Student's behavior was access to adult attention obtained through argument, noncompliance, and significant behavioral events. (Jt. Ex. 7). It included recommendations for addressing his targeted behaviors. (Jt. Ex. 7).

11. At an IEP meeting held in June 2013, the IEP Team determined that due to the Student's increased aggressive behavior, a transition to public school at that time would not be beneficial. (Jt. Ex. 8). The Team concluded that the Student needed more therapeutic and restrictive special education outside of the public school setting in order to access his education. ESY services, social work services, and special transportation were also included. (Jt. Ex. 8).
12. In mid-June 2013, the Student began receiving therapy from Christine Charest for anxiety anger management, impulsive behaviors, and depression. (T. Charest). She testified that when the Student was emotionally triggered, his maladaptive behaviors occurred in the moment. He would become defensive and argumentative, and was known to throw things and destroy property. (T. Charest). Ms. Charest stated that her working theory regarding the Student's treatment was informed by a psychological evaluation done in August 2013 by Dr. Daniel W. Hamilton, Ph.D. (T. Charest).
13. Part of the Student's treatment with Ms. Charest was how to manage his anger and how to cope with and manage stress. (T. Charest). One of his triggers was strained relationships, specifically with his father, and related violence. (T. Charest). Struggles with his girlfriend and other peer conflicts were also triggers. (T. Charest). The Student also struggled with transitions, such as between xx and xx school. (T. Charest). He was apt to seek out the attention of adults for help through inappropriate behaviors. (T. Charest).
14. During the course of his treatment with Ms. Charest, the Student made progress, meeting and sustaining his goals by using coping strategies and not "acting out." (T. Charest). By December 12, 2014 she determined that he had made sufficient progress to discharge him. (T. Charest). However, in February 2015 she saw him for three sessions due to an increase in oppositional behaviors both at home and at school (T. Charest). Thereafter, she did not see or speak to him. She spoke to the Mother the day before the due process hearing. (T. Charest).

15. In August 2013, the Student began seeing Daniel Dorsky, P.A. (T. Dorsky). He saw him about 8 times for medication management of the Student's ADHD, acquired communication disorder, mood disorder, childhood insomnia, and anxiety. (Jt. Ex. 29). He described the Student's predominant behaviors as being "outward" in appearance, such as being fidgety, agitated, and irritable. In Mr. Dorsky's opinion, poor judgment was a symptom of the Student's mood disorder and/or ADHD. (T. Dorsky). He believed the Student lacked insight due to his mood disorder, which then led him to make poor judgments. His mood disorder was indicated by persistent irritability and agitation. (T. Dorsky). Behaviors related to the mood disorder emanated from an emotional state, and could include yelling at teachers or saying hurtful things to his mother. (T. Dorsky). The Student had been stable until February 2015, when Mr. Dorsky saw the Student, at which time it appeared that he seemed "a little more tense." (T. Dorsky). He had no further contact with the Student until mid-May 2015, when he was contacted about a bomb threat incident. (T. Dorsky).

16. In August 2013, a psychological evaluation was completed at the request of the IEP Team at the Renaissance School. (Jt. Ex. 9). The evaluation was performed by Daniel W. Hamilton, Ph.D. Dr. Hamilton's diagnoses of the Student included Unspecified Communication Disorder; ODD; and Neurodevelopment Disorder. He summarized that the Student exhibited "mild AD/HD; anxiety; depression; or Bipolar Disorder along with ODD." He stated that with respect to ODD, the family and parent dynamics played a key role. (Jt. Ex. 9, p. 34). He also opined that those who are well-treated for any of these comorbid conditions tend to be less oppositional, stating "If ODD is fueled by family dynamics medication will have little or no real affect, other than to render (the Student) somewhat more amenable to family-based changes. There is no substitute for changing the dynamics that underlie the oppositional behaviors." (*Id.*)

17. Dr. Hamilton stated that the Neurodevelopment Disorder was the Student's most prominent issue. He stated that the Student's cerebral cortex (responsible for judgment, logic, and impulse control) was not well integrated with his limbic system and the

amygdala, the more primitive area of the brain controlling the “fight or flight” impulses. He stated that, “With (the Student) the primitive brain hijacks the thinking part, hormones flood in; and for several minutes (the Student) is out of control and aggressive until the thinking brain recovers and takes over.” (Jt. Ex. 9, p. 35). He explained that normal development would indicate an integration of the two areas of the brain, but the Student’s development in this area has been delayed. He stated:

In (the Student’s) case, he should be further along with this process by now, although why he is not remains a mystery. Is very clear, however, that (the Student) is highly sensitive to environmental contexts. For example, (the Student) maxed out at his day treatment program long before he was considered for discharge. In fact, the criterion for discharge was not something that (the Student) was ever going to accomplish. He had lost hope. He perceived that the staff had given up on him. He had nothing to lose. Thus, (the Student) made no effort to control himself since he had already “failed.”

(The Student) is highly influenced by those around him. When he is surrounded by well-functioning peers at football, camp, or church (the Student) molds himself to be just like them. Plunging him in to another program with peers that have serious problems will most likely predict a repeat of his Day Treatment experience. (*Id.*)

18. Dr. Hamilton emphasized that the Student’s “most prominent issue is his extreme lack of control regarding handling angry feelings.” He explained that when the Student is provoked, he becomes irrational and acts as if he has been assaulted by someone and is fighting back. The scores reported from the Comprehensive Executive Function Inventory (“CEFI”) ranked the Student in the 10th percentile. Particularly notable were his sub-scores for inhibitory control and emotional regulation. He scored in the “Well Below Average” range, suggesting that he had poor ability to control behavior or impulses, including thinking about consequences before acting, and maintaining self-control. His Emotional Regulation score was less than 90 and significantly lower than his average score on the CEFI Scales. In summary, Dr. Hamilton explained that the Student had poor self-control and management of his emotions, including difficulty staying calm when handling small problems and reacting with the right level of emotion. His scores revealed that he had difficulty waiting patiently, responding calmly, and managing stress without getting emotional. Dr. Hamilton also explained that the student’s “mild ADHD and anxiety are present and very likely will responded to medication and that improvement with his ODD symptoms may then be seen.” He emphasized that in

particular, the Student's "most prominent issue is his extreme lack of control regarding handling angry feelings." "When he is angry (the Student's) whole perceptual field changes. He becomes irrational and acts as if he has been assaulted by someone and is fighting back. He does not care who gets in his way or is negatively affected by his actions." (Jt. Ex. 9).

19. Dr. Hamilton made 17 recommendations for the Student's treatment plan. They included:

- Learning and adopting appropriate skills;
- Activities, hobbies, and leisure time endeavors to build a sense of self-pride and accomplishment (e.g., school and community-based activities);
- Use of pro-social activities as leverage to compel the Student to act better;
- Refusal to engage him when he is "itching for a fight," which will "deprive (the Student) of the fuel he needs to keep his angry feelings burning;"
- Establishment and maintenance of healthy eating habits, sleep routines, and exercise;
- Immediate elimination of any exposure to tobacco;
- Work with a mental health professional on emotional expression and impulse control with a therapist with whom he has a relationship and who is versed in cognitive behavioral and supportive therapy;
- Help in defining and adopting responsible behaviors;
- Help in developing positive family, peer, and community relationships and supports;
- Understanding that his father's abandonment of him is an ongoing source of demoralization;
- Help in adopting a positive work ethic and useful skills for his future; and
- Discipline that is consequence-based and an aid in helping him understand that he neglects to respect the rights of others.

