

STATE OF MAINE  
SPECIAL EDUCATION DUE PROCESS HEARING

Parent )  
 )  
v. )  
 )  
RSU#79/MSAD#1 )  
 )

ORDER

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 Department of Health and Human Services, 30 Skyway Drive, Caribou, Maine on November 8 and 9, 2018. Present and participating throughout the hearing were: Hearing Officer David Webb, Esq.; [REDACTED], Parent; Brent Langley, Parent’s friend/support; Eric Herlan, Esq., counsel to MSAD #1; and Megan Stanley, Director of Special Education, RSU #79/MSAD #1.(“District”).

Witnesses:

[REDACTED] Parent  
Megan Stanley Director of Special Education, MSAD #1  
Denise Bosse Retired Director of Special Education, MSAD #1  
Benjamin Greenlaw Principal, Presque Isle High School  
Tim McCue School Resource Officer, Presque Isle High School  
Brian Carpenter Superintendent of Schools, MSAD #1

I. PROCEDURAL BACKGROUND

On July 19, 2018, the Parent filed a complaint against the District. On July 30, 2018, the District responded to the Parent’s complaint and filed a motion to dismiss. The Parent responded to the motion to dismiss on July 31, 2018. On August 24, 2018, the Hearing Officer granted the District’s motion to dismiss with regard to the Parent’s claims relating to improper bullying response actions under the Maine’s bullying

prevention law. The Hearing Officer denied the District's motion to dismiss with regard to the Parent's claims that the District's response to the bullying allegations amounted to a denial of a FAPE.

On October 29, 2018, a telephonic prehearing conference was held. Documents and witness lists were exchanged in a timely manner. A Prehearing Report and Order was issued by the Hearing Officer on October 30, 2018.

The Parent distributed 58 pages of documents (herein referenced as P-#) and the District distributed 688 pages of documents (herein referenced as S-#) at the prehearing conference and at the hearing, with the agreement of the parties. Following the hearing, both parties requested to keep the hearing record open until November 19, 2018 to allow the parties to prepare and submit closing arguments. Pursuant to post hearing order issued on November 12, 2018, the closing arguments were limited to a maximum of 25 pages, double or 1.5 spaced.

The District submitted an 18-page final argument memorandum and the Parent submitted a 12-page final argument memorandum. The record closed upon receipt of the briefs on November 19, 2018. The parties further agreed that the hearing officer's decision would be due on December 5, 2018.

**II. ISSUES:** Evidence will be taken on the following issues:

1. During the time period between the end of the previous due process hearing and the time when the Student became a home-schooling student, was the Student denied a FAPE?
2. Did the Parent appropriately notify the District and request access to special education and related services from the District during the time that she was home-schooling the Student?
3. If so, did the District take appropriate actions under the IDEA and MUSER to determine whether the Student required additional services based on the concerns raised by the Parent?

4. If the District failed to properly respond to her concerns, was the Student denied a FAPE?
5. If the Student was denied a FAPE with regard to any of the above, what is the appropriate remedy under the IDEA and MUSER?
6. Did the Parent refuse to participate in efforts by the District to address the Student's disability and if so did such refusal constitute parental "obstructionism" thereby reducing the remedy available to the Student under IDEA or MUSER?

### III. FINDINGS OF FACT

1. The Student is 14 years old (born [REDACTED]) and resides with his mother (Parent) in Presque Isle, Maine. The Student's mother has sole parental rights with regard to educational decision making for the Student, pursuant to an Order issued by the Maine District Court, Presque Isle on March 22, 2018. [S-450; Parent testimony].<sup>1</sup>
2. The Student has been determined to be eligible for special education instruction and related services with multiple disabilities including Other Health Impairment (ADHD) and Specific Learning Disability ("SLD"). [S-300].
3. The Parent previously filed a due process hearing (*Parent v. RSU 79 #17.088*) on June 26, 2017 and a hearing decision in the previous matter was issued on January 8, 2018. [S-63].
4. In *Parent v. RSU 79 #17.088*, the Hearing Officer Sheila Mayberry issued an order on January 8, 2018 that while programming for the Student was inadequate between the fall of 2016 and February 2017, programming after that time was appropriate. Specifically, Hearing Officer Mayberry held that the Student made "reasonable progress after 1:1 programming and other changes were made to his programming after February 8, 2017." [S-116-117]. The Hearing Officer also found that the goals in the Student's IEP were appropriate after February, 2017.
5. While the District offered programming to the Student, the Parent kept the Student out of school since June 13, 2017 and for the 2017-2018 school year.

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<sup>1</sup> The Student's father, [REDACTED], did not participate in this hearing.

