

STATE OF MAINE

SPECIAL EDUCATION DUE PROCESS HEARING

March 24, 2020

20.032H— [REDACTED] & [REDACTED] v. RSU #35

REPRESENTING THE PARENTS: Amy Phalon, Esq., Mary Stevens, Esq.

REPRESENTING THE DISTRICT: Isabel Ekman, Esq.

HEARING OFFICER: Shari Broder, Esq.

This hearing was held and this decision issued pursuant to Title 20-A, MRSA §7202

et. seq., and 20 U.S.C. §1415 et. seq., and accompanying regulations. The hearing was held on January 3, 9, 10, 13, 22, 24 and 27, 2020, at the Berwick Town Office, York County District Court in York, ME, and offices of the Drummond Woodsum in Portland, ME. Those present for the entire proceeding were the Mother, the Father, Attorneys Phalon, Stevens, Amy Catlin, Katherine Barber, director of special services, Attorney Ekman, and the undersigned Hearing Officer. Testifying at the hearing were:

The Mother

The Father

Katherine Goodwin

Nicholas Jasinski, Ph.D

Gretchen Timmel, M.Ed

Sarah Camp

Tighe Blackadar

Thomas Grebouski, Ph.D

Rebecca Johnson, MA, CCC-SLP

Peter Ryan

Kara Wisniewski, Ph.D

Katherine Barber

Occupational Therapist, Reach for the Top

Clinical Psychologist

Licensed Educational Psychologist

Guidance Counselor, Marchwood Middle School

Guidance Counselor, Marshwood High School

Certified School Psychologist

Speech & Language Pathologist, RSU #35

Math Teacher, Marshwood Middle School

School Psychologist

Director of Special Services

All testimony was taken under oath.

**I. PROCEDURAL BACKGROUND:**

On October 23, 2019, the Maine Department of Education received the Parents' hearing request on behalf of their [REDACTED] ("Student"). On November 14, 2019, the parties participated in a scheduling conference, followed by a prehearing conference held by telephone on November 25, 2019.

Participating in the prehearing conference were: Amy Phalon, Esq., Isabel Ekman, Esq., Katherine Barber, director of special services; and Shari Broder, Hearing Officer.

On November 19, 2019, RSU #35 (also referred to as "the District") moved to dismiss the due process hearing without prejudice unless the Parents agreed to provide consent to release educational and mental health records relevant to the issues in the hearing request. The District had difficulty obtaining numerous relevant documents from the Student's out-of-state health care providers and experts, specifically from Amita Hospital in Illinois and Dr. Margaret Bauman, one of the Parents' expert witnesses who is located in Massachusetts. Despite the District's legitimate concerns about the failure of these out-of-state providers to produce all of the requested records, I had no ability to require production of the documents from out-of-state entities. In the Prehearing Order dated November 25, 2019, I ordered the Parents to sign the District's authorizations to release records for the entities in question. Because of the difficulty obtaining important documents for this hearing, I also extended the hearing dates over objection from the District. The District moved to reconsider this decision and filed a second Motion to Dismiss on December 13, 2019, due to the continued failure of some of the Student's medical providers to produce complete medical records. I addressed these issues in my Order on District's Second Motion to Dismiss dated December 20, 2019.

For hearing, the Parents submitted approximately 1160 pages of exhibits (herein referenced as P-#), and the District submitted approximately 1550 pages of exhibits (herein referenced as S, SA, SB, SC-#, etc.).

As noted above, the hearing took place over the course of seven days. Both parties requested to keep the hearing record open until March 2, 2020 to allow the parties to prepare and submit post-hearing memoranda. The District submitted a 50-page closing argument and the Parents submitted a 48-page closing argument. Reply briefs were due from both parties on March 9, 2020 and limited to 10 pages in length. Upon receipt of reply briefs, the record closed. The parties further agreed that the Hearing Officer's decision would be due on March 24, 2020.

## **II. ISSUES:**

1. Did the District violate its child find obligation by failing to evaluate and identify the Student under the Individuals with Disabilities Education Act (IDEA) between October 23, 2017 and May 9, 2019?
2. If the Hearing Officer concludes that the District violated its child find obligations with respect to the Student, did the District fail to provide the Student with a free appropriate public education (FAPE) in the least restrictive environment between October 23, 2017 and the end of ■ seventh grade year?
3. If the Hearing Officer concludes that the District violated its child find obligations with respect to the Student, did the District fail to provide the Student with FAPE in the least restrictive environment during ■ eighth grade year, 2018-19?
4. Did the District fail to offer the Student an appropriate Individualized Education Program during ■ ninth grade year until the family moved out of the District on November 10, 2019?
5. If the Hearing Officer concludes that the District failed to provide the Student with FAPE in the least restrictive environment between October 23, 2017 and November 8, 2019, when the Student stopped attending school in the District, what remedy is appropriate?

These issues are addressed below.

### III. FINDINGS OF FACT

1. The Student is 14 years old (DOB: [REDACTED]). [REDACTED] lived with [REDACTED] parents (“Parents”) and two younger siblings in Eliot, Maine between 2007 and November 10, 2019, when [REDACTED] moved with [REDACTED] family to Dover, New Hampshire. The Student’s younger [REDACTED] began receiving special education from the District when the Student was in 5th grade. The Mother has a master’s degree in clinical mental health and has worked with families with disabilities and delays. She has an understanding of child development and clinical psychology, and has taken a class in conducting mental health evaluations.<sup>1</sup>

[Testimony of Mother]

2. The Student attended District schools from pre-kindergarten through 8th grade. This hearing focuses on the District’s educational responsibility for the Student between October 23, 2017 and November 8, 2019.

3. When the Student was six years old, the Parents brought [REDACTED] to Margaret Dawson, Ed.D., of the Center for Learning and Attention Disorders in Portsmouth, NH for a psychological evaluation, due to concerns about anxiety because the Student would come home from school “spent.” [Testimony of Mother, P-421] The report noted that the Student’s early infancy was unremarkable and developmental milestones were within normal limits. [REDACTED] family has a history of anxiety, depression and possibly attention problems. The Student’s teachers reported no behavioral concerns at school. Cognitive test results showed the Student to be squarely in the average range, and [REDACTED] handled tasks well requiring sequential processing and memory. [P-423, 425] Dr. Dawson concluded that while the Student was a successful student, “as the demands for focus and sustained attention in school

<sup>1</sup> Coincidentally, the Mother’s evaluations class was taught by Dr. Grebouski. [Tr. 583]

increase, ■ anxiety level may rise, and ■ is at risk for more significant problems down the road.” She noted that the Student exhibited attention problems and some anxiety. [P-425-426]<sup>2</sup>

***Sixth Grade--2016-2017***

4. The Student began attending Marshwood Middle School (“MMS”) for sixth grade. At MMS, the teaching staff is divided into teams, each with a teacher in science, social studies, math and English language arts (“ELA”). These teachers work closely with one another and with the students in their group. They meet daily, and at least biweekly with the guidance staff, the purpose of which is to discuss students who are struggling with a variety of problems, including social/emotional regulation, attendance, academic concerns, and engagement in school. [Testimony of S. Camp]
5. The first half of the Student’s 6th grade year was unremarkable, as ■ GPA was 3.5 and higher, and ■ attendance was average. [S-25, 27] During that year, however, the Student started begging the Mother not to make ■ go to school, and complaining about stomach aches and headaches. [Testimony of Mother] The Mother did not share this information with the District, and the Student’s teachers did not notice anything unusual in the first half of sixth grade.
6. On January 30, 2017, the Mother sent an email to Jessica Lawson, the Student’s 6th grade social studies teacher, to let her know that the Student was, “struggling at home and getting ■ to school has been a real challenge.” [S-A-1] She told Ms. Lawson that she was not reaching out to other teachers at that point, but wanted to know whether Ms. Lawson had noticed any change in the Student’s mood in the classroom, adding that she thought ■ was depressed. Although ■ was not being bullied, the Student felt as though ■ did not quite fit in, which the Mother observed, “I’m sure

<sup>2</sup> Although the Mother testified that she shared this evaluation with the District, it was not in the Student’s files and Ms. Barber did not see it until the hearing. Ms. Barber testified that if it had been given to anyone in the school, it would have gotten to the special ed office.

90% of 6th graders” also felt that way. The Mother said that they were seeking therapy services for the Student, as ■ preferred to have therapy outside of school. [S-A-1-2, testimony of Mother] Ms. Lawson responded that she had noticed that the Student had been absent a bit, and had been quieter and more reserved, but that ■ still participated in class and was not shying away from other kids. Ms. Lawson offered to speak with the other teachers to get their feedback, and said, “If I can help [the Student] in any way, please feel free to ask. If you think my asking would help, I can always find a quiet time to talk with ■ . . . ■ such a great kid. I don’t want ■ to dread coming to school.” The Mother responded that she thought the adjustment and workload of middle school, along with hormones and a genetic predisposition to mood stuff, was making everything feel overwhelming for the Student. [Testimony of Mother, S-A-1] That year, the Student began seeing a therapist from Sweetser, Elizabeth Bardwell. She told the Mother about the possible availability of services for the Student under Section 504 of the Rehabilitation Act, due to the Student’s diagnoses of anxiety and ADHD, and gave the Mother a book about the difference between Section 504 and the IDEA. [Testimony of Mother, Tr. 530]

7. Around this time, the Mother told the Student’s guidance counselor, Sarah Camp, that the Student had anxiety and ADHD, but that the Student did not want to stand out. Instead of approaching ■ initially, Ms. Camp observed the Student in ■ nutrition class. ■ appeared to be more subdued than ■ peers, but she did not know ■ well enough to know if that was unusual. The Mother told Ms. Camp that she was considering keeping the Student home for a few days, and asked Ms. Camp to send homework home because she felt that bringing the Student to school was wrong. [Testimony of Mother] Ms. Camp responded that in her professional experience, it was worse to keep students at home. She explained that it was better for the Student to be in a routine and around peers, and that it

was more difficult to transition back after being kept home for school avoidance. [Testimony of S. Camp, S-A-3]

8. On February 12, 2017, Ms. Lawson emailed the Mother to report that the Student was engaging a little more in class, and had shown her [REDACTED] fidget device, which [REDACTED] had been using appropriately. The District implemented some regular education interventions for the Student, such as motor breaks, allowing [REDACTED] to have a fidget and an afternoon snack. Ms. Lawson touched base with the Mother to see how the Student was doing, and whether [REDACTED] was okay with giving a presentation to [REDACTED] class after February vacation. The Mother reported back that the Student asked for the fidget cube on [REDACTED] own, and that [REDACTED] had been having headaches, dizziness and a few other mild symptoms from starting medication. She added that she may request a 504 plan for the Student's attention issues. [Testimony of S. Camp, S-A-19, P-661] The Mother emailed Ms. Camp about this, to which Ms. Camp responded that the District would need documentation of the Student's diagnosis to proceed, and that once that was received, they could schedule an initial 504 meeting to determine whether the Student qualified, and if so, what accommodations [REDACTED] would need to access [REDACTED] education. [Testimony of S. Camp, S-A-12-13]

9. After February break, Ms. Camp reported that she checked in with the Student and [REDACTED] was doing okay, and did great on [REDACTED] oral presentation in social studies. Ms. Camp told the Mother that she talked with the Student about possible strategies to ease [REDACTED] anxiety. [Testimony of S. Camp, S-A-19, 24] Ms. Camp began regularly checking in with the Student's team, who reported that although the Student was quieter than usual, [REDACTED] attendance was average, [REDACTED] was getting good grades, and had no trouble completing or turning in [REDACTED] work. There were also no reports of bullying, and the team noticed no substantial impact on the Student's social or emotional functioning at school.

10. On March 2, 2017, the Mother emailed Ms. Camp asking her to check on [REDACTED] that day because [REDACTED] had a rough morning and [REDACTED] anxiety was getting worse, so they were taking [REDACTED] off medication. Ms. Camp did as the Mother requested, and found the Student not eating and with [REDACTED] head on the table. She offered the Student a quiet place in her office, which [REDACTED] accepted, and talked with [REDACTED] about using deep breathing as a strategy for anxiety. As the District had not received documentation of the Student's diagnoses from the Parents, Ms. Camp checked with the team about whether a 504 referral was warranted. Members of the team reported seeing a marked improvement in how the Student was doing. [Testimony of S. Camp] Ms. Camp told the Mother that she had raised the issue of a Section 504 referral with the team, but their response was that they would like to wait because the only classroom accommodation that would be helpful at this point was motor breaks as needed, which they were providing to the Student already. [Testimony of S. Camp, S-A-21 ]

11. Although the Student had been seen by Dr. Gear, a psychiatrist, the Parents did not provide the District with a diagnosis from [REDACTED] or any other doctor of the Student's, nor did they pursue a 504 plan at that time. [Testimony of Mother] The Mother did, however, ask Ms. Camp whether the Student could see a psychologist named Heather Blier who she heard worked with students with issues of anxiety and depression. Ms. Camp responded that Dr. Blier consulted with the District and worked with students through the special education department, and that she had no idea of her availability beyond the IEP process. [S-A-20]

12. On March 7, 2017, the Mother emailed Jessica Lawson to let her know that the Student was adjusting to a new medication and had a chest cold, so [REDACTED] would not be in school for two days. Ms. Lawson offered to email or call the Student to find out how [REDACTED] was doing. The Mother's reply said, "So



I don't need you to do the paperwork--we saw the doctor and [the Student] is switching medication but feels kind of funky. I'll let [redacted] know you're thinking of [redacted]. " [S-A-26]

13. On March 20, Ms. Camp emailed the Mother to let her know that the Student was doing better in school, and asked whether this was what she was seeing at home. The Mother replied, "The medication is working !!! [redacted] improving each day, such a relief. . . I'm so happy [redacted] in a better space!"

[Testimony of S. Camp, S-A-30] The Parents did not email the District again this semester about the Student's functioning in school.

14. During April and May, the Student emailed the Mother from school several times to complain about various ailments, such as that [redacted] legs or [redacted] nose hurt, or that [redacted] had a stomachache, and asked to come home. The Parents thought the Student might have Lyme Disease, so they took [redacted] to a rheumatologist, who put [redacted] on doxycycline. [Testimony of Mother, P-637-656] The Parents did not email the District about the Student's requests to come home.<sup>3</sup>

15. The Student ended [redacted] 6th grade year on the honor roll and scored above state expectations on [redacted] standardized assessments. [S-24, 25, 32,-37]

### ***Seventh Grade--2017-18***

16. Just before the start of 7th grade, on August 30, 2017, the Mother emailed Sarah Camp inquiring about how to move forward with getting a 504 plan for the Student's ADHD and anxiety. [Testimony of Mother] The Mother mentioned having a physician's letter. Ms. Camp offered to set up an initial 504 meeting, but emphasized that she would need the physician's documentation before the team could meet to determine whether the Student qualified and needed accommodations in the classroom. Ms.

<sup>3</sup> Ms. Camp testified that, had the Parents or Student reported these requests to leave school to MMS, it would have been a "red flag" and she would have been informed of this. [Testimony of S. Camp]

Camp also said that they normally start having these meetings a little later in the fall to give teachers time to get to know the Student, and said she would be in touch to find a good date and time.