20. Dr. Hamilton opined that the Student "[may] need to begin to realize that legal charges may be brought against him if he assaults another person. (Jt. Ex. 9). (The Student's) parents are encouraged to notify the authorities if safety becomes an issue for the Student. Insist that the police enforce whatever law the Student may have broken. It may be that the Student needs the learning experience that comes along with becoming involved in

the juvenile justice system to finally decide that he has to get a grip of himself or face consequences.” (Jt. Ex. 9, p. 37).

21. An IEP Team meeting was held on September 26, 2013. At that time, the Student had transferred from the Renaissance School to the Regional Educational Treatment Center (“RETC”), an out-of-District placement. (Jt. Ex. 10). The IEP concluded that the Student was not yet ready to transition into public school. (*Id.*)

22. An IEP was developed from the IEP meeting on September 26, 2013. (Jt. Ex. 11). It included results from Dr. Hamilton’s evaluation and the functional behavior assessment developed by Ms. Jefferson. The IEP noted that, “(The Student’s) most prominent issue is his extreme lack of control regarding handling his angry feelings. He experiences mild ADHD. In peer related social situations (the Student) is immature regarding the rights of others. The Student will benefit from work on emotional expression and impulse management.” (Jt. Ex. 11). The IEP described the Student’s developmental needs, stating that, “(The Student’s) anger, aggression and anxiety significantly impact his responses to challenging demands. (The Student’s) most prominent behavioral issue is his extreme lack of self-control regarding handling angry feelings. His ability to focus and remain on task is minimal compared with his peers.” (*Id.*) The IEP goals included several relating to writing, math, and behavior. The first behavioral goal stated that, “(The Student) will complete expectations for a gradual transition to a less restrictive setting, as appropriate, as measured by grades, attendance and staff observation.” (Jt. Ex. 11, p. 8). The second behavioral goal stated, “(The Student) will increase self responsibility to follow school rules and exhibit age appropriate behavior with 80% accuracy.” (Jt. Ex. 11, p. 10). The third behavioral goal stated, “(The Student) will increase his time on task and task completion from 30 to 40% of the time.” (Jt. Ex. 11, p. 13). Short-term objectives related to his goals were also included. His specially designed instruction encompassed 23 hours per week in the special education setting. Social work services and special transportation were provided. (Jt. Ex. 11, p. 16). Supplemental aid was also provided for up to 30 hours a week, if needed. (Jt. Ex. 11, p. 17).

23. The IEP Team convened on January 29, 2014 to discuss the Student's transition to public school. (Jt. Ex. 12). It was decided that he would slowly start to transition after the February break. The Written Notice indicated that since the Student had been attending the RETC, he had not exhibited any aggressive physical behaviors. His behaviors were described as rude or disrespectful, but not physical. The Mother indicated that she was concerned about the size of the school, but was in agreement with a gradual transition. (Jt. Ex. 12).
24. The IEP Team met on April 18, 2014 to discuss the Student's transition to the School's xx school. (Jt. Ex. 13). At that time, he was taking only a math class and attending lunch in the public school setting. It was reported that he entered the school in a mature way and was motivated to be there. He was interacting appropriately with his peers and staff. His behavior in math class was "adequate at least 80% of the time, with no incident to report. He is easily redirected with verbal prompts and reminders." While he was performing at the 21st percentile in math, he was earning a grade of 89. (Jt. Ex. 13). The teachers at RETC also reported that the Student was exhibiting few negative behaviors and was acting out his feelings "a lot less." (Jt. Ex. 13). It was noted that the Student attended the IEP meeting and reported that he felt that his math class was going well. (*Id.*). The Team planned on the Student taking a literacy class in May 2014 if he continued his progress. (*Id.*).
25. The IEP Team met on October 1, 2014 for the Student's annual review. (Jt. Ex. 14). The Team added goals in reading, writing, math, and literacy to his IEP since it was determined that his skills were "below average" in those academic areas. (*Id.*) He continued to work in the special education setting, since he continued to have difficulties using appropriate coping strategies when he became frustrated. He was provided with counseling to help him work on demonstrating age-appropriate coping strategies when he became stressed. (*Id.*)
26. The IEP Team also included a behavior plan to address "task behaviors" and increase his organization and work completion. ESY services were discontinued, since the Student

had not shown any regression. Special transportation was also discontinued, since he no longer required it to benefit from his educational program. (*Id.*).

27. The Student's special education teacher reported to the IEP Team that the student was motivated and wanted to do well. He raised his hand in class, volunteered to read aloud, and would go up to the board. He was willing to help others in class. He required frequent breaks to remain on task. He needed prompting during less structured times and had more difficulty following through during these times. The Student's regular education teacher reported that he was doing very well and behaving appropriately. He was noted as being a polite young man, but could be "antsy." (Jt. Ex. 14).

28. Between February and May 2015, the Student was noted to have developed leadership skills, was helpful in the classroom, and was high in the pecking order with his friends. (T. Thompson, Hayes). He was conscientious and a hard worker. (T. Hayes). He was a good student. (T. Thompson, Hayes). At times, he exhibited emotional dysregulation in the classroom. (T. Thompson, Hayes, Lardieri). This would occur when other students would make noises or other annoying behaviors, or there would be unexpected changes in the schedule (T. Thompson, Hayes). Once agitated, it became difficult for him to manage his impulsive emotional reactions, including verbal insults, scathing remarks, and physical pacing. (T. Thompsons, Hayes, Lardieri). He did not exhibit physical aggression when he became agitated. (T. Hayes, Lardieri). Strategies to help the Student included allowing him to have motor breaks, such as getting a drink of water, walking around the school, doing pushups, or going to the gym to run. (T. Thompson, Hayes, Lardieri). These were relatively successful tools that would allow the Student to return to the classroom. (T. Thompson). The Student would get more agitated when there were more opportunities for peer interaction. (T. Thompson, Lardieri.). While the Student had incidents during the spring of 2015, his teachers believed that he had made progress. (T. Thompson).