[S-97; Bosse testimony]. Prior to the issuance of the hearing decision in *Parent v. RSU #79*, the Parent and the District reached an informal agreement to allow the Parent to provide the Student's educational program at home, and the District would not pursue a truancy claim against the Parent, even though the Student was not on formal home-schooling status. [Bosse testimony]. As part of this agreement, the District provided the Parent with the Student's classroom materials so that the Parent could work with the Student at home pending the outcome of the Hearing Officer's decision. [Bosse testimony].

6. As of March 13, 2018 the Student has been on home schooling status. [Parent testimony, S-434].
7. On May 1, 2018, The Department of Education noted in a letter to the District's superintendent that the District was in substantial compliance with the hearing officer's decision. [S-476].
8. The Parent told Denise Bosse that she was keeping the Student out of school because she was not pleased with the reading program that the District proposed for the Student. [Bosse testimony]. The Parent did not inform Ms. Bosse that she was keeping the Student at home due to concerns about bullying. [Bosse testimony].
9. In a psychological evaluation of the Student prepared by William O'Connell, M.A., P.C dated January 24, 2017, the Student informed the examiner that "...he very much enjoys school...interpersonally gets along well at school as he is not bullied." [S-36]. In this report, the Student's parents reported that the Student has several friends that he frequently sees outside of school and that he "gets along averagely well with his peers and parents" [S-35]. Mr. O'Connell's report does not mention any concerns about bullying. [S-33].
10. Mr. O'Connell ruled out a diagnosis of Emotional Disturbance, however he noted that the Student "may evidence a medical diagnosis of anxiety" and recommended further assessment by a medical provider. (S-45).
11. A psychological evaluation of the Student was conducted by Susan Jarmuz-Smith, Pys.D in February, April and May, 2017. [S-48]. In her report dated June 7, 2017, Dr. Jarmuz-Smith noted that the Student was referred by the

Parent to “assess his cognitive, academic and social-emotional functioning...” to determine supports for the Student to access his education. [S-48].

12. Dr. Jarmuz-Smith also noted in her report that the Parent reported that the Student had “good friends at school with minimal apparent behavioral concerns.” [S-50]. There is no mention in this report that the Parent or the Student’s teacher had concerns about bullying. [S-48-S-62].
13. On January 10, 2018, Denise Bosse sent an e-mail to the Parent in order to set up the training and tutoring required by Hearing Officer Mayberry’s January 8, 2018 order. [S-136]. Ms. Bosse also inquired about the Parent’s intent regarding the Student returning to Presque Isle Middle School or whether she intended to home-school the Student.
14. In an e-mail dated January 11, 2018, the Parent responded to Denise Bosse’s e-mail and stated: “I want [the Student] to be an MSAD 1 student but not physically have to attend your school because of the way you treated me which has definitely had an adverse effect on his education.” [S-136].
15. In an e-mail to Denise Bosse dated January 12, 2018, the Parent asked if the Student’s educational programming could be provided at an “alternate location” as she and the Student “feel extremely [un]comfortable [sic] coming to any of the schools because of this Due Process hearing.”
16. In an e-mail dated January 16, 2018, the Parent notified Superintendent Brian Carpenter that the Student had received a hostile text message from another student, which the Parent characterized as bullying. [S-141].<sup>2</sup>

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<sup>2</sup> The text messages related to the Parent’s bullying allegations, which are undated, are between the Student and another student (“[REDACTED]”) as follows:

The Student: Why you talk s\*\*\* to me on Xbox? Oh you talk s\*\*\* to me cuz you with all your friends

[REDACTED]: Shut the f\*\* up

The Student: you just talk show [sic] on Xbox-s\*\*\*

[REDACTED]: Oh really-Couldn’t tell-I’m gonna stop talking to u I might get aids

The Student: cuz you’re a p\*\*\*\*

[REDACTED]: U be talking s\*\*\* u little f\*\*

The Student: Now you’re trying to be nice to me now

[REDACTED]: Oh ya definitely

The Student: Breaking call you a leprechaun

[REDACTED]: Bitchy shut the f\*\* up

The Student: That looks like you (referencing a small bear emoji with the word f\*\*\*)

17. In an e-mail dated January 16, 2018, Denise Bosse denied the Parent's request for an out-of-school program. [S-150]. Ms. Bosse offered to convene an IEP team meeting to consider the Parent's request to change the Student's placement

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█: Oh really

The Student: why do you just keep saying oh really

█: because you are f\*\*\*ing autism

The Student: what's autism?