[Testimony of Mother, S. Camp, S-A-33] The Mother responded that she would drop off the physician's letter and that the Student was "anticipating a much better year this year!" as [REDACTED] had been "doing so great" and was "looking forward to it." [S-A-32]

17. On September 21, 2017, Dr. Gear, a psychiatrist, wrote a letter stating that he evaluated the Student on March 3, 2017, and saw the Student on September 21 for follow-up medication management. Dr. Gear diagnosed the Student with anxiety and Attention Deficit-Hyperactivity Disorder, predominantly inattentive type. [P-387] That day, the Student emailed the Mother asking to be dismissed because [REDACTED] was having an awful day. [P-632]

18. The 504 meeting was scheduled for October 31, but had to be rescheduled because the school lost power due to weather. [Testimony of S. Camp, S-17] On November 14, 2017, the District convened the 504 meeting. In attendance were the Mother, Ms. Camp, the school principal, and Katie Sanzone, the Student's science teacher. Ms. Sanzone, as the representative of the Student's teaching team, said that the Student was an excellent student who made the Honor Roll for the first quarter. [REDACTED] was reserved but did not present as anxious. [REDACTED] auditioned to read aloud at the Veteran's Day assembly and was selected. She also shared that [REDACTED] was a very focused and dedicated learner, was considerate of others, responsible, and kind. [S-17] Ms. Camp said that 6th grade was truly difficult for the Student, but [REDACTED] was a different kid now. [REDACTED] told her that sketching and motor breaks helped [REDACTED] manage [REDACTED] anxiety. [Testimony of S. Camp] The Mother shared that the Student began taking medication, and [REDACTED] teachers noticed a difference in [REDACTED] demeanor. [REDACTED] was engaged, getting [REDACTED] to school was easier, and [REDACTED] continued to do remarkably better. There were no concerns w/peer interactions or work

completion at this point. The team reached consensus that although the Student had a disability, it did not substantially limit [REDACTED] ability to access [REDACTED] education, and that a 504 Plan was not necessary at that time.<sup>4</sup> There was no discussion about Autism Spectrum Disorder (“ASD”). [Testimony of S. Camp, S-17] The following day, the Mother and Ms. Camp emailed about allied arts changes, with the Mother saying, “You’re the best . . . I love all the support!” [S-A-53]

19. In December of 2017, the Student asked whether [REDACTED] could be moved to the higher “transitions” math class because [REDACTED] thought math had been very easy. [Testimony of Mother, P-622] Peter Ryan, the math teacher, was concerned about doing this because they rarely move a student mid-semester into another class, as it’s hard for them to be successful. Mr. Ryan, who had the Student for both math and advisory, described the Student as a very capable, high performer and a pleasure to have in class. When they did group work, [REDACTED] was willing to work with any level. Mr. Ryan observed that “everything was great in 7th grade,” and it seemed to be “a positive experience.” The Student sat with two friends in the front of the classroom and had normal interactions with them. Mr. Ryan also explained to the Mother that [REDACTED] offered something over the summer for students who wanted a greater math challenge so they could show they were ready for the 8th grade algebra class. That summer, Mr. Ryan had seven students who attempted this and three were successful. [Testimony of P. Ryan] The Student wrote that the summer math work was hard for [REDACTED] to understand, and [REDACTED] wanted to do regular math in 8th grade. [S-A-89]

<sup>4</sup> This was in contrast to the Mother’s testimony at the hearing, at which she said she had concerns about the outcome of the 504 meeting, although these were not documented in any way, that the Student was not doing well in 7th grade. She testified that mornings were like the previous year, although she did not inform anyone from the District that she had concerns about getting the student to school. [Testimony of Mother, Rr. 512] The Mother testified that she was checking Infinite Campus regularly to see what schoolwork was missing, and trying to organize things for [REDACTED]. [Testimony of Mother] Ms. Camp testified that she did not hear other concerns from the Parents during 7th grade. [Testimony of S. Camp]

20. On February 18, 2018, the Mother corresponded with the Student's physical education teacher, Renee Caverly, because she felt that the Student needed some support. Although she reported that "[t]his year has been way better in terms of [redacted] mental health, but [redacted] really having a difficult time managing reciprocal friendships." [redacted] would invite kids over but was not successful in doing things outside of school with [redacted] classmates. Ms. Caverly responded "The one thing that you need to know is that [the Student] is an amazing kid. [redacted] is not doing anything wrong! I need to put my thinking cap on to think of kids that [redacted] may click with . . . Also know that 7th grade is often a time of weird 'friendship' stuff. [redacted] not alone for sure!!" [Testimony of Mother, P-621]

21. In the Spring of 2018, the Student took standardized assessments. On the MEA, [redacted] scored at state expectations in ELA and above expectations in Math. [redacted] performed much better on [redacted] Star Math and Reading scores than many other MMS students. [Testimony of S. Camp, S-30, 31]

22. On May 29, 2018, Mr. Ryan emailed the Parents to let them know that although Mr. Ryan was getting complete work and the Student's best effort at the beginning of the year, the Student's effort on [redacted] math work seemed to have dropped a bit recently. Mr. Ryan testified that he tried to let parents know these things right away. He speculated that it might be because math was now at the end of the day, and Mr. Ryan said he planned to discuss this with the Student. He also wanted to give the Student a chance to recover some points because [redacted] had been great all year and deserved the opportunity. [Testimony of P. Ryan, P-608] The Mother responded, "I'm not sure what's up. [redacted] been struggling and we're getting the same vibe at home. . . I agree that fatigue plays a big part for the day and end of year as well." [P-608]

23. That day, Ms. Sanzone spoke with the Mother, who said she wanted a 504 plan. Both Mr. Ryan and Ms. Sanzone emailed Ms. Camp about the Student, who immediately set up a meeting. [Testimony of S. Camp, S-A-77] Ms. Camp thought it was a good idea. [Testimony of S. Camp]

24. The 504 team met on June 8, 2018 to review the Student's progress that year. ■ teachers noticed a change in the Student's demeanor since the initial 504 meeting, finding ■ inconsistent in the classroom. The Mother explained that it was difficult for the Student to hold ■ self together at school, and ■ came home very fatigued and "checked out." She did not, however, tell the District that she had concerns about getting the Student to attend school. [Testimony of Mother] The team also noted that the Student benefitted from sensory breaks to help calm ■, and from structure and routine. They found the Student eligible for a 504 plan, discussed accommodations and created a plan. [Testimony of Mother, S. Camp, P-375-380] The team unanimously agreed to the plan as appropriate to meet the Student's needs. It included preferential seating, teacher check-ins to make sure ■ stayed on task, extra time on assignments and projects as needed, an opportunity to take motor breaks and use manipulatives, and prompting to check ■ work for accuracy and completeness. It also called for the Student to advocate for ■ by articulating ■ needs when ■ was overwhelmed or needed clarification, and to use available online and analog tools to keep track of ■ schoolwork. [P-125] Although the Parents testified that getting the Student to school during 7th grade was a challenge, the Mother also admitted that she did not inform the District of these concerns. The Student was absent nine days during the school year, four of which were for a family vacation and the other five were reportedly for illness, and ■ was tardy four times. [Testimony of Mother, S-87] The District had no concerns about this level of absenteeism. The Student finished the year making the

Honor Roll every quarter except the third one when [REDACTED] received a C. [Testimony of S. Camp, Mother, P-375]

***Eighth Grade--2018-2019***

25. The staff at MMS saw the Student get a strong start in 8th grade. On September 5, 2018, the Mother called Ms. Camp and asked her to check in on the Student, reporting that [REDACTED] had been anxious that morning. Ms. Camp observed [REDACTED] in physical education, and [REDACTED] was fully participating. She also observed [REDACTED] at lunch and was initially a little concerned that [REDACTED] was sitting with only one other student. Ms. Camp chatted with them and they began interacting more with one another. Ms. Camp was [REDACTED] 504 case manager, so she checked in with [REDACTED] teachers as well, who reported that the Student was doing fine. They had no concerns about peer interactions or work completion. [Testimony of S. Camp, S-A-91] Although the Mother was seeing an increase in the Student's school refusal this fall, she did not share that information with Ms. Camp or other District staff. [Testimony of Mother]

26. In September of 2018, the Student began having psychotherapy with Renee Armstrong-Hay from Sweetser. The Student wanted to gain additional support and skills to manage [REDACTED] anxiety and social relationships. [REDACTED] had approximately five sessions, in which the Student reported increased feelings of satisfaction and pride related to [REDACTED] efforts in socialization with [REDACTED] school peers. [REDACTED] was motivated and engaged during these sessions, which used Cognitive Behavioral Therapy (CBT), and the therapist's notes state that the Student reported [REDACTED] was doing better. [S-H-22-32] The Parents did not share their concerns about school refusal with Ms. Armstrong-Hay. According to the Mother, the Student stopped seeing Ms. Armstrong-Hay because she was not helping the Student with school refusal, but did not tell Ms. Armstrong Hay that school refusal was a problem, and there was nothing in the therapist's

records about it. The Mother did not seek another therapist for the Student at that time because she did not think ■ needed to be in therapy. [Testimony of Mother, Tr. 524-527]<sup>5</sup>

27. On October 17, 2018, the Parents contacted two of the Student's teachers because they learned that ■ had very low scores in social studies and ELA. The Parents explained that the Student struggled in afternoon classes because ■ ADHD medication wore off by that time. Elizabeth Clark, the Student's social studies teacher, explained that the Student appeared to have low scores because ■ had not turned in two assignments. She said that the Student earned a 101 on ■ Economic test, and that completing ■ homework would bring ■ grade up. Ms. Clark offered to speak with the Student during lunch time, and provided times when ■ could speak with other teachers. [S-A-100] Missing an assignment could have a drastic effect upon a student's grade, but the staff worked with students to remedy this. [Testimony of P. Ryan] Students were permitted to submit assignments late, as middle school students often needed reminders. Learning how to be organized and turn in assignments on time was part of a middle school student's development, as many of them struggled with it.

[Testimony of P. Ryan, S. Camp] When Ms. Camp checked with the Student's teachers, they reported that ■ was doing a great job, but had not turned in all of the work, which was why ■ grades appeared low. The Mother emailed teachers regularly to express concerns about missing assignments and the Student's overall grades, which fluctuated on Infinite Campus.

<sup>5</sup> Almost every professional recommendation regarding the Student's needs throughout the period in question emphasized the importance of psychotherapy, particularly CBT. It was unclear from the record why the Student had so little therapy, other than the Mother's testimony that the Student was doing well enough between December of 2018 and March 2019 that she felt the Student did not need therapy. Nonetheless, the Parents then placed ■ in an IOP.

28. Ms. Camp kept an eye out for the Student, and never saw [REDACTED] isolated and alone. [REDACTED] seemed unsure in social situations but this was not unusual for a middle school student. [REDACTED] had a couple of friends at school, not a lot of them. [Testimony of S. Camp, P. Ryan]

29. On October 19 and 21, 2018, Ms. Camp corresponded with the Mother to discuss the Student's schedule. Ms. Camp also reported that Mr. Ryan had observed that the Student's organization skills were causing some difficulty. Organizational skills were another challenge for many 13 and 14 year-olds. [Testimony of P. Ryan, S. Camp, S-A-102] Mr. Ryan began working with the Student to help [REDACTED] organize [REDACTED] work better.

30. The Student's 504 team was scheduled to meet on October 24, 2018. About 20 minutes before the meeting was scheduled to start, the Mother emailed then-special services director Carole Smith requesting "a neuropsychological evaluation to be completed this school year to address executive functioning concerns stemming from ADHD and anxiety disorders impacting [the Student's] ability to fully access [REDACTED] education." She requested that Heather Blier conduct the evaluation, "given her background and scope of expertise." [S-A-106, P-594, testimony of Mother]. Dr. Blier, however, was not qualified to conduct a neuropsychological evaluation.<sup>6</sup>[Testimony of K. Barber, K. Wisniewski] Although this email did not request special education services specifically, the District treated it as a special education referral request.

31. The 504 team met at the scheduled time. Although the Principal offered the Student a study skills class, the Mother and District personnel believed it was not a good idea because it would have to take

<sup>6</sup> Although Dr. Blier's license allows her to conduct psychological evaluations, she cannot conduct neuropsychological evaluations. [Testimony of K. Barber] Neuropsychological and psychological evaluations both use many of the same tools, with the main difference being that neuropsychological evaluations take place under a medical model. [Testimony of K. Wisniewski, T. Grebouski]



the place of an allied arts class like physical education, everyone agreed it was preferable to have the Student in allied arts. [Testimony of S. Camp] The team also discussed the Student's missing assignments and organization, adding an accommodation that would allow ■■■ to use "advisory/focus and after school extra help time to identify and practice effective organizational strategies." [S-58-59] Mr. Ryan ran that program, and would meet with the Student to be sure ■■■ was clear about what ■■■ assignments were. The Student would then tell Mr. Ryan what ■■■ needed to do. Like most eighth graders, the Student was reluctant to stay at school, preferring to go home, so ■■■ did not attend this program regularly. [Testimony of P. Ryan] Ms. Camp thought everything in the 504 plan was working. [Testimony of S. Camp]

32. On November 8, 2018, the Student emailed Ms. Camp to ask if ■■■ could take gym in the afternoon because ■■■ had so much energy, and without gym, ■■■ felt like ■■■ could not focus or sit still. Ms. Camp replied that she would make the change, and ■■■ could begin the next day. [Testimony of S. Camp, S-A-122]

33. On November 28, 2018, the District convened an IEP team meeting to discuss the referral and determine what evaluations were needed. [S-75] During this meeting, the team discussed their observations of the Student. Mr. Ryan noticed a difference in 8th grade, and thought the Student appeared to struggle to get through the day, was withdrawn and exhausted by day's end, so ■■■ did not want to stay after school to get help. [Testimony of P. Ryan, S-76] Ms. Camp concurred that the Student often looked tired and internalized ■■■ stress. [Testimony of S. Camp, S-76] The District proposed conducting special education evaluations to determine the Student's academic and psychological functioning. The Mother reported that the Student's ability to be and feel successful was a huge problem because ■■■ was forgetting things, would check out when teachers called ■■■ up, and

struggled with peer relationships. [Testimony of Mother, S-76] Teachers were not, however, seeing a big impact on the Student's ability to access ■■■ education. [Testimony of S. Camp] The Mother clearly stated, however, that she did not think the Student needed special education services and did not want ■■■ to be evaluated for special education. [Testimony of Mother, K. Barber, P. Ryan, S-77] She did not discuss the reasons for her decision. [Testimony of K. Barber] Katherine Barber attended in her capacity as assistant special education director, and explained the special education identification process, the different timelines required for a special education evaluation versus a Section 504 plan, and that IEPs were not just for students with learning disabilities.<sup>7</sup> [Testimony of K. Barber, T. Grebouski]. Dr. Grebouski, Ph.D., the certified school psychologist who was at the meeting because he would be conducting the Student's psychological evaluation, said he could do the evaluation under the 504 Plan. The questions that were referred to Dr. Grebouski to explore in ■■■ evaluation were the Student's psychological processing and its relationship with ■■■ executive, social and emotional functioning, and how that affected ■■■ ability to engage in school, and to further assess the Student's diagnosed conditions of ADHD and anxiety. [Testimony of T. Grebouski] That day, the Mother signed a form consenting to an evaluation of the Student for psychological processing to explore executive functioning and social emotional functioning that impairs school engagement, and to further assess the diagnosed conditions of ADHD and anxiety. [Testimony of T. Grebouski, P-351]

34. In December, the Student emailed the Mother about once a week asking to be dismissed from school, either because "today has already been miserable and my throat hurts," or that ■■■ felt really

<sup>7</sup> As discussed in the section about the referral process below, the Mother's testimony about her lack of understanding of special education was not credible.

weird because of [REDACTED] medication. [Testimony of Mother, P-578] The Mother did not share this information with school personnel.