29. The Student's IEP for 2014-2015 included a Positive Reinforcement and Supports Plan ("Plan"), dated May 7, 2015. (Jt. Ex. 14). The goal of the Plan was to develop strategies

to assist the Student in applying new skills to replace problematic behaviors. It described two off-task behaviors. One included, “the inability to focus and complete work which included blurting out in class, or tapping objects, or spinning in or around the rolling chair.” (Jt. Ex. 14). The behavioral intervention was described as follows: “(The Student) will be allowed to take five-minute walking breaks in order to help him remained (sic) focus. He will be allowed to sit or stand at his workplace (either the desk or the podium). (The Student) will be given non-verbal and verbal prompts and cues to initiate tasks. (The Student) will receive check-ins and prompting during work times to ensure that he remains on task to finish his assignments.” (Jt. Ex. 14). Positive reinforcements included receiving praise and encouragement, as well as tangible rewards (e.g., “Demon Dollars”) for demonstrating replacement behaviors. The second target behavior focused on inappropriate social behaviors defined as, “[t]he inability to accept feedback without negative consequences; impulsive noises, and/or acting out in response to anxiety provoking situations; inappropriate interactions; and inappropriate language.” (Jt. Ex. 14). The replacement behaviors or skills to be taught included the ability to “[a]ccept feedback without negative responses; age-appropriate reactions in response to anxiety provoking situations; appropriate peer interactions; appropriate language.” (Jt. Ex. 14). The behavioral interventions included allowing the Student to take five-minute walking breaks and verbal prompts and cues as reminders to demonstrate age-appropriate social behaviors. Demon Dollars would be awarded as a positive reinforcement. (Jt. Ex. 14).

30. From September 26, 2014 through May 4, 2015, the Student engaged in nine “major” and five “minor” incidents of verbal altercations with students or teachers. There were two additional major incidents that had a physical aspect: one that led to a fight with a peer and a second involving throwing things out the bus window. (Jt. Ex. 25).

31. On May 14, 2015, the Student attended his health class on the third floor of the xx school. There were no reports from his teacher that the Student was behaving inappropriately at the time. (T. Langlais). There were no reports that he appeared to be having any anxiety, stress or agitation. (T. Thompson, Hayes, Langlais). At about 9:15 a.m., he took a break to go to the bathroom. (Jt. Ex. 17). School video cameras showed the Student entering the

bathroom. The video indicated that the Student had been in the bathroom for four to five minutes. (*Id.*) When he returned to the classroom, he reported to the teacher that he had seen a bomb threat in the bathroom. (T. Langlais, Jt. Ex., 17).

32. The Principal was notified and staff went into the boys bathroom and found the words “BomB at 12:01 am” written in one of the bathroom stalls. (T. Langlais). The Student was called into Principal Langlais’ office and was interviewed. (T. Langlais). Mr. Langlais reported that the Student told him what he saw and that he did not know who did it. The Student was calm in his demeanor and seemed credible (T. Langlais).
33. The Student was then directed to talk to Police Officer Mike Whalen, who had been contacted as part of the School’s protocol during such an incident. (T. Langlais). The Student told him he had seen the writing in the bathroom, and went back to his class and told his teacher. He stated that he did not know or hear who may have been responsible. (Jt. Ex. 17). The Student was then directed back to his classroom. (T. Langlais).
34. The Student’s behavior in his math class, the fourth period of the day, was unremarkable. (T. Thompson).
35. During the day, two other police officers, Dionne and Lacombe, spoke to the Student. (Jt. Ex. 17). He repeated his story that he had seen the threat, reported it, but did not know who did it. (*Id.*) Officer Lacombe noted that during his interview, the Student seemed nervous. (*Id.*) Officer Lacombe interviewed two other students during that day, both of whom denied any knowledge of the incident. (Jt. Ex. 17).
36. As the end of the school day approached, Mr. Hayes, the School’s social worker, happened to be in the Student’s classroom during the 6th period. (T. Hayes). He and Mr. Thompson, the teacher during that period, noted the Student was anxious and agitated. During the afternoon announcements, he started pointing and swearing at the intercom yelling, “shut up shut up!” and started pacing. (T. Hayes, Thompson). They decided to move the students outside and let the Student run around the football field to be able to

calm down. (T. Hayes, Thompson). While he calmed down somewhat, it was still apparent that he was agitated. (T. Thompson, Hayes).

37. Throughout the school day, Officer Lacombe continued to investigate the incident. Two other students were interviewed, but he determined they were not involved. Officer Lacombe reviewed the carefully drawn characteristics of the written threat. The circle was neatly and accurately drawn, almost as if a protractor was used. (Jt. Ex. 17). Also, he noted the video footage showing the time frame in which the Student went into the bathroom and when he returned, over four minutes, and the fact that he seemed nervous during this first interview with him. (*Id.*) Officer Lacombe decided to speak to the Student again close to the end of the school day. In his professional opinion, the person reporting a threat is often the person making the threat. (*Id.*) In the second interview he asked the Student to draw what he saw on a piece of paper. The Student first drew a circle. At that point Officer Lacombe came to believe that the characteristics of the circle that the Student drew “almost exactly matched the circle in the picture of the threat.” (*Id.*) (The Student) then began to write the wording in the circle, but was clearly struggling in this penmanship and was not writing freely, appearing to try to change the style of his writing. (*Id.*) He continued to interview the Student about his actions when he went to the bathroom. The Student reported that he texted his mother while he was in the bathroom, but then recanted and said that had sent her a Facebook message. During this point in the interview, the Student became nervous and it was apparent to Officer Lacombe that he was lying about what he knew. He told the Student that he suspected him of making the threat and suggested that he “come clean before this got much more out of hand.” (*Id.*) He advised the Student that he if admitted to the incident, he may be able to avoid criminal charges. (*Id.*).

38. At that point, the Student admitted to writing the threat. (Jt. Ex. 17). Officer Lacombe’s report stated that the Student, “broke down, began to cry and admitted that he was the one who wrote the threat on the wall and that it was stupid and he was sorry. He stated that he did not want to have a criminal record because he wanted to get into the military when he

got older and it would prevent him from doing so. I asked (the Student) why he did it and he stated that he broke up with his girlfriend the day prior and he was just mad.” (*Id.*)

39. After admitting what he had done, Mr. Langlais and the Leigh Lardieri met with the Student. He was asked to restate what he had done. In a calm manner, the Student said that he went to the bathroom and wrote the word “bomb” inside a bathroom stall. (T. Langlais, Lardieri). He stated that he did it because he had broken up with his girlfriend (T. Langlais).
40. The Student’s Mother and stepfather were contacted and asked to come to the school to discuss the situation. (T. Langlais, Mother). The Student’s stepfather arrived first and spoke with the Student who repeated that he had written the bomb threat. (T. Langlais). When the Mother arrived, he also told her what had happened and that it was because he had broken up with his girlfriend. (T. Langlais, Mother). The Mother asked him a few questions, at which point she became very upset and left the meeting. (T. Mother).
41. The Mother later testified that Officer Lacombe threatened the Student with criminal charges if he did not admit to the threat. (T. Mother). She stated that during the incident, the Student wrote her a message on Facebook stating that he was taking blame for someone else. She stated that she wanted to bring this up at the meeting with Mr. Langlais, but that the Student indicated to her not to do it. (T. Mother). She further testified that she waited for him to come out of the meeting and drove him home. She stated that in the car, he reiterated that he did not make the threat. (T. Mother). She stated that she believed the investigation was not proper. (T. Mother).
42. Based upon the investigation and the Student’s admission to writing the bomb threat, the Student was suspended for 10 days. (T. Langlais).
43. A manifestation determination review (“MDR”) meeting was scheduled for May 21, 2015 (Jt. Ex. 18). In a letter, dated May 20, 2015, to School staff, the Parents’ attorney, Courtney Beer, Esq., requested a postponement of MDR until May 29, 2015 in order to

properly evaluate the records, and also due to scheduling constraints. She also requested that the expulsion hearing be rescheduled pending the outcome of the MDR. She also requested a copy of the Student's education records for the prior three years. (Jt. Ex. 20).