█: U

The Student: I know it's you, you don't have to tell me-that's right you better stop talking

█: Dude shut up

The Student: Don't call me dude-I'm your daddy

█: that's kind of gay

The Student: yeah that's gay in your mind

█: I would hope it's gay in urs to

The Student: not that means like I own you

█: Umm that's incorrect

The Student: sorry my autistic kicked in-why did breygan call you a leprechaun

█: Bc I get p\*\*\*\*

The Student: I didn't know leprechauns get p\*\*\*\*-your small as a p\*\*\*\*-you ever seen one before?

█: Oh

The Student: what took you so long to type

█: bc I have autism

The Student: see you just keep saying oh you have nothing to say-see you not going to respond like a little b\*\*\*\*

█: why u censored it-scared mommy's gonna find out-I'll beat u in nhl 18-u wanna play nhl 18-Rn-One on one-I'll beat you

The Student: you're a p\*\*\*\* I'm not playing with you.

█: Ur scared

The Student: How did you know

█: Ur the p\*\*\*\* won't play me I thought you weren't scared

The Student: I guess I'm a p\*\*\*\* cuz I won't play you in NHL

█: (emoji of hand holding up middle finger)

The Student: F\*\*\* you too

█: lol

The Student: I want now this is a joke-I'm not playing

█: U want what now

The Student: what do you want

█: Nothing from u

The Student: then why did you add me on Snapchat???

█: bc u were on quick add dumb f\*\*\*

The Student: why did you still add me-Cuz you know I f\*\*\*\*\* hate you

█: oh its fine I can im add u Un\*

The Student: Good on add me

█: OK but before I go. I f\*\*\*\*\* your mother

The Student: that's not going to hurt my feelings same I'm about to f\*\*\* your mom tomorrow

to an “out of school model” but warned that “such a change would be very restrictive” and would “run counter to what the hearing officer just concluded.” [S-150].

18. In an e-mail dated January 18, 2018, Denise Bosse informed the Parents that to avoid a truancy action, they needed to either return the student to school or request home-schooling status. [S-168]. Ms. Bosse noted that the Parents could request an IEP team meeting to discuss placement options. [S-168].<sup>3</sup>
19. In an e-mail dated January 16, 2018, Superintendent Brian Carpenter responded to the Parent’s bullying concerns stating that he was forwarding this matter to Tim McCue to address in accordance with the District’s bullying policy. [S-153]. Mr. Carpenter also mentioned in this e mail that Diane Bosse would be addressing the special education issues with the Student. [S-153].
20. The Parent wrote a letter to the District on January 19, 2018 and requested that the District permit her to educate the Student at home, referring to a “restricted home-schooling program”. [S-289; Bosse testimony].
21. In an e-mail to Denise Bosse dated January 22, 2018, the Parent requested that the Student’s disability be changed back to Specific Learning Disability instead of Multiple Disabilities. [S-182]. Denise Bosse responded to the Parent on January 22, 2018 and offered to set up an IEP team meeting to discuss the request. [S-202].
22. In an e-mail sent by the Parent to Denise Bosse on January 22, 2018, the Parent said that she would not be speaking at the IEP team meeting and asked that the following statement be read at the meeting:

The team can be aware of my stance and I realize it's not just what I want or feel is right. My stance is, "[The Student's] Educational Records from first grade to current [sic] talk of attention issues, however it does not state that his ADHD has had or currently has an adverse effect of his education." I will take it one more step further, "If it had, then grades 1-6 grades are missing functional performance goals." Then one more step for 7 grade, "if his ADHD did have such a significant, profound, adverse effect on his education do you feel as educators that having him go stand

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<sup>3</sup> At the time of this e-mail correspondence, communication was made to the Student’s mother and father, as both Parents had equal parenting rights regarding educational decision making.

in a corner to do activities is an appropriate goal to justify putting a student under a multiple disabilities category." [S-207].

23. On January 23, 2018, Denise Bosse arranged a team meeting for January 30, 2018, which was confirmed by the Parent in a responsive e mail. [S- 234].
24. In an e-mail from the Parent to Denise Bosse dated January 25, 2018, the Parent requested that the District record the January 30 IEP team meeting and send a copy of the recording to her. [S-268].
25. Brent Langley, a friend of the Parent, wrote to Ms. Bosse on behalf of the Parent on January 29, 2018 to request that the IEP team address placement issues, noting that since [the Student] has been in the home setting, "they have seen a great improvement in [the Student's] self-esteem and he is in a safe place for his anxiety which is almost non-existent during his instruction time at home." [S-287].
26. On January 30, 2018, an IEP team meeting was held. [S-294]. The Parent did not attend this meeting, however Ms. Bosse read the Parent's written statement at the meeting which was recorded for the Parent to review at a later time. [S-296, Bosse testimony]. The team addressed the Parent's concerns about the Student returning to PIMS and discussed different placement options, including home schooling and placement in the district where the father resided in Washburn. [S-297; Bosse testimony].
27. At the January 30, 2018 IEP team meeting, the team determined that the Student "will continue to receive Special Education Services as a child with Multiple Disabilities: SLD (which includes Orthographic and Phonologic Dyslexia) and OHI (which Includes ADHD)." The team further determined that the Student would no longer take the Alternate Assessment, and that the Parents could enroll the Student in homeschooling or transfer to a different district if they didn't want the Student to return to Presque Isle Middle School. [S-295]. The Written Notice provided that the Parents were to report their placement decision to the District by February 5, 2018. [S-297].