35. On January 3, 2019, the Mother emailed Mr. Ryan to see whether he had seen a “shift” in the Student. Mr. Ryan responded that the Student had a much more relaxed attitude and disposition about [REDACTED], initiating a “hello” to the teacher upon entering advisory, sitting down with another [REDACTED] and having a normal advisory period. Mr. Ryan noted this as a big change from what [REDACTED] had been doing coming in with a late pass and trying not to have anyone notice. [REDACTED] was also very active in math class. Mr. Ryan noted it had only been two days, but the Student’s body language and personal investment in class seemed to be higher. [Testimony of P. Ryan, S-A-162]

36. The Student then became ill, and went to the pediatrician on January 8, 2019 to be tested for mononucleosis. The following day, the Mother told Ms. Camp that the test was negative, and emailed Ms. Camp to report that the Student’s anxiety was disappearing, and asking whether [REDACTED] could attend school for half-days until [REDACTED] was feeling better. Ms. Camp said she would look into it. [Testimony of S. Camp, S-A-170, 171] On January 10, the Mother reported to Ms. Barber that the Student had mononucleosis. [S-A-173]<sup>8</sup> The Student returned to school on Monday, January 14, 2019, and was not absent from school again until February 7, 2019, when [REDACTED] was excused to visit a private school. [S-A-187]

37. On January 18, 2019, the Mother corresponded with the Student’s ELA teacher, Tracy LaPointe, who reported that the Student had been given extra time to complete work, especially [REDACTED] make up work, and that [REDACTED] turned in all of [REDACTED] work in a timely manner with no problems. She added that she

<sup>8</sup> During this week, the Mother testified that the Student was absent from school because she “could not physically get [REDACTED] to school,” and was looking into programs for students with school refusal, yet did not tell the District this, and reported that the Student had mononucleosis all that week. [Testimony of Mother S-A-170-176]

always checked in personally with the Student, especially when ■■■ had been absent. Ms. LaPointe remarked that the Student was doing a great job in class, and that she was doing what the Parents expected and complying with the 504 Plan. [S-A-177]<sup>9</sup>

38. On February 4, 2019, Dr. Grebouski conducted his evaluation of the Student. He administered the Wechsler Intelligence Scale for children (WISC-V), on which the Student scored solidly in the average range. [Testimony of T. Grebouski, S-92-93] The test showed no concerns about verbal communication, and Dr. Grebouski noted that the Student was very open and not restricted in ■■■ communication. Furthermore, he noted no problems with the Student on nonverbal communication. The evaluation supported the Student's long standing diagnoses of anxiety and ADHD. Dr. Grebouski administered the Minnesota Multiphasic Personality Inventory (MMPI-A), which he described as the gold standard for diagnosing mental health disorders. It contained over 476 questions. The Student had no challenge with such a long evaluation, and ■■■ consistency was great. Symptomatology was high for anxiety, with the highest elevations on scales dealing with anxiety and depression, which the Parents were most concerned about. "■■■ tends to worry excessively, see least positive outcome of events that are neutral." The evaluation further concluded that the Student projected ■■■ own thoughts from other people, which would prevent ■■■ from attempting friendships, and avoid potentially risky social events. ■■■ self-criticism prevented ■■■ from viewing relationships positively, and ■■■ social skills were affected by ■■■ withdrawn behavior. [Testimony of T. Grebouski, S-99-100]

39. Dr. Grebouski also administered the Behavior Assessment System for Children (BASC-3), which included a clinical interview of the Parents and the Student's teachers. The BASC-3 resulted in a

<sup>9</sup> The Mother testified that the Student was on a stimulant and had to use the bathroom often, but Ms. LaPointe would not let ■■■ leave the classroom, so ■■■ was scared ■■■ have an accident. Ms. LaPointe explained that she let ■■■ go to the bathroom after she heard the directions, and that ■■■ had various other opportunities to use the bathroom as needed. [S-A-177]

clinically significant Attention Problems score, consistent with [REDACTED] ADHD diagnosis. Dr. Grebouski found that the Parents view of the Student's functioning was very different from that of [REDACTED] teachers. At home, the Student's Overall Executive Functioning Index score, based upon the Mother's reports<sup>10</sup>, was 58, which falls in the Extremely Elevated range, while these scores at school fell into the Not Elevated range.<sup>11</sup> [S-100-101] This was not unusual for students who tend to hold it together while at school. [S-154] The BASC-3 contains 10 questions affecting the probability of ASD, but does not diagnose this. Dr. Grebouski thought these scores were not indicative of Autism, but pointed more towards anxiety. He explained that if the Student had ASD, the MMPI scores would look profoundly different. [Testimony of T. Grebouski, S-155] When Dr. Grebouski conducted the testing, he saw the Student joking and interacting with [REDACTED] peers, but also observed [REDACTED] being more distant. Teachers reported that the Student was a pleasure to have in class, was doing well overall, and that [REDACTED] had some specific friends, but would not try to seek someone out. Dr. Grebouski never observed the Student alone or isolated. Dr. Grebouski did not think the Student required individualized instruction, and that [REDACTED] did not need a special purpose private school to make educational progress. [Testimony of T. Grebouski]

40. On February 14, 2019, the Mother emailed Ms. Camp, with a copy to Mr. Ryan, to bring them up to date on what had been transpiring with the Student. She reported that the Student did not feel supported by one or two of [REDACTED] teachers, and was not comfortable advocating for [REDACTED] and this was contributing to [REDACTED] anxiety. She added that other teachers were "tremendous," and "help keep [REDACTED] up

<sup>10</sup> The Mother testified that Dr. Grebouski did not meet with the Parents or interview them, but he obtained their input by providing them with the opportunity to complete the BASC parent interview questions. [Testimony of T. Grebouski, S-100]

<sup>11</sup> Executive skills checklists from the summer of 2019 also showed that the Parents had a much more negative view of the Student's executive skills than did [REDACTED] teachers. [S-459-471]

to speed and ■■■ feels competent and capable,” but the other one or two do not understand ■■■ challenges, and the Mother felt that “the impact is too much.” [Testimony of Mother, P-535] She explained that she took away the Student’s video games and Xbox because it was clear those were ■■■ coping mechanisms and had the effect of limiting what he wanted to participate in. She also described an incident outside of school involving a peer who treated the Student poorly. The Mother said that all of this has made “the perfect storm,” and she was not sure she was making the Student return to school. She felt that ■■■ needed more executive functioning support and a smaller, more nurturing environment where ■■■ would not feel so overwhelmed. The Parents planned to make a final decision over break, and were considering whether to home-school ■■■, with the Mother noting that she was not concerned about academics because the Student was reading at college level and was exceptional at math. [Testimony of Mother, P-535]

41. On February 15, 2019, the Mother emailed Dr. Grebouski and told him that she was looking for an intensive outpatient program (IOP) for the Student’s anxiety and depression, and asked for his recommendation. She added that the Student might not be returning to school, and that ■■■ would be attending BigFish for a trial placement. [S-A-202] She then confirmed on February 21 that ■■■ was taking a medical leave, stating, “We’ve taken away technology and ■■■ is literally spiraling. ■■■ has a gaming addiction which I believe we caught early but the lack of gaming as a coping mechanism is causing ■■■ to be in crisis.” [Testimony of Mother, S-A-207] Dr. Grebouski did not recommend any IOPs because he told the Mother that the Student’s diagnoses did not require an extended treatment program. Because ■■■ was going into such a program, however, Dr. Grebouski did not make recommendations in his evaluation report because the IOP would cause such changes that recommendations would be premature. Dr. Grebouski also opined that the majority of adolescents had

some degree of screen addiction, and if you took away anyone's coping mechanism entirely, it would cause them to spiral, explaining, "Cold turkey is certainly painful." [Testimony of T. Grebouski, S-A-207]

42. While awaiting the results of Dr. Grebouski's evaluation, the Mother told Ms. Barber that the Student was thinking of working from home for the rest of the year, and asked how to access the curriculum. Ms. Barber sent her the Maine contact person for home schooling, but told the Mother that there were many options, and not to make a decision in haste, but to await the evaluation results. Ms. Barber also reached out to the Student's team to meet and discuss options to keep ■■■ engaged in school and with peers, and also contacted Dr. Grebouski about the status of the report. [Testimony of Mother, S-A-206]

43. The Parents did not take Ms. Barber's advice, and stopped sending the Student to MMS on February 25, 2019. They were working with a consultant to find a program to address ■■■ school refusal. The consultant recommended a program in the Chicago area that the Mother thought was appropriate for the Student's needs. [Testimony of Mother] At this point, the District was still unaware that the Parents were having trouble getting the Student to attend school, as the Parents had not shared this information.

44. On March 5, 2019, the Student was admitted to the Amita Alexian Brothers Hospital ("Amita") in Hoffman Estates, Illinois, where ■■■ remained until approximately March 22.<sup>12</sup> [S-133] This was a partial hospitalization medical program, not an educational setting. All of the Student's peers there had school refusal issues. The program consisted of group therapy around anxiety, CBT, family-based therapy with

<sup>12</sup> The Mother testified that the Student was there for a month, and that the fourth week was "really hard." It is unclear, however, how long the Student was actually in the program, but ■■■ clearly was not there for an entire month. The documents from Amita were not authenticated, and one "Final Report" said the last day attended was 3/22/19, which would have been a 17-day stay, while another summary of the Student's treatment said ■■■ was discharged on 3/29/19, which would have been a 25-day stay. [compare S-133 with S-137]

both Parents and the Student, and meeting with a caseworker. The Student spent an hour or two each evening completing schoolwork that was provided by the District, but there was no evidence that the Student was receiving any educational services from Amita during [REDACTED] stay.<sup>13</sup> To get the Student to do [REDACTED] homework, the Parents paid [REDACTED], and [REDACTED] was allowed to play Clash of Clans video game until the staff at Amita advised the Parents that this was not an appropriate intervention. [Testimony of Father, Mother]

45. Case management notes from Amita state that the Student was receptive to staff feedback, treatment expectations and recommendations. The notes also state that the Student said in group therapy that [REDACTED] has been emotionally manipulating [REDACTED] parents, specifically [REDACTED] mother, because [REDACTED] parents had taken away [REDACTED] video games, although [REDACTED] was managing better regarding [REDACTED] perseveration around video games and difficulty focusing on homework. The notes, which appear to be dated March 22, 2019, also state that the Student was going to be “starting at a new school called BigFish, after patient’s parents felt unsupported by old school district.” [P-E-104-105, testimony of Mother] BigFish Learning Community (“BigFish”), located in New Hampshire, is not a school, and it is not accredited as such in Maine or New Hampshire. It is a support program for home-schooled students. Students who attend BigFish register with their state as being home schooled, and pay a membership fee to attend. There is very little structure, and students are free to come and go, they do not receive grades and are not required to attend either of two class blocks during the day. When a teacher is absent, sometimes these class blocks are taught by students. They receive no homework, and there are no required classes. The director of BigFish is not licensed as an educator in New Hampshire, and only two of the

<sup>13</sup> The Father’s testimony on this point was unclear, and he was unable to describe any kind of education the Student may have received at Amita, other than that there was someone there with the title of “teacher” although he did not know what her credentials were.



staff there are licensed educators. BigFish does not offer specially designed instruction, social skills or executive functioning instruction, and there are no mental health professionals who consult with BigFish, nor do any staff have mental health training [S-B-2, Testimony of Mother]

46. While the Student was at Amita, the staff suggested a neuropsychological evaluation, which was conducted by Nicholas Jasinski, Psy.D., who diagnosed the Student with ASD. Dr. Jasinski met with the Student twice, once with the Father present. Testing was conducted by a technician. As Dr. Jasinski noted, the results of the Student's cognitive testing was likely inflated due to the practice effect of giving █████ the same test as █████ took the previous month.<sup>14</sup> Dr. Jasinski administered the GARS-3, which is a subjective measure of Autism based upon input from the Parent that is one piece of a battery of evaluations necessary to make this diagnosis. [Testimony of K. Wisniewski] Dr. Jasinski did not observe the Student in the learning environment, did not speak with anyone from the District and had no input from MMS. Other than Dr. Grebouski's report, he did not review any of the Student's school records. He testified that he could not speak to the Student's presentation in school. Although Dr. Jasinski normally obtained rating scales from school staff, he did not do so for this evaluation, and based █████ ASD diagnosis solely on rating scales completed by the Parents, interviews of the Student, and reviewing test results. [Testimony of N. Jasinski] He concluded that, as a result of testing and information from that clinical history, the Student met the diagnostic criteria for ASD, specifically high functioning Autism, and ADHD, inattentive type. He also concluded that the Student manifested

<sup>14</sup> Dr. Jasinski did not explain why he chose to administer tests the Student had just taken a month earlier, as this practice is, in this Hearing Officer's experience, avoided by psychologists by administering different tests than the one the student had recently taken, so there would be no practice effect. It was psychologist Laura Goldberg's opinion that Dr. Jasinski's testing was not valid for this reason. [S-213] Although the Parents made much of the fact that Dr. Jasinski's evaluation was a "neuropsychological" evaluation, all of the tests he administered were tests that Maine school psychologists are licensed to administer. [Testimony of T. Grebouski]

significant depressive symptoms, which were likely secondary to the distress of ■ undiagnosed ASD. Dr. Jasinski concluded that it was likely these depressive symptoms and the Student's tendency to withdraw from contact were the prime reason ■ began to refuse to attend school. [Testimony of N. Jasinski, S-157-162] Dr. Jasinski noted that social issues typically became more difficult at the Student's age. He recommended continued psychiatric consultation regarding medication management, individual psychotherapy, and that the Student "be granted a full individualized education plan at ■ school," stating that the Student required significant accommodations given ■ diagnoses of ASD and ADHD, specifically access to a school counselor for periods of emotional distress in school, the freedom to take breaks when overwhelmed, preferential seating, the provision of study guides and classroom expectations for behavior, extended time on tests, extended deadlines to complete work, testing in a distraction-limited environment, and the ability to use a computer or have a note taker due to fine motor limitations. He also recommended therapy outside of school, and social work services. [Testimony of N. Jasinski] Other recommendations were about the family and not the educational environment. There were no recommendations for direct instruction, and Dr. Jasinski's evaluation did not address whether the Student's ASD adversely affected the Student at school. [S-161]

47. On March 19, 2019, while the Student was still at Amita, ■ 504 team at MMS met to review the testing completed by Dr. Grebouski. Dr. Grebouski was present to report the results of the evaluation. At this time, District personnel first learned that the Student had been hospitalized for school refusal, and had been diagnosed with ASD. [S-154] Dr. Grebouski explained that he saw no evidence of ASD, and based on the Student's presentation, would rule it out. He believed that the Student's difficulties appeared to stem from ■ ADHD and anxiety. The Student's self-report on the MMPI gave no indication of Autism, and the Student during testing was very positive and engaged. If it were an area

of concern, Dr. Grebouski explained that the profile on the MMPI would look profoundly different. [Testimony of T. Grebouski] The Mother expressed frustration and did not agree with the findings, stating that the Autism diagnosis made sense to her, given the Student's report of feeling different and ■ difficulty making social connections.<sup>15</sup> [S-155] Dr. Grebouski thought the Student's anxiety was increasing and developing into school avoidance, but there was no question that ■ was able to learn when engaged and present. He also felt that the Student could receive appropriate programming in public school. [Testimony of T. Grebouski] Ms. Barber emphasized the importance of creating a transition plan to reintegrate the Student to MMS, and recommended reconvening the team when the report from Amita was available to the school, along with Dr. Jasinski's evaluation. At that point, the District had received no reports from Amita. The Mother stated that the Student would continue working with Amita for three more weeks.<sup>16</sup> [Testimony of S. Camp, S-156]

48. Later that day, the Mother emailed Diane Murphy, the director of BigFish, to speak with her regarding the Student finishing 8th grade there, "as ■ is no longer able to attend MMS. Had a meeting today and don't feel I'm getting anywhere with them." [S-B-89]

49. At this point, the Parents had no intention of returning the Student to MMS, and were focusing on seeking a private placement. On the evening of March 20, the Parents sent a letter to the District unenrolling the Student from MMS, and informing the District that they would be enrolling ■ in a home school program. Just over an hour later, the Parents changed their mind, saying it was in the Student's best interest to wait until the evaluation was completed. [Testimony of Mother, S-A-225]

<sup>15</sup> The Parents and Student were apparently all very invested in the ASD diagnosis because it provided them with an explanation of the cause of the Student's school and social difficulties. [Testimony of Mother, Father]

<sup>16</sup> This was another example of the inaccurate dates in the Mother's testimony. As noted in footnote 12, the Student was discharged either 3 or 10 days after this meeting.

