STATE OF MAINE

SPECIAL EDUCATION DUE PROCESS HEARING
Case No. 16.036H — Parent v. SAD #75

REPRESENTING THE FAMILY:	**Pro Se**
REPRESENTING THE DISTRICT:	**Daniel Nuzzi, Esq., and Nathaniel Bessey, 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 took place on March 22 & 23, 2016 at the West Bath District Court in Bath, Maine, and on March 24, 2016 by telephone. Those present for the entire proceeding were the Father (henceforth "Father" or "Parent"), Attorneys Daniel Nuzzi and Nathaniel Bessey, Patrick Moore, Director of Special Services for SAD #75 ("the District"), and the undersigned hearing officer. The Mother was present for most of the hearing. [1]

Testifying at the hearing were:

The Sister	Minor child of Mother and Father, Sister of the Student
The Father[2]	
The Mother	
Tanji Johnston	Special Education Coordinator, [redacted] ("[redacted]")
Parent B	Parent of Student B
Suyapa Yost	Educational Technician III, [redacted]
Sarah McLaughlin	Speech Pathologist, [redacted]
Barbara Linnehan-Smith	Adaptive physical education instructor, [redacted]
Kathryn Anderson	Special education teacher, [redacted]
Jody Surace	Special education teacher, [redacted]
Patrick Moore, Ph.D.	Director of Special Services

All testimony was taken under oath.

[1] Although the Mother attended most of the hearing, and was a witness, she was not a party to this due process hearing.

[2] When referring collectively to both the Mother and the Father, I will use the term "Parents." Reference to "the Parent" means the Father only.

I. PROCEDURAL BACKGROUND:

On January 11, 2016, the Father filed this hearing request on behalf of his son ("Student"). On March 14, 2016, a prehearing conference was held at the West Bath District Court in Bath, Maine. Participating in the conference were: [redacted]., the Parent of the Student; Daniel Nuzzi, Esq., and Nathaniel Bessey, Esq., counsel to the District; and Shari Broder, Hearing Officer. Documents and witness lists were exchanged in a timely manner. The Father submitted approximately 40 exhibits (herein referenced as P-#), and the District submitted approximately 296 exhibits (herein referenced as S-#).

As noted above, the hearing took place over the course of three days. Both parties requested to keep the hearing record open until April 28, 2016 to allow the parties to prepare and submit posthearing closing arguments. Because the transcript was not available until after that date and the parties wished to use it to prepare their posthearing memoranda, the deadline for submitting closing arguments was extended to May 10, 2016, with reply briefs due on May 17, 2016. Each party submitted a 42-page closing argument and a 7-page reply brief. The record closed upon receipt of these documents on May 18, 2016. The parties further agreed that the hearing officer's decision would be due on June 2, 2016.

II. PRELIMINARY MATTERS:

On January 26, 2016, the District filed a Motion to Dismiss the following allegations:

1. Allegation C: Failure to provide all records related to the Student
2. Allegation D: Refusal to identify employees who have indicated a hesitancy to comply with the Student's individualized education plan (IEP).
3. Allegation E: Failure to permit the Student to carry a recording device
4. Allegation F: Unlawful change in placement
5. Allegation G: Unlawful exclusion from Special Olympics-related services

After allowing the parties an opportunity to submit written materials on these issues, I issued an order dated March 9, 2016. In that order, I granted the District's motion with respect to Allegations C & E, except to the extent that Allegation E involves whether the Parent was deprived of his right to participate in the Individuals with Disabilities Education Act ("IDEA") decision-making process to the extent that it deprived the Student of a free appropriate public education ("FAPE") because the District prohibited the Student from wearing a recording device during the school day. I deferred ruling on Allegation D and denied the motion with respect to Allegation F. The Parent voluntarily dismissed Allegation G and that portion of Allegation F that involved the exclusion of the Student from group lunches.

On March 10, 2016, the Parent filed a Motion for Reconsideration which was denied, as set forth in the March 14, 2016 prehearing order.

On April 10,2016, several weeks after the closing of the evidence, the Parent filed a motion requesting to reopen the record to take additional testimony from Sarah McLaughlin and the Parent, and to take testimony from Lauren Radovich, the autism consultant, and both counsel for the District, as well as to admit additional documents regarding events that occurred after the evidence closed. I denied this motion by order dated April 11, 2016.

Because several issues in this case have been raised in some form in the four prior due process hearings brought by one or both Parents, as well as on appeal in Federal Court, the parties have stipulated to the admission of portions of the record from those adjudicatory proceedings to avoid the need to present the same evidence that is already contained in those documents as sworn testimony.

III. ISSUES:

1. Did the District violate state or federal special education law by failing to provide postsecondary transition planning consistent with the requirements of the law?

2. Did the District fail to complete a timely annual review of the Student's IEP in violation of state or federal special education law?

3. Did the District violate the IDEA by failing to provide documents related to autism consultant services provided to the Student?

4. Did the District's actions in not permitting the Student to wear a recording device while at school deprive the Parent of his right to participate in the IDEA decision-making process to the extent that it deprived the Student of FAPE in violation of state or federal special education law?

5. Did the District's changes to the students or staff in the Student's classroom during the winter of 2014 constitute a change of the Student's placement in violation of state or federal special education law?

6. Did the District violate state or federal special education law by failing to provide the Student with autism consulting services under the Student's IEP?