28. The team determined that the Student's mother would have three days after the meeting to express her concerns which would then be added to the Written Notice. [S-296].
29. On February 1, 2018, Emalee Drost, the District's Special Education Assistant, sent an e-mail to the Parent regarding the commencement of the tutoring for the Student pursuant to Hearing Officer Mayberry's January 8, 2018 order. [S-333].
30. On February 4, 2018, the Parent sent an e-mail to Superintendent Carpenter stating that the Student was physically assaulted by another student on February 3, 2018. [S-346]. The Parent sent several photographs showing some scratches on the Student's hand and noted in the e mail that the assault happened "during a scheduled time to get [the Student] use [sic] to the idea of returning to your school district by hanging out with his old friends." [S-346]. In her e-mail, the Parent asked the Superintendent to "not continue to pursue truancy until you have properly completed an investigation and have a safety plan in place." [S-346].
31. On February 7, 2018, the Parent wrote to Emalee Drost noting that the Student would not be attending tutoring that day "because he is nauseous aka anxiety." [S-371; Bosse testimony]. The Parent referenced a 2013 medical report from Dr. Flynn indicating that the Student "has/shows signs of anxiety...but nothing is getting done for him." [S-371].
32. On February 8, 2018, Ms. Bosse wrote to the Parent stating:

"if you are asking me to address the issue of anxiety through special education, we would need to order evaluations of the anxiety and then have the team consider whether it is impacting school...I know you believe it is, and that is important. But we did not see it when he last attended.... [S-393].
33. In a subsequent e-mail sent on February 8, 2018 by Ms. Bosse to both of the Student's parents, she stated:

[The Student's mother] has raised a concern that [the Student] may have anxiety that prevents him from accessing the compensatory tutoring ordered by the hearing officer. The reports she references don't appear to me to justify that conclusion. But if either of you have a current medical

report that recommends that the Student not participate in this tutoring, please let me know and pass on a copy of the report for me to consider. But please, it has to be something current and it has to address directly his ability to participate in the tutoring we have scheduled. [S-394].

34. Neither parent responded to the District's offer to consider current evaluations or to evaluate the Student based on his anxiety concerns. [Bosse testimony].
35. The Student only attended one tutoring session on February 6, 2018. [S-413, 414].
36. On February 15, 2018, Denise Bosse wrote to the Student's parents to inform them that the District would be suspending tutoring and the other remedies ordered by Hearing Officer Mayberry until such time as the parents make the Student "available to access said remedies." [S-417].
37. The bullying/assault allegation was referred by the Superintendent to Tim McCue for investigation. [Bosse testimony].
38. Tim McCue, the District's School Resource officer, is a 25-year veteran of the Presque Isle Police Department. [McCue testimony]. Mr. McCue testified that one of his duties is to investigate bullying complaints. [McCue testimony]. Mr. McCue was asked to investigate the Parent's bullying allegations with regard to the text messages and the physical altercation in early February. [McCue testimony]. Mr. McCue testified that when he investigates bullying, he is looking for a "pattern of behavior or a shocking act that will "impact a child's life." [McCue testimony].
39. Mr. McCue testified that he received the Parent's phone number from the Special Education office and attempted to contact her on a number occasions in the two-week period after he received the complaint, without success. [McCue testimony]. Mr. McCue testified that he was able to make contact with the other student involved in the physical altercation and that student's family.
40. On March 1, 2018, Tim McCue wrote a report to Denise Bosse concerning his investigation of the alleged bullying incident on February 3, 2018. [S-425]. In his report, Mr. McCue noted that with regard to the physical altercation, the Student and one of his friends got into a disagreement while they were in the vehicle of one of the Student's friend's parents. [McCue testimony; S-665 to