The Mother said she was “truly saddened by the way our district has handled my [REDACTED] [sic] diagnosis of ASD while in placement in one of the most established programs in the country for school refusal/anxiety.” [S-A-230] The Mother was irate because, despite the District not having received any medical documentation to date from Amita, including Dr. Jasinski’s evaluation, the District had not accepted [REDACTED] diagnosis of Autism at that point. [Testimony of Mother Tr. 180-181] Although the Parents had signed releases for the Student’s medical records from Amita, the District had difficulty obtaining Dr. Jasinski’s report and any other medical records. <sup>17</sup> [Testimony of K. Barber, S-A-231-232, 237, 240] When Ms. Barber received the Parents’ emails early the next morning, she immediately scheduled an IEP team meeting to review the results of the Student’s testing, which was set for April 10, 2019. [S-A-226]

50. In the meantime, the Mother kept BigFish informed of the Student’s arrival home the week of March 25, giving Ms. Murphy contact information for the Student’s Amita liaison to transition the Student to BigFish. [S-B-67-69] Although the Mother was vacillating between BigFish and MMS, the Parents did not attempt to contact the District during this time to inform them of the Student’s return or to connect the District with the Student’s Amita liaison. [Testimony of Mother]

51. Ms. Barber emailed with the Mother several times to prepare to transition the Student back to school and to obtain [REDACTED] Amita records. Nonetheless, the Parents did not notify her of the Student’s return to [REDACTED] home in Eliot. [Testimony of K. Barber] The District learned that the Student had returned to Maine sooner than expected upon the Mother emailing the Student’s social studies teacher to

<sup>17</sup> As noted in the Procedural Background, despite having releases from the Parents, the District had a very difficult time obtaining medical records from Amita, which resulted in my decision to delay the commencement of this hearing. In April, Amita released a few pages of records that were redacted. It appears that the complete records were ultimately produced but not authenticated, other than Dr. Jasinski’s evaluation.

obtain more homework for [REDACTED]. [Testimony of Mother, S-A-241] The date of the IEP team meeting was changed to April 11, 2019 at noon, a time which the Mother initially confirmed worked for the Parents. [S-A-233] Later that day, the Father told the District that this date was not good because they were going to be on vacation from April 10-17, so the meeting had to be postponed a second time. [S-A-235] 52. On April 4, Ms. Barber sent another letter offering tutoring to support the Student in the interim. [Testimony of K. Barber, S-A-252] Four days later, Ms. Barber emailed the Mother again, stressing the importance of the Student attending school, and adding that the District was happy to work with the Mother to support [REDACTED] attendance. She reiterated her earlier offer of tutoring, said the District was open to an abbreviated day and “anything else we can do to help [the Student] between now and our IEP team meeting.” [Testimony of K. Barber, S. Camp, S-A-253] The Mother emailed Ms. Barber to let her know that the Parents wanted to move forward with the IEP meeting, and that they should have the neuropsychologist’s report by the end of that week, but that they were not comfortable returning the Student to MMS that year, and were having [REDACTED] complete 8th grade at BigFish. The Parents declined the offer of tutoring. [Testimony of K. Barber, Mother, S-A-255] By this time, the Student had been home for approximately 10 days and had not attended any school. Based upon the Mother’s letter, Ms. Barber assumed the Parents would be homeschooling the Student. [Testimony of K. Barber] While the District was trying to schedule an IEP team meeting and transition the Student back to MMS, the Student attended BigFish for at least two days. <sup>18</sup> [Testimony of Mother, S-B-55, 56, 62, 63, 65] The District felt that a re-entry meeting and transition plan was very important to the Student’s success. [Testimony of S. Camp]

<sup>18</sup> The Mother testified that she could not recall how many days the Student attended BigFish in April of 2019, so the total number of days was not in evidence, other than that [REDACTED] attended BigFish on April 18, 2019. [S-B-55, 56]

53. In April, the Student began working with Kate Goodwin, an occupational therapist (OT) from Reach for the Top. [Testimony of Mother, K. Goodwin] In her evaluation, she wrote that the Student began refusing to attend school in December of 2018, and was in the process of enrolling at BigFish. [P-215] She found that the Student had poor self-regulation, avoided new situations, had attention difficulties, and challenges at home sitting for mealtime and participating in daily routines. ■ also had issues with both fine and gross motor skills. [Testimony of K. Goodwin, P-215-218] She recommended weekly OT services. During their work together, she has seen ■ make progress towards ■ goals. Ms. Goodwin has not observed the Student in the school environment or at BigFish, and all of her school-related information was obtained from the Parents. [Testimony of K. Goodwin]

54. In mid-April, the Student began working with a therapist, Kyle Ganson. The Student saw Mr. Ganson, for just over a month. Mr. Ganson's May 16, 2019 progress report said that the Student was feeling less depressed, and that going to school was helping. The Student continued to have trouble with feeling overly tired and sleeping for long hours after school. [Testimony of Father, S-E-10] The Mother then terminated the therapy relationship because she was going to seek out a therapist who specializes in Autism. [S-E-1] Mr. Ganson made a recommendation, but the Parents did not engage another therapist for the Student.<sup>19</sup>

55. On Saturday, April 20, the Mother emailed Ms. Camp to inquire whether the Student could come to MMS "for a lunch hour, as ■ was feeling depressed from not seeing anyone." There had been no re-entry meeting at this point because the Mother intended to have the Student attend BigFish. The Student missed ■ peers and wanted to stay in the loop with MMS. [S-A-262] The District

<sup>19</sup> This is another example of the Student making progress with individual psychotherapy but the Parents discontinuing it without engaging another therapist, despite Dr. Jasinski's recommendation that "individual psychotherapy is strongly recommended." [S-161].

accommodated this request. Then on April 24, the Mother called Ms. Barber to ask whether the Student could attend a full day at MMS. The Student returned to school that day. Ms. Camp checked in with [REDACTED] before [REDACTED] left, and [REDACTED] was very tired, but wanted to try again the next day, so Ms. Camp asked the teachers for their input. [Testimony of S. Camp, S-A-264] She reported the Student saying that ELA was very overwhelming for [REDACTED] and [REDACTED] did not think [REDACTED] could manage it. Ms. LaPointe, the Student's Literacy and ELA teacher, observed that day that the Student entered the classroom, sat with another Student, said hello to her and smiled and made eye contact. [REDACTED] read for the entire 20-minute reading time. She was not sure why [REDACTED] reported feeling overwhelmed. [S-A-264] The Mother then asked to schedule a meeting to make a transition plan for the Student's return to school full time. [Testimony of Mother, S-A-271, 263] The District continued to attempt to obtain records from Amita, and on April 28, the Mother emailed Ms. Barber the copy of Dr. Jasinski's report she had received five days earlier. [S-A-278]

56. Two days later, on April 30, the District convened a transition meeting to discuss a plan for the Student's re-entry, to review suggestions from Amita, and review the Student's 504 accommodations to help [REDACTED] be successful. Ms. Barber said it was imperative for the Student to participate in the meeting, which [REDACTED] did. Ms. Barber also notified the Parents that this was not an IEP team meeting, and that the IEP team meeting to review evaluations had been rescheduled for May 9, 2019. [S-A-279]

57. At the transition meeting, the Student reported feeling isolated, which seemed to be adding to [REDACTED] symptomatology. The Student wanted to return to MMS. While the Student felt accepted at school, [REDACTED] was looking for natural ways to connect with [REDACTED] classmates outside of school. Because [REDACTED] became exhausted in the afternoon and functioned better in the morning, the team discussed schedule changes. It was also noted that the Student benefitted from [REDACTED] time at Amita, and was learning to

advocate for ■■■ self and articulate ■■■ needs. The team updated the Student's 504 plan to include additional supports discussed at the meeting, including what work ■■■ would not have to make up and working with Mr. Ryan to improve ■■■ organizational skills. [P-194]

58. Prior to the May 9, 2019 IEP team meeting, the Parents prepared a statement of concerns, including that they wanted the Student identified as eligible for special education as a student with Autism and Other Health Impairment (OHI) due to ■■■ ADHD. [Testimony of Mother, P-174] On May 9, the IEP team met to consider the Student's eligibility for special education. At this meeting, the Parents were represented by an attorney, Mary Stevens, Esq. The team determined that the Student was eligible for special education services as a Student with an emotional disability (ED). The Student's primary concern was being able to work through ■■■ anxiety so ■■■ could attend school for a full day, as ■■■ was struggling to stay awake and focused in the afternoons. [Testimony of S. Camp] Although the team considered Dr. Jasinski's evaluation, because he had not addressed the issue of whether or how the Student's ASD adversely affected ■■■ in school, the team could not use this opinion to determine special education eligibility.<sup>20</sup> [Testimony of K. Barber] Additionally, Dr. Jasinski's evaluation used only a single rating scale in determining his diagnosis, and did not include any input from the school, nor did he use the Autism Diagnosis Observation Schedule (ADOS-2), which was recognized as the gold standard for ASD diagnoses. [Testimony of K. Wisniewski, P-161] On the other hand, the team had adequate evidence of how the Student's anxiety and attention issues affected ■■■ ability to benefit from ■■■ educational program. Dr. Goldberg, the psychologist who explained Dr. Jasinski's evaluation to the IEP team, agreed with the emotional disturbance eligibility category, based upon the Student's

<sup>20</sup> As discussed below, Dr. Wisniewski, who diagnosed the Student with ASD in the fall, testified that Dr. Jasinski's report did not contain sufficient information to identify the Student for special education based on ■■■ ASD. See *Fact #77*.



anxiety and depression, and how it affected [REDACTED] in school. Dr. Goldberg also discussed how the Student's executive functioning organization difficulties were very dominant in [REDACTED] area of weakness. [Testimony of Mother, S-222] In response to the Mother's concern that the ED determination would limit the issues the Student needed addressed, the District explained why that was not the case, and that the Student's IEP would be based upon [REDACTED] needs, not [REDACTED] eligibility category. [Testimony of K. Barber, S-277-278] The team then discussed interim services of executive functioning and social skills instruction, but the Mother said the Student was "not in a place to receive that right now." [S-292] The team agreed to convene within 30 days to develop the Student's IEP.

59. A few days after the meeting, the Mother told Ms. Camp that she wanted the Student identified under Autism rather than ED, as she thought it was more appropriate. [Testimony of S. Camp, Mother, S-A-288] The Mother told Ms. Camp that she was considering having Dartmouth-Hitchcock Medical Center complete the ADOS-2.<sup>21</sup> [S-A-288] She could not understand why the team was "so stuck on ED," when she felt that all of the Student's problems were rooted in [REDACTED] ASD. [Testimony of Mother]

60. On May 18, 2019, the Mother called Sweetser Child Crisis Intervention because the Student told her [REDACTED] was thinking about killing [REDACTED] self. [Testimony of Mother] The Student was admitted to St. Mary's Hospital in Lewiston for four days. The Parents told the District that the Student was at St. Mary's because the family needed support changing the Student's medication. [S-A-294] While he was at St. Mary's, [REDACTED] psychiatrist, Dylan McKenney, MD, wrote that the diagnosis of Autism was "highly suspect," as the Student had not had appropriate testing to make that diagnosis and the symptoms that were highlighted were relatively new and appeared to be more the result of depression and

<sup>21</sup> There was no evidence that this testing occurred. The District also offered to do an ADOS-2, but the Mother said she would feel more comfortable having it done at Dartmouth-Hitchcock. [Testimony of Mother] It was ultimately administered as part of Dr. Wisniewski's fall 2019 evaluation.

obsessive and compulsive features arising out of the Student's anxiety. Dr. McKenney noted the family's strong history of anxiety disorders and other mental illnesses. [S-G-21] Although the Mother was concerned that the Student told her [REDACTED] would feel suicidal when they left St. Mary's, [REDACTED] said, "it was an impulsive thought when my parents were here." [S-G-24] [REDACTED] diagnoses at discharge were Major Depressive Disorder and Generalized Anxiety Disorder with features of OCD. [S-G-26] These reports were not provided to the District,<sup>22</sup> and based upon the Mother's misrepresentation, District personnel thought the Student had been hospitalized solely for medication management. [Testimony of K. Barber, S. Camp]

61. The IEP team met on June 3, at which time the team discussed how much better the Student seemed to be doing at school. The Mother shared that she noticed a difference within five days of the Student being on Prozac. Ms. Camp noticed a positive difference with the Student's new medication, as did the art teacher, and the Student was tolerating full days in school. [Testimony of S. Camp, S-343-344]. The IEP team discussed the evaluations, and members of the team continued to be concerned that the evidence before them did not support identifying the Student as eligible under the coding of Autism at this point. With the exception of the Parents, the team thought [REDACTED] would be eligible as a Student with an emotional disturbance (ED), based upon [REDACTED] depression and anxiety. The Parents felt very strongly that they wanted the Student identified under Autism, disagreed with the exceptionality of ED determined at the previous IEP team meeting, and would not consent to the Student receiving special education services with this coding. [Testimony of K. Barber] The Mother did not mind delaying the development of the IEP, as she felt it was more important to have the Autism determination than

<sup>22</sup> Ms. Barber had to request these reports from the Mother, who initially provided only a copy of the discharge summary. [Testimony of K. Barber, S-A-308]

for the Student to receive services. [Testimony of Mother, S-343]. The Father did not feel comfortable with this label either, as it made him think of someone who throws a raging fit and is a “chair thrower.”<sup>23</sup> [Testimony of Father, S-533] The District again explained that the Student’s diagnosis was not what drove the IEP’s programming, but added that if getting clarification on the diagnosis was so important, that it would be best to wait until evaluations the Parents planned were completed. [S-356] At this point, the District still felt that the available evaluations did not support providing special services to the Student under the exceptionality of Autism. Had the Parents signed consent, the Student could have begun receiving services immediately and throughout the summer. [Testimony of K. Barber]The team decided to defer development of an IEP pending resolution of the eligibility determination issue, as the Parents had made an appointment on June 7 to have the Student assessed by Margaret Bauman, MD, a pediatric neurologist in the Boston area who specialized in Autism. The team agreed to continue the Student’s 504 plan in the meantime. [S-343]

62. Dr. Bauman, who administered no written tests to the Student, but conversed with [REDACTED] and did a neurological assessment, noted normal developmental milestones, and that the Parents represented that the Student seemed to be fairly stable until around the age 12, when [REDACTED] began to experience significant depression, anxiety and school refusal. Dr. Bauman diagnosed the Student with ASD without having seen copies of records from the Student’s inpatient experience at Amita and St. Mary’s, and without reviewing [REDACTED] other evaluations.<sup>24</sup> She added that if the measures utilized during the Student’s

<sup>23</sup> This was the Father’s testimony at the hearing and also at the August 29, 2019 IEP team meeting, where he elaborated, “when you say you’re going to label my child as emotionally disturbed, I think of the chair thrower, someone who throws a raging fit.” [S-533] Unfortunately, he allowed his unfounded stereotypes about people with mental illness to prevent the Student from receiving special education services.

<sup>24</sup> Dr. Wisniewski thought that it was very odd, in the absence of adequate information, Dr. Bauman nonetheless diagnosed the Student with Autism. [Testimony of K. Wisniewski] I agree, and consequently did not give much weight to her evaluation.

assessments did not include specific diagnostic assessments for ASD, that may need to be scheduled, and her final decision would depend upon a review of those evaluations. She strongly recommended that the family obtain an educational advocate to identify appropriate schools for the Student going forward and provide a classroom observation. Based solely upon the description of the Parents, Dr. Bauman did not believe the District had the background or staff to provide the Student with an appropriate education. [S-452] The Mother asked Dr. Bauman to include in her report that the Student would be a good candidate for Learning Skills Academy in Rye, NH (LSA), but Dr. Bauman did not do this.