44. After Ms. Lardieri spoke to Ms. Beer, the MDR was rescheduled for May 26, 2015. (Jt. Ex. 21).

45. On May 18, 2015, the Mother met with the School's superintendent, William Webber, to discuss the processes for discipline and suspension. (Jt. Ex. 19, T. Mother).

46. The IEP Team met for an MDR on May 26, 2015. (Jt. Ex. 23). The Team reviewed excerpts from the psychological evaluation performed by Dr. Low in 2012; the Functional Behavioral Analysis performed by Dr. Jefferson in 2013; the Written Notices dated June 3, 2013 and September 26, 2013; the Protection from Abuse incident report dated May 18, 2014; the IEP dated September 23, 2014; and the DSM-Criteria for ADHD and ODD. (Jt. Ex. 23-24).

47. The narrative from the Written Notice summarizing the MDR review indicated that the Student's behavior on May 14, 2015, writing the bomb threat in the bathroom, did not have a direct and substantial relationship to his disability. (Jt. Ex. 24). The Written Notice included the impressions of the Student before and after the incident. The Team discussed that the primary behaviors they saw in the school setting had been dissipating over the course of the year. The Written Notice summarized comments from the Mr. Hayes, Student's counselor, as follows:

(The Student) is very motivated and he wants to do well. He said that (the Student) can be hard on himself to do things for grades and/or for the lacrosse team. They have worked a lot on helping (the Student) manage his anxiety. Ryan reported that when things change in his schedule, he gets very nervous, he doesn't like change. He needs a strong leader in the classroom and that this has been a positive thing with the two teachers he has had this year. (Dr. Lardieri and Mr. Thompson). Ryan said they are also working on managing language, and frustration. (The Student) takes break as needed and returns within an appropriate amount of time. He gets into altercations with his peers. He is able to accept reason and feedback from people he trusts. He wants to be in control, but feels safest when an adult is in control. His defiant behavior is mostly with changes

and people he doesn't know. If you know (the Student) and he trusts you, he will accept reason and will take redirection. It doesn't mean he will agree with it. He is able to calm back down when he talks to him. He values his relationships. Ryan stated that (the Student) often does have relationships with peers/girls and those relationships are very valuable. He thinks a lot about what his mom thinks and what his dad. (sic) On the day of the incident, he reported that (the Student) was anxious, and pointing and swearing at the intercom as students were being called to go home. The class then went outdoors, and (the Student) was able to calm down and finish the assignment the class was working on. He will be fine if he feels he is being treated fairly and he is being respected. He was working hard to play lacrosse. (Jt. Ex. 24).

48. Mr. Thompson, the Student's special education teacher and case manager, reported that (the Student) could be agitated by his peers. He noted that the data collected over the second semester of the 2014-2015 school year indicated that his day-to-day replacement behaviors were trending upwards. He reported that the Student had been taking breaks, and tended to eat a lot. There were days when he was "jumping out of his skin" and would be allowed to go to the gym and run around or do push-ups in class. Mr. Thompson stated that just reminding the Student of the strategies to use, and giving him space, worked best to help him calm down. (Jt. Ex. 24).

49. Mr. Thompson also reported that on the day of the incident, the Student seemed "fine." He was doing his work. He was in the classroom throughout the third period for both an academic seminar and math. No one reported to Mr. Thompson of anything out of the ordinary about him. (Jt. Ex. 24).

50. Ms. Beers, who was present at the MDR, provided the Team with a summary of the Student's evaluations. She asked if the MDR could be continued to allow her to reach out to the Student's outside providers to request that they provide additional information. She stated that the Parents believed that the Student's conduct on May 14, 2015 was a manifestation of his disability, believing that the Student did not have control over his actions and that his conduct was a way of attracting adult attention, which had been noted in his FBA from June 2012. Ms. Beers also noted that the Power School data indicated that the Student had an increase in behaviors. (Jt. Ex. 24).

51. The psychological evaluation conducted by Dr. Hamilton was not in the Student's file at the time of the MDR. (T. Hastings). There is no explanation for why it was not included. (T. Hastings).
52. The Written Notice stated that Ms. Hastings denied the request of an extension of the meeting, since it had to be held within 10 days of the incident leading to his suspension and that the required members of the IEP were present. (T. Hastings, Jt. Ex. 24). She also stated that the Student would continue to receive the services in his IEP, including literacy and math, as well as counseling services during the Student's suspension. (Jt. Ex. 24).
53. The Mother told the IEP Team at their meeting on May 26, 2015 that she was concerned about the educational plan for the Student for the rest of the school year, and how the bomb threat incident would impact his chances to move on to the xx school in the fall of 2015. (Jt. Ex. 24).
54. Ms. Hastings testified that, as the Director of Special Education, it was her job to make a decision if there was not a consensus on whether the Student's conduct on May 14, 2015 was a manifestation of his disability. (T. Hastings). She stated that all those present, including the Student's teachers and case manager and social worker, discussed whether his behavior on May 14, 2015 could have resulted from his diagnoses. She stated that while no formal vote was taken during the meeting, it was her clear sense from the tenor of the discussion that there was agreement among the staff of the xx school that the Student's conduct did not represent a manifestation of his disabilities (T. Hastings). It was her belief that the IEP Team believed that this was a new type of behavior on the part of the Student, and not related to his impulsive, in-the-moment reaction to his known triggers. (T. Hastings). The characteristics of the Student's conduct on that day, which were not comparable to his normal impulsive reactions, included his calm demeanor that morning, no apparent triggers from peers, and his calm explanation about what he had seen in the bathroom. (T. Hastings).

55. Ms. Hastings also acknowledged that, while it was not stated in the Written Notice, she told the Parents that since new evaluations were needed, if there was anything newly-discovered regarding the Student's behavior that may change the outcome of the MDR, then the IEP Team could revisit the issue. (T. Hastings). She stated, "We needed new evaluations because we were stuck on the evaluations and what they meant and what they said and that they weren't really indicati – I didn't feel they really were giving us a good picture to rely on to make the decision so I wanted more evaluations."... "I admitted at the meeting we were trying to make a decision based on evaluations that were not as relevant as they need to be to really know what – for the conclusiveness." (T. Hastings).
56. A School Committee meeting was held on May 27, 2015, at which time it was decided that the Student's suspension would be extended through June 3, 2015, and that the School Committee would convene on that day to discuss and decide whether to impose expulsion or long term suspension of the Student. (Jt. Ex. 26).
57. The School Committee convened on June 3, 2015. (Jt. Ex. 27). At that meeting, a recommendation by Mr. Langlais, to suspend, but not expel, the Student for the remainder of the school year, was approved. It was also decided that he would be offered educational services in a morning session at an alternative setting at the Dingley Building from 7:25 a.m. to 11:25 a.m., including transportation. He was also to be offered an opportunity to enroll in summer school. (Jt. Ex. 27, Tr. Langlais). Mr. Langlais stated that he did not want the Student expelled because he had made good progress during the year; in his view, the Student had made a poor choice and would not do it again. (T. Langlais). He also did not want him to be singled out by his peers if he returned for the last few weeks of the year. (T. Langlais).
58. As a result of the suspension through the end of the school year, the Student missed the career day and the promotion ceremony for those going on to xx school. (T. Lardieri).