- 666]. Mr. McCue concluded that the physical altercation between the Student and the other student was not bullying as it was a one-time incident between two friends in a parent's car, and the situation escalated and then was over.
41. Mr. McCue reviewed the text messages between the Student and the other student involved with the texting ("█.") and concluded that it was crude dialogue by both parties and that it was unclear how it pertained to the Student. [McCue testimony].
  42. On March 13, 2018, the Parent filed a Notice of Intent to Homeschool the Student. [S-434]. Since the Parent filed this home school request, she has not made any requests to enroll or to access special education and related services for the Student within the District. [Bosse testimony].
  43. In an e-mail to Brian Carpenter, Megan Stanley and Tim McCue dated August 8, 2018, the Parent requested an "official investigation regarding the bullying, sexual harassment and disability harassment my child...faced." [S-618]. The Parent noted in this e-mail that the previous investigation was "not thorough considering the compliance officer did not contact us regarding the investigation."
  44. Ben Greenlaw, the Principal of Presque Isle High School, testified that he was asked by Superintendent Carpenter to reinvestigate the Parent's bullying claims after the Parent sent her August 8, 2018 e-mail. [Greenlaw testimony].
  45. In Mr. Greenlaw's September 25, 2018 investigation report, Mr. Greenlaw noted:

I have made numerous attempts via phone calls and emails to meet with Ms. █ to address these claims. My last contact with Ms. █ was on September 4, 2018. In that email, Ms. █ said that she would not discuss the issue with me because [the Student] will not be attending PIHS this year as well as the fact that this case was "still in court". Because Ms. █ refused to speak with me (or allow me to speak with her son), I was unable to gain any further insight into her allegations that [the Student] was bullied. [S-664].

#### **IV. SUMMARY OF THE PARTIES' ARGUMENTS**

##### **Brief summary of the position of the Parent**

At the conclusion of the due process hearing *Parent v. RSU 79 #17.088*, the Parent and the District worked out an agreement whereby the Student did not have to physically attend school but he would be receiving work from the school to be completed at home and returned to the school for grading. This programming was appropriate and the Student was making progress. The District breached this agreement by abruptly stopping this arrangement after the Hearing Officer rendered her decision on January 8, 2018. As a result, the Student received no educational programming from the District between the time of the Hearing Officer's decision and the time the Student became officially home-schooled on March 13, 2018.

The Parent further alleges that the District failed to appropriately respond to her bullying and anxiety concerns, and that the initial bullying allegation was not addressed at the January 30, 2018 IEP team meeting held shortly after the bullying event on January 16, 2018. The District's failure to appropriately respond contributed to the Student's refusal to attend school based upon his emotional response to the bullying and safety concerns, thereby resulting in a denial of a FAPE for the Student.

The Student was being educated at home, in part, due to the Student's anxiety which wasn't being addressed by the District. Additionally, the Student was being educated at home because of the bullying allegations which the District did not take seriously. Even prior to the bullying incidents in January and February, 2018, the Parent raised anxiety concerns with respect to the Student in her communication with the District. These concerns were not appropriately considered by the District.

As a result, the Student was denied a FAPE during the time period between the end of the previous due process hearing and the time when the Student became a home-schooling student.

### **Brief summary of the position of the District**

The Parent's argument that the Student is in a home-schooling program only because of bullying anxiety is without merit. As evidence thereof, she has not permitted the Student to attend school at all during the 2017-2018 school year, prior to any allegations regarding the bullying issue.

Ms. Bosse testified that the Parent informed her many times that the reason the Student was not going to school was because of the Parent's belief that his reading program was inadequate and that he could be better educated at home. The evaluation of William O'Connell in January, 2017 reported that the Student enjoys school, gets along well with other students, and "is not bullied." The evaluation of Dr. Jarmuz-Smith made no mention at all of bullying or of the Student being unable to attend school.

Hearing Officer Mayberry's January 8, 2018 order held that the District was making appropriate programming available to the Student at the time he stopped attending school in June, 2017. She concluded that the programming was reasonable from February 2017 and that the goals followed Maine's Learning Results and were appropriate. To the extent that she found a FAPE violation, that violation ran only up until February 8, 2017, at which point the District was properly implementing a beneficial IEP.

When the Parent raised the bullying allegations, the District responded immediately to the Parent. The Superintendent notified her that the allegations would be reviewed through the District's bullying process and that special education would address any issues that might need further consideration. Ms. Bosse wrote to her offering an IEP team meeting to address the placement issues being raised.

At the IEP team meeting on January 30, 2018 the team discussed the Student's nonattendance and a variety of placement possibilities. In a February 7, 2018 e-mail, Ms. Bosse offered to evaluate the anxiety issue, and in a second email on February 8, 2018 she stated she could also receive current documentation from the family on anxiety. The Parent failed to respond to the District with documentation of anxiety, the offer to evaluate, or the alternative placement offer.