63. That summer, the Student attended Camp Alsing in Unity, Maine, which went very well. The Parents were desperate for a positive experience in which the Student could connect with others and feel successful. The program had very structured activities and a high staff to camper ratio. There, the Student worked on social cognition, executive function skills and camp engagement. ■ anxiety was high when they brought ■ there, but ■ had a very good experience. [Testimony of Father, P-110-112]

64. When the Student was at home that summer, ■ only connected with MMS students by playing Minecraft. Although this started out well, after a week, the other students began being less nice to ■

65. That summer, the Parents engaged an educational consultant, Gretchen Timmel. Ms. Timmel administered the WIAT-III educational test to the Student, and found that while ■ was in the superior range on pseudoword decoding, ■ reading comprehension was significantly lower. She felt that ■ had difficulty harnessing ■ executive function to higher order critical thinking. ■ writing skills were in the average to high average range, and math was also average, although ■ evidenced a lack of

automaticity in number facts while performing on the numerical operations subtest. Due to the complex nature of the Student's presentation and history, she recommended that the Student receive a comprehensive speech language evaluation that focuses on higher order language as well as social pragmatics, that ■■■ receive executive function support in ■■■ classes, due to a combination of ADHD, difficulties with verbal expression and understanding of language, as well as ■■■ emotional vulnerability. Ms. Timmel thought the Student required services directed toward maintaining emotional stability, and accommodations such as: preferential seating, use of a computer, restatement of directions, pairing of key auditory information with visuals as needed, extension of time, support in the classroom and with homework. She was unfamiliar with how the Student presented at school, and never observed ■■■ in the learning environment, but approved of the District offering ■■■ an IEP. Consequently, she admitted to not being able to speak to ■■■ full spectrum of needs and could not testify about whether ■■■ 504 plans were appropriate. [Testimony of G. Timmel, P-94-96] It was her opinion that the Student's diagnoses should be OHI (for ADHD), ED and likely speech and language. When the Parents told Ms. Timmel about their refusal to agree to the IEP with the ED identification, she responded that they should have signed on, and that the ED label was not what the Father thought it was. [Testimony of Father, S-534]

66. Despite Ms. Timmel's suspicion that the Student had a speech and language impairment, on July 25, 2019, the Mother revoked her consent (signed at the June IEP team meeting) for the District to conduct a speech and language evaluation of the Student. [P-105-107, S-A-313] On July 29, 2019, the Mother notified Ms. Barber about the consultation with Ms. Timmel, and requested that Ms. Timmel become a member of the IEP team. Ms. Barber was happy to include her, and scheduled the meeting for July 31 at 1:30, and to discuss the Student's transition to Marshwood High School (MHS). The

Mother got the date wrong. In a July 31 email, Ms. Barber also told the Mother when the Student's New Student Orientation was, and gave her the name of the Student's guidance counselor. [Testimony of K. Barber, S-A-314-319] The Student did not attend MHS New Student Orientation. [Testimony of K. Barber]

67. Ms. Barber attempted to schedule an IEP meeting at a time that worked for Ms. Timmel, but the Mother did not always respond to her emails, so the IEP team meeting was not scheduled. On August 19, 2019, the Mother then emailed Ms. Barber asking to create an IEP that would place the Student at LSA. Ms. Barber made it clear to the Mother that SAD #35 had to conduct its own testing in all suspected areas of disability, and that this would be at the District's expense. She further explained that the District must consider but is not obligated to accept the recommendations of any parent-obtained evaluations. [S-A-326]

68. A few days before the Student was scheduled to begin classes at MHS, August 29, the IEP team met. At that point, the District agreed to provisionally identify the Student as eligible under the exceptionality of Multiple Disabilities, including Autism. The team had agreed to the OHI and ED categories, then added Autism because the Parents would not allow the District to provide services without that, and the District knew the Student needed the services in the IEP to be successful in school. The team discussed the need for additional evaluations to determine whether there was a speech and language impairment and to rule out eligibility under the category of Autism. [S-617]. In other words, the team agreed to have Autism in the IEP pending an evaluation by Kara Wisniewski. [Testimony of K. Barber, 2-617] At that meeting, the Father signed a form consenting to have the Student evaluated for speech and language impairment, to conduct the ADOS-2 and do a classroom

observation.<sup>25</sup> The team developed an IEP containing goals and objectives, nine units of specially designed instruction focusing primarily on executive functioning skills, and it also included social work services once a week. [Testimony of K. Barber, S-475-481, S-617] The team discussed how to best challenge the Student while keeping [REDACTED] from being overwhelmed. [REDACTED] extended instruction time was for emotional support so that [REDACTED] had a small group setting in the resource room where [REDACTED] could check in and out each day, allowing [REDACTED] to ease into the morning without having to go directly to class. [Testimony of K. Barber, S-619] The team discussed providing transportation for the Student in the event of school refusal, but the Parents said it would not be a problem getting the Student to school. [Testimony of K. Barber, S-586] The District wanted to implement the IEP as soon as possible, but needed consent from the Parents for the initial placement. There was consensus about the IEP, with the Parents, who were represented by counsel, stating that they had no concerns about it. [Testimony of K. Barber, S-617] The Father agreed to bring the signed consent form for the provision of services on the first day of school, but did not return it until September 5, at which point the Student had stopped attending MHS. [Testimony of K. Barber, S-609].

69. The first day of school at MHS was September 3, 2019. The Student attended MHS for that day only. The staff there reported that the Student had a very good first day. This was in sharp contrast to the report of [REDACTED] Mother, who said the Student did not return on the second day because MHS was “too loud” and “no one spoke to [REDACTED] all day . . . [REDACTED] initiated 3 conversations which all ended in less than 20 seconds.” [S-A-336] One of the Student’s teachers, Barbara Burnham, reported that she was

<sup>25</sup> The Parents initially did not want the District to conduct either the speech and language or ADOS-2 evaluations, saying they would be more comfortable having them done elsewhere. [Testimony of Parents] When they did not follow through with those plans, the District conducted these evaluations at its own expense. [Testimony of K. Barber]

surprised to hear this, as the Student was very engaged in World History, where they started with a “get to know you” BINGO game. She wrote:

... ■ was excited, involved, appropriate, successful, and seemed to participate fully in conversations with many kids in the class. (■ gave me a high-5 when ■ got BINGO). It was quite loud during the activity, but again ■ didn't seem bothered by it, rather ■ seemed to enjoy ■ self. The rest of class was just one person talking at a time; ■ was attentive, followed instruction, was great.

[S-A-336]

Another teacher, Karen Doyle, reported that she had the Student in two classes, one of which was mid-morning, and the other at the very end of the day. Ms. Doyle, who taught special education, said she spoke with the Student multiple times.

■ appeared somewhat tired as well as distracted a few times by the end of the day - which was somewhat different than what I saw earlier in the day. ■ did not appear anxious, my room was very quiet and was as appropriate and engaged as other students.

[S-A-334]

70. The following day, assistant principal Kelly Glynn, was concerned when the Student did not attend, so she asked the school social worker, Tighe Blackadar, to give the Student's home a call. [S-A-339] Ms. Barber also emailed the Parents, telling them that the team was vested in helping the Student be successful, and that they received a very positive report from Ms. Burnham. She added that

[r]esearch shows students with anxiety need to be attending school. We, MSAD 35, have built in a support system and are also willing and able to set aside a special setting for ■ if/when ■ needs to regroup. We, MSAD 35, have also designed ■ schedule with ■ first period as the check-in/check-out. This would allow [the Student] to look at ■ day/assess ■ day and determine if/when ■ needs a break.

Ms. Barber renewed the District's offer to provide transportation if the Parents were having difficulty getting the Student to school. [Testimony of K. Barber, S-A-339] The Parents replied that they would not be forcing the Student to attend school, stating that they had done that in the past, and it resulted in the Student's hospitalization. The Parents added that they were not surprised that the teachers felt



that the Student had a good day, as ■ liked ■ teachers and held it together, but then got home and slept from 7:00 pm. until 9:00 a.m. the next day. The Parents agreed, however, to allow ■ to be evaluated. Although they had some concerns about the IEP, which they did not specifically state, they mentioned that Dr. Bauman thought the Student would need a different placement. [S-A-341]

71. Without first notifying the District or registering with the State of Maine to home school the Student, the Parents sent the Student to BigFish on September 5, 2019. [Stipulation, Tr. 648, Testimony of Mother] At that time, the Parents chose not to enroll ■ in a school that would meet ■ needs, as they felt that ■ needed to be in a better place first, and also because of the financial strain of paying for a private school. They also wanted input from all of the testing before making a decision so they could make the right choice. [Testimony of Father] The Parents testified that they did not believe BigFish was an appropriate program for the Student. [Testimony of Mother]

72. On September 9, 2019, MHS social worker Tighe Blackadar emailed the Parents to introduce ■ self and set up a home visit to help the Student return to school. Mr. Blackadar worked with Students with ADHD, depression, anxiety, school attendance and behavioral issues. ■ also had experience throughout ■ career working with students on the Autism spectrum, and Students who struggled socially. The Student was on ■ caseload, although ■ had not yet met with the Student at MHS. Mr. Blackadar exchanged three emails with the Parents, although they did not respond to his second one, and left a message on the Mother's cell phone, to which she did not respond. ■ was persistent, and the Parents agreed to a home visit. [Testimony of Tighe Blackadar, S-A-343, S-628]

73. Mr. Blackadar spent an hour at the Student's home on September 12, most of which was spent hearing out the Mother. She explained that she was looking at other schools because she thought the Student would do better in a smaller environment. The Student joined them for the first half-hour, and

was talkative and pleasant. Mr. Blackadar explained how the Impact Program, which ■ ran, would be beneficial for the Student, as it provided support, encouraged engagement and provided individual check-ins during study halls. During the middle of the conversation, the Student said, “If I have to go, I’ll go.” [Testimony of T. Blackadar, S-626-627] Mr. Blackadar worked with more than 50 students with school refusal issues, and helped them create plans to return to school. He thought it was a good idea for the District to transport the Student. [Testimony of T. Blackadar] Mr. Blackadar followed up by attempting to schedule a time for the Student to come in and meet with Mr. Blackadar and the Student’s guidance counselor to discuss ■ schedule and brainstorm supportive solutions for the Student’s attendance. [Testimony of T. Blackadar, S-633] The Parents, however, did not respond to Mr. Blackadar’s attempts to schedule this meeting. [S-633-634]

74. On September 12, Ms. Barber reached out to the Parents to discuss providing tutoring for the Student and to arrange for two evaluations: one with Rebecca Johnson, a speech and language therapist, and the other with Kara Wisniewski, Ph.D., a psychologist from Dirigo Consulting, which was owned by Heather Blier. Dr. Wisniewski was going to administer the ADOS-2 after conducting a parent interview. [S-A-366] Ms. Barber made another attempt to return the Student to school, presenting a plan to transition the Student by providing tutoring in a variety of possible settings, a full-time placement in the small-group resource room, social work services with Mr. Blackadar and executive function instruction. [Testimony of K. Barber, S-A-358] On September 18, the Parents responded that they would like to get tutoring set up right away, adding that the Student had been attending BigFish that week, found it very enjoyable and connected greatly with the children there. The Parents requested reimbursement for the Student’s attendance at BigFish, “as ■ needs to be with peers in a learning environment until we figure all of the details out about appropriate placement.” [S-A-357]

75. The next day, Ms. Barber notified the Parents that the District was ready to begin the Student's programming and social work services. Hannah Corcoran, the Student's case manager, would provide instruction. She was experienced in working with students with ASD, and had experience with executive functioning and social skills deficits. [Testimony of K. Barber, S-A-358] Ms. Barber said the District would begin transporting the Student to school for tutoring, with a plan to allow ■■■ to enter through the side door, and access ■■■ education by working with the tutor on curriculum. [Testimony of K. Barber, S-A-358] Mr. Blackadar, Dr. Grebouski and Dr. Wisniewski each testified that this was a good plan and would have helped the Student return to school. [Testimony of T. Blackadar, T. Grebouski, K. Wisniewski] After getting this programming ready at the Parents' request, the Parents notified Ms. Barber the next day that they were rejecting tutoring, and that the Student said ■■■ could not go to MHS. Their letter also served as their notice to the District that they were seeking reimbursement for the cost of the Student's attendance at BigFish. [S-A-361-362] The District did not offer the Parents reimbursement. BigFish was neither an approved public nor private special purpose school.

76. In the meantime, Rebecca Johnson was attempting to arrange the Student's speech and language evaluation, which she conducted on four days in late September. [S-646] Although the Student did not seem upset, the Mother reported that the Student had a rough time. Ms. Johnson offered to meet the Mother and Student at the back door of MMS, but the Mother chose not to do this. [Testimony of R. Johnson, S-A-364-651] The evaluation referral questions were: 1. what are the Student's current receptive and expressive language skills, and 2. what are ■■■ current pragmatic language skills. Ms. Johnson thought the Student seemed like a typical middle schooler. ■■■ was not talkative, but ■■■ had good reciprocity of speech and did very well during the evaluation. [Testimony of R. Johnson, S-646-651] Ms. Johnson did a comprehensive assessment. The Student scored average on receptive and

expressive vocabulary skills, in the 70th percentile for expressive and 47th percentile for receptive vocabulary. ■ also scored in the average range for listening comprehension and oral expression, in the 50th and 77th percentile respectively. ■ oral language composite score was in the 63rd percentile, which was average compared to same-aged peers. These tests involved the Student's ability to communicate appropriately, use syntax, reasoning, and linguistics, and ■ score was solidly average. [Testimony of R. Johnson, S-647-648] Ms. Johnson also administered the Social Language Development Test for adolescents (SLDT-A), on which the Student's scores were scattered. ■ scored below average on making inferences, problem solving and social interaction, average on interpreting social language and interpreting ironic statements. Nonetheless, this would not qualify ■ for special services as a student with a speech and language impairment because to receive intervention in school, a student must have a moderate impairment, which would be a score of 78 or below, but the Student scored an 89. [Testimony of R. Johnson, S-649] Ms. Johnson concluded that the Student demonstrated average to high average functional language, including receptive and expressive vocabulary, receptive and expressive language, and interpreting various components of social language. [Testimony of R. Johnson, S-651]

77. Dr. Wisniewski conducted an evaluation of the Student on September 16, 2019 and October 28, 2019. This included the ADOS-2, Autism Spectrum Rating Scales (ASRS), Vineland Adaptive Behavior Scales (Vineland-3) and a Functional Behavioral Assessment (FBA) to determine the basis for the Student's school refusal. [S-656] Because the Student hadn't attended school since the first day of 9th grade, she was unable to obtain a teacher report, as the ASRS required that it be done within four weeks due to age-based norms. It was very important to obtain rating scales from teachers to understand the Student across settings. The best she could do was interview staff from the previous

year. The lack of input from school was one of the concerns she had with Dr. Jasinski's evaluation. It was Dr. Wisniewski's opinion that Dr. Jasinski did not have sufficient information on which to assess and diagnose Autism in a school setting. He based it largely on the GARS-3 from the Parents and had no school input. GARS is just a subjective measure, and only one piece of a battery of evaluations needed to diagnose Autism. There is a significant difference between the GARS-3 and the ADOS-2, the latter of which is the gold standard for diagnosing Autism. It is a structured observation system to get at the patterns in a very structured way. [Testimony of K. Wisniewski]

78. At the time Dr. Wisniewski conducted her evaluation, the Student was attending BigFish, and she observed [REDACTED] there. At BigFish, there was a "gentle nudging" to get children to do their work, but this is not very successful. What concerned Dr. Wisniewski about students with ADHD, anxiety and Autism who attended BigFish was that they did not receive the support with structure and consistency that they needed. Particularly with anxiety, students have a desire to avoid things, and when they have an opportunity to do so, as was the case at BigFish, it is contraindicated. The lack of rigor and alignment of standards are a problem for children like the Student who have a lot of potential. [Testimony of K. Wisniewski] Another problem Dr. Wisniewski observed at BigFish was a large emphasis on technology. Because the children focus on technology during lunch and other social situations, they do not learn social skills, which is one of the Student's needs. Given the Student's known technology addiction issues, Dr. Wisniewski would suggest not focusing on technology in instruction. She did not think BigFish was an appropriate placement for the Student.<sup>26</sup> Due to [REDACTED] very complex makeup, it was very important to have social skills building support threaded through [REDACTED] daily activities, and it is very