59. The Student did not attend the morning educational sessions offered by the School. However, he attended the 2015 summer school, allowing him to complete xx grade and be promoted to xx school. (T. Mother).
60. In the opinions of both Ms. Charest and Mr. Dorsky, the Student's diagnosis of ADHD and mood disorder may have had a substantial impact on his conduct in writing the bomb threat on May 14, 2015. (T. Charest, Dorsky). They both cite the Student's breakup with his girlfriend the day before. They stated that his ADHD and mood disorder could have played a role in his conduct due to the lack of insight and poor judgment that are symptomatic of these disorders. (T. Charest, Dorsky). Neither could testify with certainty that the Student's conduct was a manifestation of his disability. (T. Charest, Dorsky).
61. Mr. Dorsky opined that if the act itself were done in a state of calmness, it would indicate that the Student was in a more deliberate and thoughtful state. He also considered the possibility that the Student's conduct may have been due to other undisclosed psychiatric conditions caused by a trauma that the Student has not reported. (T. Dorsky).

IV. SUMMARY OF THE PARTIES' POSITIONS

Parents' Position

The Parents argue that due to procedural violations in conducting the MDR, the determination by the IEP Team that the Student's conduct on May 14, 2015 was a manifestation of his Emotional Disturbance is invalid and led to the failure of the School to provide the Student with a free appropriate public education ("FAPE.")²

Specifically, the Parents claim that the School violated procedural safeguards by not granting extensions of time to arrange for the Student's outside providers, including Ms. Charest and Mr. Dorsky, to discuss with the IEP Team whether, in their professional opinions, the Student's conduct was a manifestation of his disabilities, citing MUSER §VI.2.B.5.

² The Parents do not deny that the Student committed the conduct that led to his suspension. (Parents' brief, p. 2).

The Parents also assert that due to the failure of the IEP Team to review Dr. Hamilton's psychological evaluation from 2013, the MDR was unable to properly assess whether the Student's conduct was caused by his disabilities. It argues that, accordingly, the School violated 20 U.S.C. §1415(k)(1)(E)(i); and MUSER §XVII.1.E.a-b. (Citing *School Board of the City of Norfolk v. Brown*, 769 F. Supp. 2d, 928, 947 (E.D. Va. 2010)).

The Parents argue that the refusal to continue the MDR for an additional day, in order for them to present Ms. Charest and Mr. Dorsky, denied the Student a FAPE because it significantly interfered with the Parents' ability to meaningfully participate in the MDR. It asserts that none of the reasons proffered by Ms. Hastings to refuse a continuance of the MDR, including prioritizing the schedules of its own staff, were valid. Citing *Doug C. v. Hawaii Department of Education*, 720 F.3d 1038, 1042 (9th Cir. 2013). It asserts that the School was in no danger of violating the 10-day rule when the Parents offered to waive the strict time lines.

The Parents argue that, based upon the failure of the School to continue the MDR in order to present relevant information, the Team's ultimate decision that the Student's conduct was not a manifestation of his Emotional Disturbance was incorrect, and therefore led to a failure to provide him a FAPE for the remainder of the school year. The Parents argue that the Team would have been agreed that his conduct was a result of his disability if it had heard from Ms. Charest and Mr. Dorsky.

The Parents ultimately argue that even if there were no procedural violations during the MDR process, based upon the evidence in the record, the hearing officer should determine that the Student's conduct on May 14, 2015 was a manifestation of his disabilities. The Parents cite the testimony of Ms. Charest and Mr. Dorsky, and Dr. Hamilton's evaluation. They assert that in their view, while the Student's impulsive behavior can be outwardly exhibited, ADHD does not always result in a trigger to act impulsively. The Parents note that the Student had a recent breakup with his girlfriend, an anniversary of the violent attack on him by his father was approaching, and he was meeting with school staff about his transition to xx school. The Parents suggest that all of these events could have contributed to a buildup of stress, which could have limited his level of executive functioning. The Parents also suggest that he may have had a

residual reaction to something that could have occurred the night before, or that a trigger reminding him of a significant event may have created an anxiety reaction, hijacking his brain and resulting in inappropriate behavior. The Parents note that Ms. Charest believed that Dr. Hamilton's evaluation should have been reviewed, since her reading of it suggested that it would be difficult to conclude that the incident was not a manifestation of the Student's disability.

The Parents note that Mr. Dorsky believed that the act of writing the bomb threat was connected to both the Student's ADHD and mood disorder. They emphasize his view that, while an average student would be upset about a breakup, an average student would not have the extreme response of expressing his emotions by writing a bomb threat on a bathroom stall door, opining that that type of extreme action could have been symptomatic of the Student's disabilities.

The Parents point to the FBA of May 2012, which emphasizes that, in an effort to gain adult attention, the Student would engage in negative and challenging behavior through argument, noncompliance, and significant behavioral events. It points to Mr. Langlais' Discipline Referral Form, in which he suggests that one reason for the Student's conduct was to obtain adult attention.

The Parents cite Dr. Hamilton's psychological evaluation to support their claim that the Student's conduct on May 14, 2015 can be connected to his Emotional Disturbance. They assert that Dr. Hamilton's report, which states that the Student is highly sensitive to environmental contexts and is highly influenced by those around him, suggests that his internal struggle over a breakup or his relationship with his father may have resulted in writing the bomb threat without thinking, which would be consistent with his deficits in executive functioning.

Finally, the Parents claim for the first time that the School failed to provide a FAPE to the Student after he was suspended, despite the fact that the final days of the Student's xx grade year were not focused solely on traditional academics. They argue that the service offered him did not comply with the MUSER or IDEA, since he was unable to participate in the general education curriculum pursuant to MUSER XVII.1.D.1.a. It asserts that offering only math and literacy did

not comply with the state and federal regulations regarding the provision of education to special education students during suspension, as it did not provide for his continued participation in the general education curriculum. It also claims that the School did not allow the IEP Team to consider and decide whether the Student should receive educational service at home by a tutor. Citing 20 U.S.C. § 1415(k)(2); MUSER §§ XVII.1.D.5, XVII.2.