Additionally, the Parent did not participate in the bullying investigation undertaken by Mr. McCue, which led to a bullying report dated March 1, 2018. Both investigators concluded that this was not bullying and instead was fairly typical middle school tussling between boys.

The incidents themselves do not arise to a level of bullying and were insufficiently serious to generate a level of anxiety that would keep a student out of school. The Parent offered no professional opinion on the Student's level of anxiety or its relationship to bullying or school attendance. Additionally, the Parent has failed to show that the District's responses were inadequate in these circumstances under any of the legal tests that would apply.

Even if the hearing officer concludes otherwise, there was no denial of FAPE. In part this is because the Student is not entitled to a FAPE while home schooled. MUSER IV.4(H) (2017). It is also because the District offered the Parent an appropriate IEP for the Student, and the Parent failed to present evidence against that IEP. Finally, because the Parent kept her son out of school, the District could not implement the document and cannot be faulted for the decision by the Parent to keep her son out of school.

First Circuit Court of Appeals has ruled that parents may be denied a remedy when their own behavior has the effect of preventing the school unit from meeting duties clearly established under the law. The District ultimately held IEP meetings on January 30 and September 13, 2018 to address the Parent's placement concerns, however the Parent failed to attend either. At two separate times the District offered to evaluate the

alleged anxiety that the Student may have had, and the Parent responded only to the first offer, saying she would get back to Ms. Bosse on it, however she never responded to this offer or to the offer that she bring in reports on the anxiety. The Parent also failed to respond to the District's offer of alternative placements, made at the January 30, 2018 team meeting. She kept insisting on an educational approach that was essentially illegal, but ultimately enrolled in home schooling when ordered by a court in a family law proceeding.

## **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 on all issues except for the parental obstruction claim. As the District is seeking relief with regard to the obstruction claim, the District bears the burden of persuasion on this issue.

### **B. Discussion.**

**I. The Student was not denied a FAPE during the time period between the end of the previous due process hearing and the time when the Student became a home-schooling student.**

**II. The Parent appropriately notified the District to request access to special education and related services prior to the time that she was home-schooling the Student, however, the Student was not denied a FAPE.**

**III, IV, V. Although the District made a de minimis procedural error under the IDEA and MUSER to determine whether the Student required additional services based on the concerns raised by the Parent, the Student was not denied a FAPE.**

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 (1<sup>st</sup> 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." *Andrew F. v. Douglas County School District RE-1*, 2017 WL 1066260 (Mar. 22, 2017).

Schools must also provide programming to eligible students in the Least Restrictive Environment (LRE). This 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 (1<sup>st</sup> 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.

In *Parent v. RSU 79 #17.088*, Hearing Officer Sheila Mayberry issued an order on January 8, 2018 that specifically held that programming for the Student was appropriate after February 8, 2017. [S-131]. The Parent, however, kept the Student out of school since June 13, 2017. [S-97]. Accordingly, the issue under consideration in the present case is whether the District's actions *after presentation of the bullying allegations and before the Student was enrolled as a home-schooling student* had the effect of denying the Student a FAPE.

Under the *Andrew F.* standard, "the adequacy of a given IEP turns on the unique circumstances of the child for whom it was created." *Id.* In *T.K. and S.K. v. New York City Department of Education*, 116 LRP 2393; 810 F.3d 869 (2016) the Second Circuit Court of Appeals held that a New York school district's refusal to discuss bullying during the student's IEP meetings amounted to a procedural denial of FAPE.<sup>4</sup> In *T.K.*, the court noted:

[The student L.K.]’s schoolmates bullied her so severely that she came home crying and complained to her parents about the bullying on a near daily basis. Her... three Special Education Itinerant Teachers (SEIT)’s testified that her

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<sup>4</sup> In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies--

- (a) Impeded the child's right to a FAPE;
- (b) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or
- (c) Caused a deprivation of educational benefit.

classmates constantly bullied her. One SEIT even described the classroom as a "hostile environment" for L.K. A neuro-developmental pediatrician found that the "minimal interactions" L.K. had with her classmates "were mostly negative."

The undisputed record evidence confirms that, in asking to speak with the officials about the bullying, L.K.'s parents had reason to believe that the bullying would interfere with L.K.'s ability to receive meaningful educational benefits and could prevent L.K.'s public education from producing "progress, not regression." ...For example, one of L.K.'s SEITs reported that bullying negatively affected L.K.'s "ability to initiate, concentrate, attend and stay on task with her homework assignments and activities after school." ... There was also undisputed evidence that L.K. dreaded going to school, counted the days until the end of school, and was frequently tardy, arguably due to her fear of being bullied. ... her father described L.K. as "emotionally unavailable to learn" and testified that she came home crying and complained about bullying on a near daily basis. Three of L.K.'s SEITs confirmed that she was constantly teased, excluded from groups, and subjected to a hostile environment. A doctor familiar with L.K. testified that her classroom behavior and demeanor had regressed from the prior year... The Department's persistent refusal to discuss L.K.'s bullying at important junctures in the development of her IEP "significantly impede[d]" Plaintiffs' right to participate in the development of L.K.'s IEP.