<sup>26</sup> The Mother told Dr. Wisniewski that BigFish was more of "an adult day care." [Testimony of Dr. Wisniewski] The Parents were unable to state that BigFish was an appropriate placement for the Student.

important to have certified teaching staff that understand educational standards so ■ can acquire functional skills. As a very bright, capable young man with a lot of strengths, Dr. Wisniewski stated that the Student needs to attain high standards while being able to feel good about ■ self. There was nothing at BigFish to support ■ behavioral, social or emotional needs. It was Dr. Wisniewski's opinion that BigFish was not even a good temporary plan because it was so far outside the scope of what the Student needed and disconnected from education in both public and private school settings. It is helpful to reduce the number of transitions for the Student, so her recommendation would be to implement the strategies and supports the Student needs in the regular school setting. She felt it was more important to focus on getting the interventions the Student needed in place than to focus on the diagnosis. It was Dr. Wisniewski's opinion that the Student required a dynamic, multifaceted approach, and she has seen a lot of public schools provide this. [Testimony of K. Wisniewski]

79. When Dr. Wisniewski evaluated the Student, ■ did not demonstrate difficulty with attention or response control, although eye contact was fleeting and ■ affect was generally flat. She reviewed the Student's previous evaluations, and concluded that the results of the ADOS-2, BASC-3 Content Scales, ASRS and other information collectively indicated pervasive deficits in social communication and social interaction across multiple contexts, highly restricted, fixated interests that were abnormal in intensity of focus, as well as sensory sensitivities. It was her opinion that ■ met the diagnostic criteria for ASD without accompanying intellectual impairment or language impairment, Level 1. [S-735] She did not, however, think the Student's diagnosis was an obvious one, particularly as ■ expressive and receptive language was well-developed. Dr. Wisniewski also believed that students with anxiety needed to be attending school, agreeing with Ms. Barber on this point. [Testimony of K. Wisniewski, S-A-339] When a student has school refusal, it is important to try to figure out where the stressors are, how to deal

with them and who the people are who can reconnect with the Student. There are lots of ways to help students reintegrate, including after school programs and partial day attendance. Schools can construct an environment where students feel safe. Dr. Wisniewski thought the District offered a very reasonable and appropriate plan to transition the Student back. She testified that it is very important to try as much as possible to maintain some normalcy for the Student, and tutoring is often part of that. Dr. Wisniewski had no sense of why the Parents refused the District's offer of tutoring.

[Testimony of K. Wisniewski]

80. Dr. Wisniewski also conducted an FBA, which she advised had to be interpreted with caution because the Student was not in school, so she did not have school-based behavior ratings or the teacher interviews necessary for a complete evaluation. The Student talked about the social aspects of school being a challenge, and that ■ found ■ peers did not seem to want to interact with ■.

[Testimony of K. Wisniewski, S-731]

81. Dr. Wisniewski was also concerned that the Student was not engaging in therapy, particularly in light of ■ depression, as the combination of cognitive behavioral therapy (CBT) and medication was particularly useful for children, and CBT can be more effective than medication, as it is really about skill building. Dr. Wisniewski testified that it was very important for the Student to work through ■ issues and see the many strengths ■ has. [Testimony of K. Wisniewski, S715, 722] Ideally, the District would have been able to provide services as part of the IEP and the Parents would have found a therapist for the Student outside of school. Her recommendations, which were seven pages long, included intensive and targeted high quality clinical care, and that ■ programming be overseen and supported by a clinician with expertise in treating children with ASD, ADHD, anxiety and depression, and that ■ be followed regularly by a psychiatrist specially trained in these conditions. She thought the Student was a

strong candidate for participation in school-based social skill instruction and support, and for case management and home-based services to help █ parents support █ engagement in treatment and assist them in addressing █ challenging behaviors at home. She noted that the Student had a quiet place to go at MMS, and █ availed █self of it. Dr. Wisniewski said her recommendations could be implemented in public school and that she believes in and embraces the concept of least restrictive environment, but the Student needed a gradual reentry plan. Much more could be tried before considering a private placement. [Testimony of K. Wisniewski, S-740]. Dr. Wisniewski did not have the opportunity to present her evaluation to the IEP team, as the meeting was cancelled.<sup>27</sup> Ms. Barber testified that MHS could have implemented all of Dr. Wisniewski's educational recommendations. [Testimony of K. Barber]

82. Both Dr. Grebouski and Dr. Wisniewski explained that there was not much difference between a neuropsychological and a psychological evaluation. [Testimony of K. Wisniewski, T. Grebouski] The Parents were not pleased that Dr. Grebouski was merely a "school psychologist" rather than a "neuropsychologist" like Dr. Jasinski, and argued that, had the District used Dr. Blier to conduct the neuropsychological evaluation initially requested by the Parents, it would have changed the Student's diagnosis. [Tr. 478] Both Dr. Blier and Dr. Wisniewski are psychologists, however, not neuropsychologists. Dr. Wisniewski's evaluation was far more thorough and professional than Dr. Jasinski's evaluation, and was given more weight in this decision.<sup>28</sup>

<sup>27</sup> Although Dr. Wisniewski did not know why the meeting was cancelled, it was due to the Parents' decision to move to New Hampshire.

<sup>28</sup> As noted above, Dr. Jasinski's evaluation did not comply with the MUSER evaluation requirements, and that was one of several reasons why it could not be used to establish the Student's eligibility for special education as a student with Autism. [MUSER §V(3), VII(2), VI(A)(1)].



83. For two weeks, the District sent a van to pick up the Student and bring [REDACTED] to school for tutoring and other services. The Student was attending BigFish at the time, however, and the Mother felt like having the van show up was a violation of her home. [Testimony of Mother] Then on October 2, the IEP team met to discuss the Student's absence from school. [S-655] The Parents explained that the Student had been excited to come to MHS and see if [REDACTED] could connect with [REDACTED] peer group, but [REDACTED] got nothing from them that day, and this is why [REDACTED] stopped attending school. Both Parents agreed that the Student would have gone, had they made [REDACTED], but they did not wish to do that. The Mother explained, "The thing you guys don't understand is whatever I tell [REDACTED] to do, [REDACTED] do. [REDACTED] not a behavioral problem and [REDACTED] not refusing anything." [S-658, 694-95] At that meeting, the District made numerous offers of programming, including tutoring at home, at a neutral site like a library, tutoring after BigFish, social work services, and transportation. The Parents declined each of these offers, as they were primarily focused on obtaining reimbursement for BigFish. [S-681, 683, 685-687, 699, 700] At this meeting, the Parents instructed the District to stop sending the van to their home because the Student was at BigFish. [S-683] After a series of emails, Ms. Barber informed the Parents that the District would stop sending the van. She explained that she arranged for the van so the Student could attend school after the regular start of the school day, and the District would provide [REDACTED] with both tutorial and social work services in a low stress, low demand environment geared to allow [REDACTED] to successfully transition to MHS. Ms. Barber also acknowledged that the Parents had elected to enroll the Student in BigFish and rejected the District's offer of services. [S-A-375-375]

84. The District scheduled an IEP team meeting on November 6, 2019, to review Dr. Wisniewski's and Ms. Johnson's evaluations. The Parents asked to postpone the meeting, then cancelled it because they were moving to Dover, New Hampshire. The District offered to convene an IEP team meeting to

transition the Student to ■ new school and discuss the evaluations, but the Parents declined. [ S-A-395-396, 398, testimony of K. Barber]

85. The Parents and their children moved to Dover on November 10, 2019. The Parents did not enroll the Student in public school there or attempt to obtain special education services until some time in January, 2020. [Testimony of Mother]

#### **IV. DISCUSSION AND CONCLUSIONS:**

##### **A. Brief summary of the position of the Parents:**

The District violated the Student's rights under the IDEA by failing to identify ■ as a student with a disability eligible for special education during ■ 7th and 8th grade years. The Mother made multiple requests for help because the Student was struggling, and disclosed that ■ had been diagnosed in early childhood with ADHD and anxiety in February of 2017, which is when the District first had reason to suspect that the Student had a disability that impacted ■ attention, executive functioning and social skills. The District has a duty under the IDEA, its regulations and District policy to refer the Student for a special education evaluation upon receiving notice that ■ may have a disability, but did not take appropriate steps to do this. By the fall of 2017, the District had sufficient information to raise the suspicion that the Student's ADHD, executive functioning, social skills and anxiety were negatively affecting ■ access to education, but the District did not evaluate ■ until the Mother requested a neuropsychological evaluation in October of 2018.

It took more than three months for the District to complete and review the evaluation proposed at the November 28, 2018 meeting. A comprehensive evaluation completed within the IDEA timeline of 45 school days would have been reviewed before the Student went into crisis in February and had to be placed in a partial hospitalization program for school anxiety and school refusal. Furthermore, the

District failed to assess the Student in all areas of suspected disability. A comprehensive review should have included all of the components that were part of Dr. Wisniewski's evaluation done in the fall of 2019, plus a speech and language, and occupational therapy evaluation.

The District failed to provide the Student with FAPE during the periods at issue in this hearing. ■■■ has ASD, and has struggled in school with ■■■ differences and deficits without a special education program to help ■■■ complete work and keep up in class. The Student's educational performance declined throughout this period, and the gaps between ■■■ social skills and those of ■■■ peers widened during 7th grade, causing ■■■ to suffer from strong feelings of isolation and rejection due to an inability to navigate social settings and maintain friendships. The Parents struggled to get the Student to school every morning and remain in school all day. Consequently, the Student did not make academic progress that was appropriate in light of ■■■ circumstances.

The 504 Plan developed for the Student at the end of ■■■ 7th grade year was developed without the benefit of an evaluation and was therefore inappropriate, as it was not based upon sufficient information about ■■■ disability-related needs. Furthermore, there was nothing in that plan that actually addressed ■■■ needs, nor were the accommodations useful to provide access to educational opportunity.

The plan was not sufficient during 8th grade either. The Student was still facing the "lion in the room" every day at school. ■■■ needed a program that met ■■■ needs as a student with ASD, ADHD and anxiety in order to function at school and make progress in the general education curriculum. Without appropriate educational services, the Parents were forcing ■■■ to attend school and the year was a disaster.

The IEP in effect at the start of the Student's 9th grade year did not meet the needs outlined by Dr. Wisniewski in her evaluation, or incorporate recommendations made by Gretchen Timmel or Dr. Jasinski. It lacked services to address the Student's challenges with reading comprehension and writing, did not include ABA methods or the services of a Board Certified Behavioral Analyst ("BCBA"), and offered no social skills groups or speech and language services. It did not qualify the Student under the exceptionality of ASD.

Because the District failed to provide the Student with FAPE, ■ is entitled to compensatory education services between October 23, 2017 and November 8, 2019. This would be best delivered by providing funding for the Student to attend a special purpose school that specializes in addressing the needs of Students with average to above-average intelligence and social communication or ASD. The Parents should also be awarded reimbursement for the costs of therapy, medical expenses, evaluations, tutoring and other out-of-pocket expenses in connection with the Student's education during the period in question.

**B. Brief summary of the position of the District:**

The District did not violate its child find obligation with respect to the Student between October 23, 2017 and May 9, 2019. Maine regulations provide that the need for special education "is best established through evidence of a distinctly measurable and persistent gap in the child's educational or functional performance and cannot be addressed through services or accommodations available through the general education program." Maine Unified Special Education Regulations (MUSER) §VII.2.

Although the Parents allege that the District failed to meet its child find obligations to the Student in 7th grade, they misstated the correct legal standard, and presented no evidence to support their

allegation. In fact, the Parents' closing argument contains numerous inaccuracies and misstatements of fact, and should be viewed skeptically.

Ms. Timmel testified to the appropriateness of the Student's 504 plans in 7th and 8th grade (an issue not in dispute here, as the Hearing Officer has no jurisdiction over Section 504), but did so without speaking with anyone from the District, without reviewing any of the Student's educational records or being familiar with how the Student presented at school, never having observed [REDACTED] in the learning environment, so she would not be able to speak to [REDACTED] full spectrum of needs and could not testify about whether the 504 plans were appropriate. On the other hand, every District witness familiar with the Student in 7th grade testified that [REDACTED] had an excellent year. The law is clear that evidence of problems at home without a corresponding impact on educational or functional performance in school is not sufficient to trigger child find.

It was appropriate for the District to attempt to address the Parents' new concerns through regular education interventions, including a 504 plan, before considering special education. In Maine, school districts are required to implement general education interventions prior to making special education referrals, and the duty to make a special education referral only arises once it becomes sufficiently clear that the intervention process has been completed.<sup>29</sup> The District acted reasonably and appropriately in implementing general education interventions for the Student before the initial IEP meeting on November 28, 2018. Unfortunately, throughout all relevant times, the Parents consistently lied to the District about the reasons for the Student's absence and excused the same, then testified [REDACTED] was absent for school refusal.

<sup>29</sup> Comm'r Admin Letter No. 85 (June 12, 2012).

What really happened was that before any special education referral was initiated by anyone, the Parents decided that public school was not appropriate for the Student. Within 20 days of the Mother requesting an evaluation, which the District treated as a special education referral, the Student's team met to discuss special education evaluations. Before that, however, the Parents sent the Student to BigFish, then proceeded to obstruct the District's efforts to identify the Student for special education and develop an IEP. The courts have concluded that parents may not benefit from their own obstructionism. First, the Parents unilaterally determined they did not want the Student to receive special education services or evaluations. Then, days before the evaluation was completed, the Parents removed the Student from MMS, placed [REDACTED] at BigFish, unenrolled [REDACTED] from school, and in early March, brought [REDACTED] to Illinois to attend a program in a hospital setting. Even if the Parents had provided consent for special education, the Student would not have had an IEP developed until after the Parents removed [REDACTED] to Illinois, where [REDACTED] was unavailable for services for the month of March. The District attempted to work collaboratively with the Parents, but Ms. Barber's attempts to set up an IEP team meeting were stymied by the Parents in numerous ways, including not notifying the District of the Student's return to Maine, placing [REDACTED] at BigFish and ignoring the District's repeated requests for a dialogue about [REDACTED] re-entering school.

When the Parents finally sought to have the Student return to MMS, the District moved quickly to determine the Student's eligibility a week later. The IEP team identified the Student as eligible under the exceptionality of ED because there was not sufficient information to support an ASD identification at that time. Because the Parents disagreed with this, they again shut down the IEP process in June 2019.

Even if the Hearing Officer concludes that SAD 35 violated its child find obligations, it is harmless error because the Student received FAPE during 7th grade, as ■■■ received educational benefit and had a successful year. The same is true for 8th grade. ■■■ did well until February of that year.

In cases where a school district is prevented from ever implementing an IEP because of actions on the part of the parents, without ever accessing the District's services, parents challenging the adequacy of the IEP must show there was no reasonable probability that their child could benefit from it. The IEP contained every recommendation from every evaluation done to that point, and Dr. Wisniewski testified that it was appropriate to meet the Student's needs.

Even if the Hearing Officer concludes that the District failed to provide FAPE, she should decline to order any remedy because the Parents' significant obstruction limits their rights to reimbursement or compensatory education. Additionally, many of their reimbursement requests were not adequately documented or even compensable under IDEA, or there was no evidence that the services obtained by the Parents were effective or appropriate.

### **C. Discussion of the Issues:**

As the U.S. Supreme Court has held, in an administrative hearing challenging an IEP, the burden of proof lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 41 (2005), *Regional School Unit No. 51 v. John Doe*, 60 IDELR 163 (D. ME. 2012); *DB ex rel Elizabeth v. Esposito*, 675 F. 3d 26, 35 (1st Cir. 2012) . Therefore, the Parents must prove by a preponderance of the evidence that the District violated its child find obligation under the IDEA, and if so, that this violation resulted in a denial of FAPE during the period in question.