School's Position

The District answers the Parents' allegation that it violated the requirement to schedule the MDR at a mutually agreed-upon time and place by asserting that the Mother agreed to attend the meeting on May 21, 2015, prior to her attorney's request to postpone it. It also remarks that Ms. Beer's request to postpone the MDR, scheduled on May 21, to May 29 was met with a compromise to meet on May 26, 2015. The School also urges that there was no procedural violation when it refused to continue the MDR meeting for an additional day after the Parents requested more time to ask other providers to attend, in order to garner their professional input about the Student's behaviors. It claims that the Parents had not been in contact with those providers and there was no evidence that they would have been available to participate. The School points out that the Parents could have planned to bring whomever they chose to the meeting on May 26, 2015, but apparently had not done so. The School asserts that the Parents' failure to acquire the attendance of others did not make the MDR process defective.

The School also points to 20-A M.R.S.A. §1001(9), wherein there is a requirement to hold a meeting within 10 days after a disciplinary incident that requires a 10-day or longer suspension. MUSER §§ XVII.1.E., XVII.3.

The School argues, in the alternative, that even if the School committed procedural violations, they did not rise to the level of a denial of FAPE or lead the IEP Team to come to an incorrect conclusion in the MDR. The School claims that, given the testimony of the two providers that would have been present at the MDR and any additional evidence presented at the hearing, there would still have been a determination that the Student's conduct was not a manifestation of his disabilities. They cite the providers' lack of current information about the

Student, noting that neither had seen the Student since February 2015. They note that equally-qualified professionals who had been working with the Student at school did participate in the MDR and provide their own professional opinions. The School asserts that, while Dr. Hamilton's psychological evaluation had been in the Student's file at the time of the MDR, his analysis described the types of impulsive, agitated behaviors that the School personnel recognized in the Student on a regular basis. The School insists that on the day of the incident, the Student did not exhibit these behaviors.

The School argues that those who were currently familiar with the Student's conduct, behavior, and triggers were surprised to learn that he had written the bomb threat on May 14, 2015. It points to the Student's known behaviors: impulsive, disruptive, in-the-moment, and immediate reactions. It draws attention to the Student's relatively calm demeanor and lack of outward irritation or agitation, telltale signs of his distress. It notes that the message itself was carefully written, and not drawn as if someone were in an agitated state. It claims that while not every action must be based upon an impulsive reaction, it was the character of the behavior itself that was at odds with the Student's known disruptive and explosive behaviors.

Finally, the School emphasizes that, in its view, the record does not bear out the plausibility that the Student became very agitated while he was in the bathroom, wrote the bomb threat, and then calmed himself down completely and went back to his classroom to report the threat. The School insists that while his conduct was the product of a mistake and use of poor judgment, it was not a manifestation of his disability.

V. LEGAL FRAMEWORK

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

FAPE.¹ *See id.* at §1412-13. In return, the states receive funds from the federal government for use in implementing the provisions of the Act. *See id.* at § 1412(a).

If a student with a disability misbehaves in school, the IDEA provides detailed procedures that the local educational agency must follow in order to suspend or expel him. To begin with, the Act gives “school personnel” the unilateral power to suspend a student with a disability for up to 10 days as they would a non-disabled child, that is, without providing the child with an “alternative educational setting” (such as out-of-school tutoring). *See* 20 U.S.C. § 1415(k)(1)(A)(i). In Maine, school boards vested with the statutory power to oversee the operation of school administrative districts can give this power to a school principal. *See* 20-A M.R.S.A. § 1001(9-B).

Recognizing that schools have their own disciplinary rules applicable to all students, the IDEA also permits a school to discipline a student with a disability for more than 10 days, just as it would discipline a non-disabled child, provided the disabled student’s misbehavior was not a “manifestation” of his disability. *See* 20 U.S.C. § 1415(k)(5)(A). This power to suspend a student for a long period of time comes into play when students with disabilities commit offenses that are not covered by the IDEA's 45 day suspension, i.e. those that do not involve drug or weapon possession.

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

Since *Honig*, *supra*, Congress developed regulations by which school districts must review the behavior of disabled students that violates a school’s code of conduct, in order to

determine if the conduct was substantially the result of a disability. 34 CFR §300.530. Parent participation in the MDR process is essential. 20. U.S.C. §§1400(c), 1401(19), 1415(1)(A),(C),(D),(E), and 1415(b)(2). Maine has issued regulations regarding the MDR process in conjunction with the federal mandates in MUSER §XVII. The process is as follows:

1. Authority of School Personnel

A. Case-by-case Determination. School personnel may consider any unique circumstances on a case-by-case basis when determining whether a change in placement, consistent with the other requirements of this section, is appropriate for a child with a disability who violates a code of student conduct.

B. General. (1) School personnel under this section may remove a child with a disability who violates a code of student conduct from his or her current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 consecutive school days (to the extent those alternatives are applied to children without disabilities), and for additional removals of not more than 10 consecutive school days in that same school year for separate incidents of misconduct (as long as those removals do not constitute a change of placement under §300.536). (2) After a child with a disability has been removed from his or her current placement for 10 school days in the same school year, during any subsequent days of removal the public agency must provide services to the extent required under paragraph (D) of this section.

C. Additional Authority. For disciplinary changes in placement that would exceed 10 consecutive school days, if the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability pursuant to paragraph (E) of this section, school personnel may apply the relevant disciplinary procedures to children with disabilities in the same manner and for the same duration as the procedures would be applied to children without disabilities, except as provided in paragraph (D) of this section.

D...

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

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

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

In *Letter to Yudien*, dated August 1, 2003, the Department of Education, Office of Special Education Programs ("OSEP"), acknowledged the importance of swiftly carrying out an MDR. However, OSEP also recognized that there may be special consideration given under certain circumstances. It stated, for instance, that an MDR may be held over in order to conduct additional evaluations if the IEP team suspects that an additional disability may be at play that could inform the team about a student's conduct. It stated:

You properly note that in a *Letter to Terry Brune* (March 17, 2003) OSEP recommends that the IEP team not be reconvened to *re-conduct* a manifestation determination when the time has expired and new information is uncovered. However, in OSEP's view, the ten-day timeline at 34 CFR §300.523(a)(2) also is not intended to preclude the IEP team from making an appropriate determination that additional evaluations must be completed in order to make a manifestation determination. For example, where a student is being reevaluated to determine the existence of an additional disability, such as emotional disturbance, and engages in misbehavior prior to the completion of the evaluations, it may be appropriate for the IEP team to convene the review within the ten-day timeline, but decide to continue the review at a later time in order to consider the results of the completed evaluations.
(*Id.*)

(See also *Farrin v. Maine School Ad. Dist., No. 59*, 165 F. Supp. 37 (D. Me 2001) (Since there was no educational harm to the student, holding the MDR on the 12th day was only a harmless error.)

Therefore, under certain circumstances, an MDR could be properly held over in order to consider additional information before making a determination.