*T.K. and S.K. v. New York City Department of Education*, 116 LRP 2393; 810 F.3d 869 (2016).

In *M.L. v. FEDERAL WAY SCHOOL DISTRICT*; 105 LRP 13966, 394 F.3d 634 U.S. Court of Appeals, Ninth Circuit (2005), a Parent claimed that her child ("M.L.") was denied a FAPE because the school district ("FWSD") failed to take action to prevent other students from teasing her. The Parents/Appellants argued that FWSD was deliberately indifferent to the Parents' reports that their child was being teased, and that the teasing resulted in a denial of a FAPE. The *Federal Way* court held that:

...under the IDEA, a disabled child is guaranteed a FAPE, 20 U.S.C. § 1412(1), which "provide[s] educational benefit to the handicapped child." *Gregory K.*, 811 F.2d at 1314 (quoting *Rowley*, 458 U.S. at 201, 102 S.Ct. 3034) (emphasis added). If a teacher is deliberately indifferent to teasing of a disabled child and the abuse is so severe that the child can derive no benefit from the services that he or she is offered by the school district, the child has been denied a FAPE. *Cf. Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 633, 119 S.Ct. 1661, 143 L.Ed.2d 839 (1999)

105 LRP 13966, 394 F.3d 634.

In *Shore Regional High School Board of Education v. P.S.*, 381 F.3d 194 (3rd Cir. 2004), the Third Circuit Court of Appeals overturned a District Court’s finding and held that a student, eligible for special education on the basis of emotional disturbance, was not sufficiently free from the threat of harassment, thereby resulting in a denial of a FAPE. In *Shore*, the court noted:

[The Student] was the victim of relentless physical and verbal harassment as well as social isolation by his classmates...the student’s psychiatrist diagnosed him with depression... In eighth grade, the harassment became so intense that P.S. attempted suicide...[along with witnesses that testified] that placement at Shore would have exposed P.S. to a continuation of the devastating bullying that had occurred in Middle School . The District Court did not point to any "non-testimonial evidence" that undermined the testimony of these witnesses. See S.H., 336 F.3d at 271.

Accordingly, in order to constitute a denial of a FAPE, the Parent bears the burden to show that the bullying of the Student is at a level of severity that interferes with his ability to receive meaningful educational benefit. In the present case, the Parent has not met her burden to prove that the level of bullying of the Student interfered with his ability to receive meaningful educational benefit.

First, the Parent produced no historical record of the Student’s suffering from bullying. In a January 24, 2017 psychological evaluation of the Student prepared by William O’Connell, Student informed the examiner that “...he very much enjoys school...interpersonally gets along well at school as he is not bullied.” [S-36]. In this report, the Student’s parents reported that the Student has several friends that he frequently sees outside of school and that he “gets along averagely well with his peers and parents” [S-35]. Mr. O’Connell’s report does not mention any concerns about bullying. [S-33].

Susan Jarmuz-Smith, Pys.D. Jarmuz-Smith also noted in her report that the Parent reported that the Student had “good friends at school with minimal apparent behavioral concerns.” [S-50]. There is no mention in this report that the Parent or the Student’s teacher had concerns about bullying. [S-48-S-62].

With regard to the Parent’s initial bullying claim, she relies on a series of text messages between the Student and another student “[REDACTED]” [S-348-357]. While the

Parent alleges that the Student is being bullied, the text messages related to this allegation suggest that the Student in fact initiated the disparaging comment by referring to the other student as a “p\*\*\*\*” and equally participated with rude comments with the other student.

Additionally, the investigation of the February 3, 2018 incident revealed that no bullying occurred, but instead was a physical altercation that escalated between the Student and one of his friends. [S-430]. This finding was confirmed in a follow up investigation performed by the District at the Parent’s request in August and September, 2018. [S-664].

Mr. McCue and Mr. Greenlaw, both of whom performed investigations of these incidents, testified that despite repeated attempts, the Parent failed or refused to communicate with them about these incidents. I find that the Parent failed to credibly explain her failure to participate in these investigations. Furthermore, I find that the Parent’s lack of cooperation with regard to these investigations contradicts her allegations regarding the seriousness of these alleged bullying events.