**1. Did the District violate its Child Find obligation by failing to evaluate and identify the Student under the IDEA between October 23, 2017 and May 9, 2019?**

### **A. Timeliness of the referral to special education**

Every student who is eligible for special education services is entitled under state and federal law to receive a "free and appropriate public education . . . designed to meet their unique needs and prepare them for employment and independent living." 20 USC 1400(d)(1)(A). To ensure that every disabled student receives FAPE, state and federal laws require schools to identify children who qualify as disabled or who schools reasonably suspect may qualify as disabled, experience adversity in educational performance due to their disability, and "need special education and related services by reason of the disability." To be sure that each child receives FAPE, the special education laws require schools to make a referral to special education whenever "the child find process indicates that a child may require special education and related services in order to benefit from regular education because of a possible disability." *Mr. I. ex rel. L.I. v. Maine School Admin. Dist. #55*, 480 F. 3d 1, 13-14 (1st Cir. 2007), MUSER §IV.2(D) (2013); 34 CFR §300.301(b).

When these circumstances are evident with respect to a student, the school must evaluate the student to determine whether the student is eligible under the IDEA, and if so, develop an IEP. *C.G. ex rel. A.S. v. Five Town Cmty. Sch. Dist ("Five Town CSD")*, 513 F. 3d 279, 285 (1st Cir. 2008). So-called "child find" is an affirmative, ongoing obligation of all school administrative units (SAU) to identify, locate and evaluate all children with disabilities residing within their jurisdiction who may be in need of special education and related services. 34 CFR 300.111(a)(1)(i). This includes children who are suspected of having disabilities and who may be in need of special education, even if they are advancing from grade to grade. 34 CFR 300.111(c). The IDEA entitles qualifying children to services that



target all of their special needs, including academic, physical, emotional or social. *Mr. I. ex rel. L.I. , supra.*

An SAU's "child find" duty arises when:

- (1) there is a student with a disability named in the statute, or the District has a reason to suspect such a disability;
- (2) the student's disabling condition adversely affects the student's educational performance;
- and
- (3) the student may need special education and related services to make progress in their educational program.

*Doe v. Cape Elizabeth School Dep't*, 382 F. Supp. 3d 83, 99 (D. Me. 2019).

For children over age three years to be eligible for services, they must be observed in the learning environment and evaluated according to MUSER rules, and be determined to have a disability which requires the provision of special education and supportive services. They must have one or more of the disabilities listed in MUSER §VII. An important distinction between children with diagnosed disabilities and a child who is eligible for special education and related services is that, because of their disability, an eligible child can neither progress effectively in a regular education program nor receive reasonable benefit from such a program. The need for special education is best established through evidence of a distinctly measurable and persistent gap in the child's educational or functional performance that cannot be addressed through services or accommodations available through the general education program. MUSER §VII(2)

MUSER further requires that "if the child find process indicates that a child may require special education and related services in order to benefit from regular education, the child shall be referred to the Individualized Education Program (IEP) Team to determine the child's eligibility for special educational services. MUSER §IV(2)(D). Referrals may be made either by the District or by parents.

There was no dispute regarding whether the District’s child find procedure, as written, complied with the law. [S-767] In addition to this procedure, teachers met daily to discuss any concerns about students, and they met bi-weekly with a guidance counselor to ensure that children were identified when eligible. MMS also had a student assistance team that met regularly. This process is used in other SAUs in Maine as an effective means of noticing when students are struggling in school or needing additional assistance, whether through 504 plan accommodations or special education. *Cape Elizabeth School Dep’t*, 118 LRP 28728 (Me. 2017).

Under Maine law, the child find process specifically can be triggered by absenteeism and states that, “children who have the equivalent of 10 full days of unexcused absences or 7 consecutive school days of unexcused absences during a school year” should be referred to special education for evaluation. MUSER §IV.2(A) In 7th grade, the Student did not have an excessive number of absences. ■ had a total of nine absences, all of which were excused by the Parents. Central to the issues in this hearing is the fact that the Parents consistently excused the Student’s absences, regardless of the reason, and the Mother consistently misrepresented to MMS the real reason why the Student was not in school, which was in part why the District was largely unaware of the Student’s school refusal problem.<sup>30</sup> There were a number of instances in the hearing record where the Mother testified that the Student refused to go to school on a particular day, but instead of telling the District the real reason why the Student was absent, she reported some other reason. [See, e.g., Fact #24]. Consequently, it was the Mother’s choice to hide from the District the true reason the Student was absent that prevented the District from realizing that this was a problem. As both Ms. Camp and Ms.

<sup>30</sup> The Parents’ Final Argument stated that the Student missed 17 days of school and was tardy 13 times. This is one of many misrepresentations of the evidence contained in the Parents’ Final Argument and Reply Brief.

Barber testified, when a student was absent due to anxiety, it would be a “red flag” to the student assistance team for a referral to special education. [Testimony of S. Camp, K. Barber, Tr. 850-860] There was no explanation regarding why she chose to do this repeatedly over the course of several years. What was even more surprising was that when the Student was seeing Ms. Armstrong-Hay for therapy in the fall of 2018, there was no record that school refusal was discussed, and the Mother could not say that she told the therapist about the Student’s school refusal. [Testimony of Mother, Tr. 524-527] The Parents also had a practice of removing the Student from school for four or five days every year so the family could take a vacation the week before spring break because it was “more financially feasible.” [Testimony of Mother] Without knowing the nature of the problems the Student was having at home, and without an excessive number of unexcused absences as defined in MUSER, the District was under no obligation to make a referral for attendance reasons during 7th grade.<sup>31</sup>

The Parents argue that the reason the District did not consider the Student’s eligibility for special education in the spring of 6th grade or fall of 7th grade was that the Parents did not provide documentation of a diagnosis from a physician. It is unclear whether the Parents contend that they should not have been required to produce documentation of these diagnoses before the District took action. At the time, Ms. Camp requested this documentation as a first step in determining eligibility under Section 504, which requires that students have a “disability,” defined as having a record of such an impairment, or having a physical or mental disability that substantially limits one or more major life activities. 28 CFR §35.108. Consequently, the District’s request for a formal medical diagnosis was consistent with the Federal 504 regulations. Additionally, the Student’s therapist Elizabeth Bardwell

<sup>31</sup> Attendance was not an issue as a trigger for 8th grade, as the Student was referred to special education in October of that year.

alerted the Mother that the Student might be eligible for Section 504 services *because of* ■■■ diagnoses. Under the IDEA, the regulations require an evaluation by someone qualified to make the particular diagnosis to determine eligibility under each category of disability. MUSER §VII(2).

The reason why the District did not evaluate the Student for special education was not, as the Parents' asserted, the lack of documentation of a disability. It was because the Student did not appear to have a disabling condition that adversely affected ■■■ educational performance. ■■■ was an excellent student, did not usually present as anxious in school, and was making progress in ■■■ educational program without special education and related services. At that time, the Student's teachers reported that ■■■ appeared to be a normal middle school student. The Student had average cognitive abilities, was on the Honor Roll every quarter during 6th grade, and all but one during 7th grade, and did very well on standardized assessments. ■■■ exhibited no gaps in ■■■ educational or functional performance at school. Although ■■■ had some ups and downs during the winter and spring of 2017, both the team and the Mother noted improvement when the Student's medication was effective. It is not unusual for Students with anxiety or ADHD to be able to manage their conditions in school without the need for special education, and the mere fact of such a diagnosis, even if the Parents had provided the requested documentation, would not necessarily give rise to a special education referral, as the IDEA also requires that students not only must have a disability or suspected disability, but also gaps in educational or functional performance. *Cape Elizabeth*, 382 F. Supp. 3d at 99.

Contrary to the Parents' argument that a child with a disability must be referred to special education, the Court in *A.P. ex rel. Powers v. Woodstock Bd. of Educ.* explained, "The fact that a child may have a qualifying disability does not necessarily make ■■■ 'a child with a disability' eligible for special education services under the IDEA. The child must also need special education and related

services.” *A.P. ex rel. Powers v. Woodstock Bd. of Educ.* 572 F. Supp. 2d 221, 225 (D. Conn. 2008), *aff’d sub nom. A.P. v. Woodstock Bd. of Educ.*, 370 F. App’x 202 (2d Cir. 2010). School districts are not required under the IDEA to refer to special education every child who has any kind of disability. Having a medical diagnosis is a starting place for some referrals under the IDEA or Section 504. There are many students diagnosed with ADHD or anxiety who are not, simply on the basis of their diagnoses, automatically referred to special education, nor does the IDEA require this. The IDEA only mandates this when the disabling condition adversely affects a student’s educational performance. The fact that the Student continued to do well in classes and on standardized assessments, and without having the whole picture from the Parents of what was going on with the Student at home, there was no reason for the District to suspect that the Student had a disability that was preventing ■■■ from progressing or receiving educational benefit.

During the winter of 6th grade, after learning for the first time that the Student had been diagnosed with anxiety and ADHD, Ms. Camp assisted the Mother by looking out for the Student and providing some support through the general education program. In March of 2017, it appeared that ■■■ medication was helping a great deal, as was evident from both the Mother’s correspondence with Ms. Camp and the observations of the Student’s teachers. [Fact #12, 13] Ms. Camp checked in with the Student regularly and gave ■■■ possible strategies to ease ■■■ anxiety. [Fact #10]

The Parents, on the other hand, provided no reason why they did not respond to the District’s request for documentation of the Student’s diagnoses, especially in light of the fact that the Parents had this documentation from the Student’s doctor in March of 6th grade, as well as from an evaluation that was done when ■■■ was six. This was one of a number of instances in which the Parents either did not follow through with the District’s reasonable requests or made decisions that prevented the

District from obtaining the information necessary to decide whether to move forward with identifying the Student and providing [REDACTED] with special education services. [See, e.g., Footnote 25]

The Parents also argued that the District had sufficient information to raise the suspicion that the Student's ADHD, executive functioning, social skills and anxiety were negatively affecting [REDACTED] access to education. These issues, however, did not actually show up in the classroom until the end of 7th grade, and even then, most of [REDACTED] issues were not apparent in school. For reasons they did not explain during the seven days of hearing, the Parents chose to withhold a considerable amount of important information from the District about the Student's struggles, including [REDACTED] school refusal; struggles that the Parents believed were connected to the Student's experience at school. The evidence showed that in school, teachers saw the Student's main challenges as typical of middle school students: organization, homework completion and social interaction. From the District's perspective, [REDACTED] issues were no different than many other students [REDACTED] age.

Sarah Camp was always willing to help the Student by first exploring accommodations for [REDACTED] under Section 504, which was consistent with what MUSER §VII(2) required before making a special education referral, and requesting documentation of a physical or mental health diagnosis that might be affecting the Student's ability to access the curriculum was reasonable under the circumstances. A few days before the start of 7th grade, the Mother emailed Ms. Camp asking how to move forward with a 504 plan. Ms. Camp offered to set up an initial meeting, emphasizing again that the District would need the physician's documentation before the team could meet to determine whether [REDACTED] qualified. At that time, the Parents supplied a doctor's note. [Fact #16]

At the start of 7th grade, [REDACTED] teachers noticed a difference in the Student's demeanor, as [REDACTED] was more engaged. Nonetheless, in November of 2017, a team met to consider whether the Student

required a Section 504 plan. The Mother reported that the Student was taking medication, which was effective. ■ teachers noted that ■ was doing well in school, was reserved but did not present as anxious, and there were no concerns with peer interactions or work completion at this time. At the meeting, the Mother said that getting ■ to school that year was easier, and that ■ continued to do remarkably better in 7th grade. This was one of very few references in the record that getting the Student to school was an issue at all. Her statement at this meeting that getting ■ to school was easier was contrary, however, to the Mother's testimony at the hearing, where she testified that getting ■ to school was a challenge that year, and that it got harder every year. The Student continued to get good grades, and even asked to be in a harder math class. The 504 team, including the Mother, agreed that although the Student had a disability, it did not substantially limit ■ ability to access ■ education. [Fact #18] At the time, the Mother seemed fine with the result of the meeting, but again her testimony at the hearing was contrary to what she told District personnel.

At the hearing, the Mother's testimony was often at odds with her emails to MMS and other documentation. Her memory for dates and details was not good, and she was not a reliable reporter. Based upon what she actually told the 504 team that witnesses recalled and documented, there was no indication that the Student struggled with school refusal or needed a 504 plan or a referral to special education at that time.

Evidence of problems at home without a corresponding impact on educational or functional performance in school is not sufficient to trigger child find. The IDEA does not require schools to address behaviors that have minimal, if any, impact upon the Student at school. In *Gonzalez v. Puerto Rico Department of Education*, 254 F.3d 350 (1st Cir. 2001), the First Circuit explained that IDEA

services need not address "problems truly 'distinct' from learning problems." 254 F.3d at 352 (1st Cir. 2001).

Overall, the evidence showed that in school, the Student appeared to be doing well. It was not until the end of 7th grade, on May 29, 2018, that the Student's math teacher, Mr. Ryan, noticed that ■■■ work had "dropped off some," and he shared this concern with the Mother. That day, the Mother asked for a 504 plan, and Ms. Camp immediately set up a meeting. Other teachers also noticed a change in the Student, and the 504 team found ■■■ eligible for accommodations. The 504 team, including the Mother, agreed upon the accommodations in the 504 plan, and thought they would address the Student's needs. As the team did not know that school refusal was an issue, they did not discuss it. Addressing the Student's issues with a 504 plan was a reasonable step at this point. There was no child find violation with respect to 7th grade.<sup>32</sup>

#### **B. The referral process**

In 8th grade, Ms. Camp continued to check in with the Student and ■■■ teachers, who reported that the Student was doing well at the beginning of the school year. Although the Mother testified that she struggled with the Student's school refusal, she continued to withhold that information from the District staff, so they had no way of knowing what impact school might have been having on ■■■ at home.

In October of 8th grade, the Mother corresponded with the Student's teachers because of her concern about the Student's grades, which were lower due to incomplete assignments. ■■■ continued to struggle with the kind of skills that many middle school students must learn, such as organization

<sup>32</sup> Although there was considerable evidence about whether the Student's 504 plan was appropriate, my jurisdiction is limited to the IDEA and the issues before me, and does not include the appropriateness of the Student's 504 plans.



and how to navigate social situations. When the 504 team was about to meet that month, the Mother requested a neuropsychological evaluation “to be completed this school year to address executive functioning concerns stemming from ADHD and anxiety disorders impacting” the Student’s ability to fully access ■■■ education. The special education director treated this as a special education referral request. The District was fully prepared to evaluate the Student for special education and convened an IEP team meeting to discuss the referral and what evaluations were needed.

The Parents then proceeded to make a series of decisions throughout 8th grade that prevented the District from evaluating and identifying the Student for special education. The first was at the November 2018 IEP team meeting, when the Mother declared that she did not think the Student needed special education services and did not want ■■■ to be evaluated for special education. [Fact #33] She did not ask questions or explain the reason for her decision at the time. At the hearing, however, the Mother testified that the reason she did not think the Student needed special education was because she thought that meant needing direct instruction in academic classes, and that she did not realize ■■■ could get instruction in other areas. She also testified that she did not understand the difference between special education and Section 504. This is in contrast to both Ms. Barber’s and Dr. Grebouski’s testimony, which I accept as fact. Dr. Grebouski and Ms. Barber were both credible witnesses, and there was no reason to question the veracity of their corroborated statements. On the other hand, as noted previously, the Mother was not a reliable reporter, and routinely gave the school information that was different from, and even contrary to, her sworn testimony at the hearing. [See, e.g., Footnotes 4, 8, 12 & 16, Fact #60]. Furthermore, it did not make sense that the Mother, an intelligent, conscientious advocate for the Student with a Master’s degree in clinical mental health who has worked with families with disabilities, has another child receiving special education, and received

procedural safeguards from the District (both for this Student and for her [REDACTED]), either would not understand or not take the time to learn about special education services or the difference between that and Section 504. When the Student was in 6th grade, the Student's therapist gave the Mother a book about the difference between Section 504 and the IDEA that the Mother claimed not to have read. [Fact #6, testimony of Mother] It was difficult to believe that the Mother, who was so actively involved in the Student's education, and had access to this information, would make such an important decision to affirmatively reject special education services for the Student without understanding what she was doing or trying to learn more. Even if her testimony were true, the District is not responsible for the Mother's decision to not read the information provided or ask questions before making such an important decision.<sup>33</sup> The District complied with its legal responsibility under the IDEA.