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

VI. DISCUSSION

1. Whether the School committed procedural violations when it refused the Parents' request to consider information from the Student's outside providers at the MDR.

a. Initial scheduling of the MDR

The Parents argue that, despite the Mother's agreement with the School to schedule the MDR on May 21, 2015, she did so prior to engaging legal counsel, and therefore, her agreement was not valid. I find this argument without merit. The record is devoid of evidence suggesting that the Mother did not agree to meet on May 21, 2015.

b. Request to continue the MDR

The Parents claim that the School's denial of the Parents' request to continue the MDR in order for the IEP Team to hear from the Student's outside providers was a violation of MUSER §XVII.E.1.a-b. The Hearing Request Form, dated June 18, 2015, specifically states that the Parents requested that the IEP Team meeting record be left open to allow them to present "highly relevant material." The Parents allege that the failure to grant the Parents' request to continue the MDR "constitutes a procedural error because the Team made its decision without highly relevant information from three (3) professionals that should have been considered in determining whether the alleged behavior had a direct and substantial relationship to (the Student's) disability." (Hearing Request Form, p. 3).

The record indicates that the Parents were unable to speak with either Ms. Charest or Mr. Dorsky prior to the time of the MDR and did not know their availability for attending. Ms. Hastings, the School's Special Education Director, refused to grant a continuance of the MDR,

stating that that she could not schedule a second day within the required 10-day time period, and that to exceed that period would violate the statute.

I find no procedural violation for refusing to continue the MDR. The request to continue it for an open-ended period of time would frustrate the School's ability to make decisions regarding the Student's disciplinary matter. Also, an open-ended delay may have caused the Student harm by indefinitely delaying a decision regarding a potential change of placement from the xx school. The statute places the responsibility of the School to convene an MDR within the 10-day time frame. The underlying rationale for convening the meeting in an expeditious manner is to gather those who know the student and how that student's predominant behaviors compares with that of the behavior at issue. If the IEP Team believes that there may be a new, undisclosed disability that may be affecting the Student's behavior, an argument can be made that continuing the MDR may not be considered a violation of the regulation. See *Letter to Yuien*, supra. That is not the case here. While there was acknowledgement that evaluations would be performed, it was because the evaluations and FBA that the IEP Team reviewed were from 2013. There is no evidence that the IEP Team believed an undisclosed disability was at play. While Ms. Hastings told the Parents after the MDR that she would consider reopening the MDR after reviewing new evaluations, there was no obligation on the part of the School to hold it open indefinitely.

While the court in *Farrin*, supra, found no error in postponing the MDR for two days beyond the 10-day window, in this case there is no evidence that a continuation would have resulted in a short-term delay. Since the Parents had not yet been in contact with Ms. Charest or Mr. Dorsky by May 26, 2015, it was impossible to schedule a meeting with any certainty of when they could be available. In fact, both Ms. Charest and Mr. Dorsky testified that the Parents contacted them shortly after May 26, 2015 and before the expedited due process hearing.

Even if Ms. Charest and Mr. Dorsky had been able to be present at the MDR, their opinions would have been based upon their knowledge of the Student from at least three months prior to the incident. Neither had seen him since the end of 2014, other than a few times in February 2015. Their knowledge about him was somewhat stale in comparison with the current information known to teachers, the case manager, and a social worker in the School, including

how he was exhibiting behaviors that were a manifestation of his disability. In contrast, the IEP Team based its decision on current information they had about his conduct, including his frequency of documented “incidents.”

It is important to note that the MDR included all the required IEP Team participants: the Parents, Mr. Langlais, xx School Principal; David Martel, regular education teacher; Rob Thompson, special education teacher and case manager; Leigh Lardieri, special education teacher and former case manager; Ryan Hayes, the School’s social worker working with the Student as his school counselor; Jill Hastings, Special Education Director; and the Parents’ attorney. These were the individuals who had the most current information about the Student and his behaviors. The MDR did not require the presence of every outside provider in order to make an informed decision whether his conduct was a manifestation of his behavior. See *D.C. v. Mount Olive Township Bd. of Edu.*, 63 IDELR 78, (D. NJ 2014) (failure to have the student’s behaviorist present at the MDR was not vital to the manifestation determination). In contrast to *Doug C.*, supra, cited by the Parents, there is no evidence that the Parents were unable to personally participate in the MDR.

c. Failure to review Dr. Hamilton’s psychological evaluation

The Parents argue that the IEP Team failed to consider Dr. Hamilton’s psychological evaluation, dated August 19, 2013, cited in the Student’s 2013-2014 IEP. It was the most recent psychological evaluation of the Student. The School acknowledged that this evaluation was not in the Student’s records on the day of the MDR, but could not explain its absence. I find that the failure to review this evaluation was a violation of MUSER §XVII.E.1. The School’s responsibility to review *all* of the relevant information making up the Student’s education record does not cease merely because the School cannot locate the documents. Once it was discovered that the evaluation was missing, the IEP Team should have adjourned to locate it. The fact that Dr. Hamilton’s evaluation was a basis for the development of the Student’s IEP is enough to make a presumption that it should have been part of the MDR process.

2. a. Whether Parents had meaningful participation in the MDR

Based upon the finding that the School did not commit procedural violations by denying the Parents' request to postpone or continue the MDR, I find that the Parents had a meaningful opportunity to participate in the MDR process. They were given extra days to allow their attorney to review the circumstances and prepare any materials they wished to present at the MDR. While the School did not agree to postpone the MDR to May 29, 2015, both parties agreed to hold the meeting on May 26, 2015. Finally, as stated above, the denial of the Parents' request to continue the MDR indefinitely was not unreasonable, given the School's responsibility in deciding with some urgency whether to make a placement change in light of the Student's misconduct.

2. b. Whether the failure to review Dr. Hamilton's evaluation caused the IEP Team to incorrectly conclude that the Student's conduct in question was not a manifestation of his disability.

Despite the fact that Dr. Hamilton's evaluation was not in the Student's record, the question is whether a review of it would have led to a different decision on the part of the IEP Team. I find that it would not have made a difference, and therefore the procedural violation is rendered harmless. See *Farrin*, supra (where relevant test results, if considered in a MDR, would not have been given any weight by the IEP team. The exclusion of the test results was rendered harmless.)

Dr. Hamilton's report is a comprehensive review of the Student's diagnosis as it existed in 2013. In particular, he emphasized that the Student's "most prominent issue is his extreme lack of control regarding handling angry feelings." He explained that when the Student is provoked he becomes irrational and acts as if he has been assaulted by someone and is fighting back. His sub-scores for inhibitory control and emotional regulation were in the "Well Below Average" range, suggesting that he had poor ability to control behavior or impulses, including thinking about consequences before acting, and maintaining self-control. In summary, Dr. Hamilton explained that the Student had poor self-control and management of emotions, including difficulty staying calm when handling small problems and reacting with the right level of emotion. He had difficulty waiting patiently, responding calmly, and managing stress without

getting emotional. He emphasized that, “When he is angry (the Student’s) whole perceptual field changes. He becomes irrational and acts as if he has been assaulted by someone and is fighting back. He does not care who gets in his way or is negatively affected by his actions. Clearly, a simple lack of impulse control or a spoiled, entitled child having a tantrum is not a sufficient explanation for his actions.” He noted that the Student can be “out of control and aggressive” for several minutes until the “thinking brain recovers and takes over.”