In an e-mail to Denise Bosse dated January 22, 2018, the Parent requested that the Student’s disability be changed back to a Specific Learning Disability instead of Multiple Disabilities. [S-182]. Denise Bosse responded to the Parent later in the day on January 22, 2018 and offered to set up an IEP team meeting to discuss the request. [S-202].

In the Parent’s January 22, 2018 e-mail to Denise Bosse, the Parent said that she would not be speaking at the IEP team meeting and asked that Ms. Bosse read a statement at the meeting which addressed her request to have the Student’s disability be changed back to Specific Learning Disability instead of Multiple Disabilities. Brett Langley, a friend of the Parent, wrote to Ms. Bosse on behalf of the Parent on January 29, 2018 to request that the IEP team address placement issues, noting that since the Student has been in the home setting, they have seen “a great improvement in [the Student’s] self-esteem and he is in a safe place for his anxiety which is almost non-existent during his instruction time at home.” [S-287].

The Parent did not attend the January 30, 2018 IEP team meeting. [S-296]. The team addressed a number of the Parent’s concerns including a review of the Student’s handicapping condition and whether the Student could participate in an “alternative assessment.” [S-297; Bosse testimony]. The January 30, 2018 Written Notice states that

the Parent “has lost trust in” and “feels she has not been treated fairly by school personnel” and that the Student “does not want to come back to PIMS.” [S-297].

The District also addressed the placement issue at the IEP team meeting, discussing home schooling and a possible placement in the district where the father resided in Washburn. The District did not, however, discuss or address the bullying/anxiety allegations that the Parent had made on January 16 and January 28, 2018. As a result of its failure to address these parental concerns, the District committed a *de minimis* procedural violation.<sup>5</sup>

This procedural violation did not, however, impede the Student’s right to a FAPE or cause a deprivation of the Student’s educational benefit insofar as the District offered to evaluate/consider parent evaluations regarding the student’s anxiety on February 8, 2018. [S-393, S-394].<sup>6</sup>

On February 4, 2018, the Parent sent an e-mail to Superintendent Carpenter regarding an alleged physical assault on the Student by another student on February 3, 2018. [S-346]. On February 7, 2018, the Parent sent an e-mail to the District’s Special Education Assistant, Emalee Drost, noting that the Student would not be attending tutoring that day “because he is nauseous aka anxiety.” [S-371; Bosse testimony].

On February 8, 2018, Ms. Bosse wrote to the Parent offering to provide an evaluation for any alleged anxiety and also offered to consider any current evaluations that the parents had with regard to the Student’s anxiety as it relates to his inability to participate in his tutoring. [S-394]. The Parent did not respond to Ms. Bosse’s offer. [Bosse testimony].

As the Student has been enrolled in a home instruction program since March 13, 2018, without any request to enroll in or to access special education and related services, he does not have an individual right to receive some or all of the special education and related services that he would receive if enrolled in a public school. *See*, MUSER IV.4.H.

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<sup>5</sup> *See T.K. and S.K. v. New York City Department of Education*, 116 LRP 2393; 810 F.3d 869 (2016) (a New York school district’s refusal to discuss bullying during the student’s IEP meetings amounted to a procedural denial of FAPE.)

<sup>6</sup> This finding is further supported by Parent’s failure to meet her burden that the alleged bullying incidents were sufficiently serious to generate a level of anxiety that would keep the Student out of school or that the incidents caused a deprivation of educational benefit for the Student. *See*, MUSER §XVI.15.

**VI. Since the Student was not denied a FAPE and the Parent is not awarded any remedy herein, the District’s “parental obstructionism” claim is moot.**

Under the “parental obstructionism” doctrine, parents may be denied a remedy when their own behavior has the effect of preventing the school unit from meeting its duties. *See C.G. and B.S. v. Five Town Community School District*, 513 F.3d 279, 288 (1st Cir. 2008); *Lessard v. Wilton —Lyndeborough Cooperative School District*, 518 F.3d 18, 26-27 (1st Cir. 2008). Since the Student was not denied a FAPE and the Parent is not awarded any remedy herein, the District’s “parental obstructionism” claim is moot.

**ORDER**

After consideration of the evidence presented during this due process hearing,

**It is hereby ORDERED that:**

1. The Student’s IEP and placement from the end of the previous due process hearing and the time when the Student became a home-schooling student was reasonably calculated to provide him with a FAPE in the least restrictive environment.
2. Although the District made a de minimis procedural error under the IDEA and MUSER to determine whether the Student required additional services based on the concerns raised by the Parent, the Student was not denied a FAPE.
3. Because the District has met its obligations with regard to the above issues, the Parent is not entitled to compensatory or other relief associated with this matter.

SO ORDERED.



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David C. Webb, Esq.  
Hearing Officer

December 5, 2018