Identification and development of an IEP can only occur after an appropriate evaluation is completed and a determination is made by the IEP team. MUSER IV.2(A). Although the Parents had obtained an evaluation in March of 2019 from Dr. Jasinski, it did not comply with MUSER, and this did not eliminate the right and responsibility of the District to evaluate the Student with evaluators of its own choosing. *See, e.g. Andress v. Cleveland Indep. Sch. Dist.*, 64 F. 3d 176, 178 (5th Cir. 1995). Because the District must have parental consent for special education evaluations, and is required to evaluate the Student before identifying [REDACTED] for special education, the Parents' decision not to move forward with the special education evaluation process prevented the Student from being identified. MUSER §V.1.A.(3)(a)(i), 20 U.S.C. §§1414(a)(1), (b)(2)-(3).

<sup>33</sup> Although the Parents argue that there is no documentary evidence to corroborate the discussion of this issue, it is not needed when there is credible corroborated first-hand testimony from two witnesses.

The District nonetheless agreed to proceed to evaluate the Student under Section 504 by having Tom Grebouski, Ph.D., conduct a psychological evaluation. Because this was not conducted pursuant to the IDEA, there were no mandated deadlines. Again, this was due to the Parents' decision. Had [REDACTED] evaluated the Student under the IDEA, the IEP team would have been required by law to meet and review the evaluation by Friday, February 8, 2019. Dr. Grebouski's report was dated February 28, 2019.

The Parents then took another step to prevent the District from identifying the Student. Before obtaining a written copy of the evaluation results, the Parents interrupted any process the District could have undertaken to evaluate and provide services for the Student by choosing to remove [REDACTED] from Maine and placing [REDACTED] in a program in another state. It is well-established that when parents unilaterally place a student out of state, the school district cannot be compelled to assume any responsibility for evaluating the child while [REDACTED] remains in the out-of-state placement. *Five Town CSD, supra* .

When the Student returned to Maine, the Parents did not notify the District, and did not appear interested in pursuing the Student's education at MMS, instead electing to have [REDACTED] attend BigFish. As the First Circuit noted in *Five Town CSD*, when a Parent has a fixed purpose to place their child in another school, this constitutes an "unreasonable approach to the collaborative process envisioned by the IDEA." *Five Town CSD*, 513 F.3d at 288. The District tried to be accommodating and wanted to transition the Student back to MMS, but the Parents were not cooperative. Despite Ms. Barber's attempts to set up an IEP team meeting upon learning through indirect means that the Student had returned to Maine, the Parents were unavailable, then informed the District that the Student would be attending BigFish for the remainder of the school year.

Ironically, in both the Parents' closing argument and reply brief, they accuse the District of halting the special education referral process with statements such as, "By the time the District initiated and *abruptly terminated* the IEP referral process in November 2018 . . ." This is an astonishing allegation, because this is *precisely the opposite of what the evidence clearly demonstrates*. The only reason the IEP referral process was terminated was due to choices made by the Parents, not by the District, as enumerated above.<sup>34</sup>

The Parents further argue that they did not refuse consent, stating that the Mother signed the only consent form presented to her. As the Parents know well, the only reason this consent form was presented was because the Mother was clear that she did not want the Student evaluated for special education, so the District did the next best thing--to have essentially the same psychological evaluation done of the Student, only under the auspices of Section 504.

### **C. Identification process**

Immediately upon learning that the Parents were interested in reviewing the results of the Student's evaluations, Ms. Barber scheduled an IEP team meeting for April 10, 2019 to consider the Student's eligibility for special education. The District made numerous attempts to schedule the meeting and transition the Student back to MMS, but it was delayed because the family had vacation plans and also due to delays in obtaining Dr. Jasinski's evaluation report. The delays were not the fault of the District, which acted promptly.<sup>35</sup>

<sup>34</sup> This was one of numerous erroneous statements in the Parents' final argument and reply brief, most of which contained no citation to the record. The most alarming, however, was the accusation on page 25 of the Parents' Final Argument that Ms. Barber changed the Student's executive skills questionnaire responses. There was no testimony or other evidence in the record that supported this serious accusation.

<sup>35</sup> Ms. Barber corresponded with the Parents to offer tutoring to support the Student in the interim, stressing the importance of the Student's attendance at school and offering flexible options. Although interested in having the IEP meeting, the Parents were in less of a hurry to return the Student to school, and declined to have [REDACTED] return to MMS, even for tutoring. It appears that their decision to pursue an IEP

At the May 9, 2019 IEP team meeting, the team agreed that the Student was eligible for special education services as a Student with an emotional disability. At that point, ■ was not identified as a Student with Autism because there was no evaluation addressing the issue of whether or how the Student's ASD adversely affected ■ in school.

MUSER defines Autism as follows:

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

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

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

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

MUSER §VII(2)(A). (emphasis added)

Although Dr. Jasinski diagnosed the Student with ASD, his evaluation did not comply with MUSER, and contained no input from the District or the Student's teachers, nor could he address how the Student's ASD affected ■ educational performance because he did not obtain this information, as required by the IDEA.<sup>36</sup> Dr. Grebouski did not agree that the testing supported the ASD diagnosis. Therefore, there

was so that they could request District reimbursement for placing the Student at BigFish, a placement that everyone agreed was inappropriate for ■. The Student ultimately wanted to return to MMS, and the District acted immediately to accommodate ■ request. [Facts #55, 57]

<sup>36</sup> There were a number of unorthodox choices that Dr. Jasinski made when conducting his evaluation. As Dr. Wisniewski credibly testified, Dr. Jasinski's evaluation only used a single rating scale from the GARS-3, a tool that is not as highly regarded in the field as the ADOS-2, which Dr. Jasinski did not administer, in determining the Student's diagnosis. He did not include any input from the school. [Fact #77] Additionally, he administered the WISC-V cognitive test just one month after the Student had taken that test as part of Dr. Grebouski's evaluation, which, as Dr. Jasinski and Dr. Goldberg both explained, impairs the reliability of the results. See *Footnote 14*. Furthermore, in between the two IEP team meetings, the Student was

was simply no evidence at the May IEP team meeting to support a conclusion by the team that the Student's Autism adversely affected [REDACTED] educational performance. Additionally, there was no evidence at that time that the Student's disability was significantly affecting [REDACTED] verbal and non-verbal communication, as required by the law for an Autism coding.<sup>37</sup> The IEP team's conclusion that it could not provide services under this disability was correct. There was discussion about why the Student could not be identified as a Student with ASD for special education purposes, and why [REDACTED] could be identified as having an ED. MUSER contains the following definition:

#### E. Emotional Disturbance

(1) Definition. Emotional Disturbance means a condition which exhibits one or more of the following characteristics over a long period of time and to a marked degree that adversely affects the child's educational performance:

- (a) An inability to learn that cannot be explained by intellectual, sensory, or health factors;
- (b) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
- (c) Inappropriate types of behaviors or feelings under normal circumstances;
- (d) A general pervasive mood of unhappiness or depression;
- (e) A tendency to develop physical symptoms or fears associated with personal or school problems.

MUSER §VII(2)(E).

Although the Parents wanted [REDACTED] identified under Autism, there was consensus about the identification at the end of the meeting, and an agreement to draft [REDACTED] IEP at a meeting in early June.

hospitalized at St. Mary's for 4 days, during which time [REDACTED] psychiatrist determined that the Student's Autism diagnosis was "highly suspect" because [REDACTED] had not had appropriate testing to make that diagnosis, and for other reasons. [Fact #60]

<sup>37</sup> Although this was addressed in Dr. Grebouski's report, the District subsequently requested a speech-language evaluation to assess the Student's verbal and non-verbal communication. The Parents initially signed consent to evaluate, then revoked it. [S-A-313] They then signed consent again in August, and the evaluation was completed in September. The results are discussed in Fact #77.

With the eligibility determination of the IEP team, the Student could have begun receiving special education and related services right away, as the team discussed providing interim executive functioning and social skills instruction before the IEP was even drafted. The Parents chose to reject those interim services, thus delaying the provision of any special services to the Student. [Fact #59]

A few days later, the Parents made another decision that resulted in further delaying the identification of the Student and the development of ■■■ IEP. Despite the IEP team making it clear that Student's diagnoses were not what drove the IEP, and that ■■■ services would be based upon ■■■ actual needs regardless of whether it was under the banner of Autism or ED, the Parents decided that it was more important that the Student receive services under the coding of Autism, even if it meant delaying the delivery of services. [Fact #60] They made this decision again at the June 3, IEP team meeting. [Fact #62] Although the Mother wondered why the District was "so stuck" on the ED designation, one might question why the Parents were so stuck on the Autism designation, so much so that they refused to consent to providing special education services to the Student unless ■■■ was identified as a Student with Autism.<sup>38</sup> Consequently, without the Parents' consent, the Student lost the opportunity to receive services during the end of 8th grade and through the summer.

As the First Circuit explained:

Congress deliberately fashioned an interactive process for the development of IEPs. In doing so, it expressly declared that if parents act unreasonably in the course of the process, they may be barred from reimbursement under the IDEA.

*Five Town CSD*, 513 F. 3d. At 288. The First Circuit added that when determining whether a parent acted unreasonably, courts consider actions that disrupt, stall the consummation, or prevent the

<sup>38</sup> The Parents continued their inflexibility, even after the Student's psychiatrist at St. Mary's removed the Autism diagnosis as being "highly suspect." [Fact #61] Furthermore, when they consulted with Ms. Timmel that summer, she told the Parents that the Student needed services for maintaining ■■■ emotional stability, and that they should have "signed on" to the IEP. [Fact #66]

development of the final IEP. “[P]arents cannot brandish the incompleteness of an IEP document as a sword to prove denial of FAPE to a child when the document is incomplete as a result of the parents’ own uncooperativeness.” *Five Town CSD*.

Here, as in *Five Town CSD*, the delays that prevented the development and implementation of the Student’s IEP was the product of the Parents’ own choices. Between November 28, 2018 and August 2019, it was solely decisions made by the Parents that prevented the evaluation and identification of the Student for special education, as well as the delivery of services. Based upon the evidence and for the foregoing reasons, I conclude that the District did not violate its child find, evaluation or identification obligations under the IDEA.

**2. If the Hearing Officer concludes that the District violated its child find obligations with respect to the Student, did the District fail to provide the Student with FAPE in the least restrictive environment between October 23, 2017 and the end of [REDACTED] seventh grade year?**

As I have determined that there was no child find violation during seventh grade, there is no need to address this issue.

**3. If the Hearing Officer concludes that the District violated its child find obligations with respect to the Student, did the District fail to provide the Student with FAPE in the least restrictive environment during [REDACTED] eighth grade year, 2018-19?**

As I have determined that there was no child find violation during eighth grade, there is no need to address this issue.

**4. Did the District fail to offer the Student an appropriate Individualized Education Program during [REDACTED] ninth grade year until the family moved out of the District on November 10, 2019?**

Every student who is eligible for special education services is entitled under state and federal law to receive a "free and appropriate public education ... designed to meet their unique needs and prepare them for employment and independent living." 20 USC 1400(d)(1)(A). The Hearing Officer must



examine whether the Student's educational program contained in [REDACTED] IEP was "reasonably calculated to enable the student to receive educational benefit." *Board of Educ. v. Rowley*, 458 U.S. 176, 207 (1982).

A few years ago, the Supreme Court addressed the "more difficult problem" left open in *Rowley* of establishing the legal test for substantive appropriateness of IEPs. *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017). The Court explained that the IEP must be "reasonably calculated to enable the child to make progress appropriate in light of the child's circumstances" and that a student's

. . . educational programming must be appropriately ambitious in light of [REDACTED] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives. *Endrew F.* 137 S. Ct. at 1000. The Court noted that "[t]he adequacy of a given IEP turns on the unique circumstances of the child for whom it was created." *Id.* at 1001.

The Supreme Court has explained that the "reasonably calculated" standard of *Endrew* means that crafting an appropriate program of education requiring "prospective judgment" is a "fact-intensive exercise" that must be "informed not only by the expertise of school officials, but also by the input of the child's parents." *Id.* at 999. While parents are always free to seek optimal educational opportunities for their children, under federal law, "the benefit conferred [by the IEP] need not reach the highest attainable level or even the level needed to maximize the child's potential." *Lenn v. Portland Sch. Comm.*, 998 F.2d 1083, 1086 (1st Cir. 1993). An IEP can provide FAPE even though it "may not be the only appropriate choice, or the choice of certain selected experts, or the child's parents' first choice, or even the best choice." *Amann v. Stow Sch. Sys.*, 982 F.2d 644,651 (1st Cir. 1992). The instruction and support services must be sufficient to permit the child to benefit educationally from that instruction. *Roland M. v. Concord Sch. Comm.*, 910 F. 2d

987 (1st Cir. 1990). Parents challenging the adequacy of an IEP must show that there was no reasonable probability that the child could benefit from it. *Mr. G. and Ms. K. v. Timberlane Regional School District*, 47 IDELR 5 (NH 2007), citing *Roland M.*, 910 F.2d at 989.

There was consensus about the IEP, and the Parents, who were represented by counsel, said they had no concerns about it. [Testimony of K. Barber, Parents, S-617] It contained appropriate goals and objectives, nine units of specially designed instruction focusing primarily on executive functioning skills, and included weekly social work services. It was aimed at supporting and challenging the Student academically without making █████ feel overwhelmed. [Fact #68] Dr. Wisniewski testified that the IEP was appropriate to meet the Student's needs. [Facts #79, 81] The only opinion that the IEP was inappropriate came from Ms. Timmel, who said she was concerned about whether the District could implement it.<sup>39</sup> As she never visited MHS and was unfamiliar with the school setting, this testimony was given less weight than the opinions of Dr. Grebouski and Dr. Wisniewski, who were familiar with the programming offered at MHS, and had input about the Student from school staff.

Dr. Grebouski testified that MHS could have provided an appropriate program for the Student, and has been able to meet the needs of students with considerably greater needs.

There was competent evidence that the Student's IEP was reasonably calculated to provide the Student with FAPE in the least restrictive environment. Unfortunately, despite the District's efforts to help the Student transition into this program, the Parents were unwilling to give it a fair try.

<sup>39</sup> Although Ms. Timmel was a knowledgeable witness, she admitted that without observing the Student in the learning environment, she could not speak to █████ full spectrum of needs. [Fact #66]

They have not shown that there was no reasonable probability that the Student could have benefitted from this IEP.

**5. If the Hearing Officer concludes that the District failed to provide the Student with a free, appropriate public education in the least restrictive environment between October 23, 2017 and November 8, 2019, when the Student stopped attending school in the District, what remedy is appropriate?**

As the District did not violate the IDEA, the Parents are not entitled to any remedy.

**V. ORDER**

1. The District did not violate its child find obligation or its obligation to evaluate, identify and place the Student in special education.
2. The Student's IEP for 9th grade was reasonably calculated to provide the Student with FAPE in the least restrictive environment.
3. As the District did not violate the IDEA, the Parents are not entitled to a remedy.

*Shari Broder*

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SHARI B. BRODER, Hearing Officer