Given this detailed understanding of Dr. Hamilton’s view of the Student and those of the Student’s teachers, social worker, and case manager, it does not appear that Dr. Hamilton’s evaluation would have had a significant impact on the IEP Team in the MDR. Dr. Hamilton’s opinions correlated with those of the IEP Team, who had the most current day-to-day experience with the Student.

Mr. Thompson, Mr. Hayes, and Ms. Lardieri all described the same types of behaviors exhibited by the Student when he is under stress and agitated. He has a difficult time with emotional regulation; if he’s in an agitated state, he will lash out verbally with scathing remarks. When he becomes physically agitated, he needs to take frequent breaks to walk, run, do push-ups, and breathing exercises. The Student’s behaviors are impulsive reactions to his immediate environment. When someone or something irritates him, his typical reaction is an outburst of anger and negative verbal responses. These behaviors are the same ones that Dr. Hamilton described in his evaluation. I find, therefore, that the failure to provide Dr. Hamilton’s report to the IEP Team during the MDR was not fatal to the MDR process and does not void the IEP Team’s finding that that the Student’s behavior on May 14, 2015 was not a manifestation of his disability.

3. Whether the Student’s conduct on May 14, 2015 was a manifestation of his disability.

The Parents claim that in light of the testimony of Ms. Charest and Mr. Dorsky, it must be found that the Student’s conduct in writing the bomb threat on May 14, 2015 was a manifestation of his disability. I find that their opinions, as stated on the record, are insufficient to warrant a determination that the Student’s conduct was a manifestation of his disability.

Ms. Charest's views of the Student's behavior were informed by her history with him as a therapist and her reliance on Dr. Hamilton's evaluation. She acknowledged that the Student's predominant behaviors were impulsive in nature due to his low executive functioning (e.g., difficulty with emotional regulation and cognitive flexibility.) She noted that generally, a person with ADHD or ODD does not always need a trigger to act impulsively. She opined that the Student could have written the bomb threat due to an underlying event in his life that could have contributed to a buildup of stress and anxiety, such as the recent breakup with his girlfriend, the upcoming anniversary of a violent altercation with his father, or his upcoming transfer to xx school. She also suggested that something could have happened the night before the incident that could have spurred his decision to write the bomb threat. However, Ms. Charest acknowledged that it was just as possible that the behavior was not a manifestation of his disabilities.

Ms. Dorsky's opinion was based upon his knowledge of the Student from a medical perspective. He explained that the Student exhibited his symptoms of emotional dysregulation, including lack of focus, fidgety, and irritability, in February 2015. He stated that the Student's problem in controlling his behavior and exercising poor judgment were due to his ADHD diagnosis and mood disorder. It was his opinion that impulsive actions were not always emotional reactions. He opined that writing a bomb threat is a type of external action in response to an extreme emotion, which he believed was symptomatic of the Student's ADHD and mood disorder. He also acknowledged, however, that engaging in some types of action while in a calm state of mind may indicate that the act was deliberate and thoughtful. He suggested that the Student's motivation could have been based upon an unknown psychiatric condition due to an unknown trauma.

Neither of the opinions of Ms. Charest or Mr. Dorsky provides substantially different information than those of the members of the IEP Team or Dr. Hamilton. They affirm the pattern of impulsive behaviors that the IEP Team discussed at the MDR and Dr. Hamilton described in his report. Both offered only speculative opinions on whether the Student's actual act in writing the bomb threat was a manifestation of his disabilities.

Based upon the record as a whole, I find that that the predominant behaviors exhibited by the Student were impulsive, spontaneous reactions to external provocation, usually from his peers. His history of anger management and difficulty with self-control, while improved over the course of the school year, were his predominant behaviors. School staff were surprised that the Student was the one who had written the bomb threat, because it was out of character with his impulsive, reactive behaviors. His demeanor before and after the incident was calm and collected. The video showing that he stayed in the bathroom for over four minutes, indicating that he took time to draw an almost perfect circle and then write a legible message inside it. He did not rush. He clearly was thinking through his actions as he was doing it. He knew it was an act for which he could be disciplined, since he himself reported that someone had written a bomb threat. I find that this behavior was evidence of pre-planning and deliberation. See *Michigan State Educational Agency*, 45 IDELR 47 (SEA MI, 2005) (where student's act in writing names on bathroom wall with a threat to kill them was considered deliberate, not impulsive, and not a manifestation of his attention deficit disorder, or other disabilities); *Farrin*, supra (where selling marijuana was found not to be an impulsive act commensurate with the Student's learning disability); *Maine Sch. Adm. Dist. No. 59*, 30 IDELR 229 (SEA ME 2003) (ADHD did not impair student's ability to control his behavior on the day he threatened to bring a gun to school and kill classmates. His acts could not be described as impulsive, as they were not the result of a single decision.)

I find that the writing the bomb threat in the bathroom stall door was not a manifestation of the Student's disabilities. There is no evidence that the Student was angry, agitated, or provoked, either before or after he went to the bathroom and wrote the bomb threat. He became agitated only at the end of the school day. He denied having written the threat until Officer Lacombe interviewed him a second time, after coming to the conclusion that he had, in fact, written the threat. It was only then that he admitted his conduct and became emotional.

There is no evidence that the Student had engaged in this type of deliberate conduct during the year. It took forethought, time, and planning. All of the other reported incidents involved impulsive reactions, such verbal insults and defiance.

Based upon the totality of the record, I find that the School did not err in determining that the Student's conduct on May 14, 2015 was not a manifestation of his disabilities.

4. New Issues

MUSER §XVI.13.D states that the party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the due process hearing request filed under Section XVI.6.B., unless the other party agrees otherwise. These provisions also apply to appeals of an MDR determination. MUSER XVII.3.A.

The Parents raise new issues in their brief that were not included in the Hearing Request. They claim that even if the IEP Team determined that the Student's conduct was a manifestation of his disabilities, the School failed to continue his educational services to enable him to continue to participate in the general curriculum while in a different setting, and to progress toward meeting the goals set out in his IEP. Citing MUSER §§XVII.1.C. and XVII.D.1.a. They assert that the offer to provide math and literacy services during his suspension does not comply with the regulation because it does not provide for his continued participation in the general education curriculum. (Parents' brief, pp. 17-18).

The Parents also claim that the School's refusal to have the IEP Team decide whether the School should provide the Student with at-home tutoring, as an alternative option to the provision of educational services at the Dingley Building, was a violation of 20 U.S.C. §1415(k)(2); MUSER §§XVII.1.D.5., XVII.2.

The Parents' Hearing Request form was limited only to the alleged procedural violations of the MDR and whether the record, as a whole, was sufficient to find that the Student's conduct on May 14, 2015 was a manifestation of his Emotional Disturbance. Therefore, I find that the above new issues cannot be considered in this due process proceeding.

VII. CONCLUSION

The Parents have not proved by a preponderance of the evidence that any violations

occurred during the MDR process or that the Student's conduct on May 14, 2015 was a manifestation of his Emotional Disturbance. No compensatory education is warranted.

It is so ORDERED.



Sheila Mayberry, Esq., Hearing Officer

August 14, 2015
Portland, Maine