7. Does the IDEA require the Father, upon demand, with the names of educators who participated in a union grievance over two years ago?

8. If the hearing officer finds a violation of applicable special education law, what remedies, if any, are appropriate?

These issues are addressed below.

III FINDINGS OF FACT

1. The Student is [redacted] years old (DOB: [redacted]), and lives with his parents and younger sister ("Sister") in [redacted], Maine. He is eligible for special education and related services under the categories of autism and intellectual disability. The Student attends [redacted] School ("[redacted]") and is in the [redacted] grade.

2. In addition to his other diagnoses, the Student has a language disorder called Landau-Kleffner syndrome. [S-269 at 1040] Over the years, with treatment, he is now able to understand language, although not as well as his same-age peers. [S-269 at 1039] His

communication skills are limited, and although he is becoming more verbal, he is predominantly nonverbal. The Student is a happy child who loves going to school. [S-269 at 1039, testimony of Father] He is easy to get along with, and the District staff have great affection for him and enjoy working with him. [S-291, P-36 at 32, testimony of T. Johnston]

3. Kelly Allen was the Student's teacher when he was at [redacted] School in the District. She was his teacher from [redacted]. [P-36 at 2] In 2010, Ms. Allen became the autism consultant for the District, assisting staff working with students with autism in grades kindergarten through 12, including the Student. From 2010 through 2014, Ms. Allen continued working as an autism consultant under the Student's IEP. In this capacity, she provided consultation to his teacher and the school staff working with him. [P-36 at 3]

4. By the time the Student began attending [redacted], the relationship between the Parents and District officials had grown tense. [S-279 at 6] The Parents became dissatisfied with Ms. Allen. At times, the Mother showed up unannounced at field trips, which caused consternation among the District staff. [S-279 at 7] Ms. Allen had also been the Student's case manager until some time in 2014 when the Father asked to remove her from this position because he learned that Ms. Allen had filed a grievance with the District based upon her allegations of difficult and hostile working conditions created by the Parents.[3] [P-36 at 16] Ms. Allen filed the grievance because she wanted to be able to work in an environment where she did not feel like her work was under a microscope in terms of not being sued[4] and not being in meetings where the Parents compared her and her colleagues to how the Nazis

[3] This is one of the grievances about which the Father is seeking the names of the grievants.

[4] Over the past several years, the Parents have sued many people in connection with the Student's education in the District including school staff members: Ms. Allen, Superintendent of Schools Brad Smith, Tanji Johnston and Patrick Moore; two disabled minor children who were in the Student's classroom and their mothers; and filed a notice of claim against teacher Jessica Fournier [S-30, 263, testimony of Father, Parent B]

treated people at Auschwitz. [P-36 at 17] Ms. Allen loved the Student and otherwise enjoyed her time working with him. [P-36 at 32]

5. Because the Student is very limited in his ability to communicate and has difficulty comprehending certain things, the District and Parents developed a variety of ways to communicate about the Student's experience during the school day and to help the Parents participate in the development and implementation of the Student's educational program. [Testimony of Father] The Parents have been very active members of the IEP team. For years, the District has sent the Parents written daily reports about the Student's day and has held monthly meetings with the Parents. Student's educational technician ("ed tech"), Suyapa Yost, normally communicates with the Mother daily, usually at the end of the day while Jody Surace, the Student's special education teacher, talks with the Mother in the morning at drop-off time. [Testimony of J. Surace] Ms. Surace has worked with the Student since at least [redacted] grade, initially as his ed tech. She became his special education teacher during the 2015-16 school year. [Testimony of Mother] Ms. Surace and Ms. Yost complete a daily log that goes home to the Parents. [Testimony of S. Yost, Jody Surace, S-40, S234, S-243, P-13, P-40, S-270 at 12-13] Ms. Surace sends the Parents emails about anything she deems important, places information every week about the Student's program in the "Portal," an online resource for parents, and shares data collection about the Student's progress. The Parents have only accessed the Portal four or five times since the beginning of the school year. [Testimony of J. Surace] The Parents have received daily reports every day since the Student began attending school in the District. [S-264 at 180] These logs are often very detailed, containing information about the Student's interactions and what he worked on. [P-40] The Father testified that over the past two years, he is only aware of four or five

inaccuracies in these daily reports. [Testimony of Father, S-135, S-263 at 51-52] He reported receiving regular emails, notes, reports and other communications from District staff, including replies to his emails from the teaching staff. [Testimony of Father, S-263 at 51, 53] The record reveals extensive communication between the Parents and school personnel about the Student and his education. The Father has also said that the District is very responsive, and that in just about every case, if the Parents ask for a change in something, the District is very receptive. [S-269 at 99]

6. On the morning of February 10, 2012, the Father was meeting with Patrick Moore, District director of special services (henceforth "Dr. Moore") and Kelly Allen, who was the Student's case manager at the time. During the meeting, Dr. Moore and Ms. Allen told the Father that the Mother had been spying on a community field trip. The Father called the Mother immediately, and she claimed she had simply gotten caught behind the school bus on her way to the grocery store. Later that morning, the Mother emailed Dr. Moore and Ms. Allen a scanned copy of her time-stamped grocery receipt to refute the accusation. [S-279 at 7] When the Mother arrived at the end of the school day to pick up the Student, he burst into tears as soon as he got into the car, and cried for about an hour. The Parents sought an explanation from the District for this unusual behavior, but there was none. [*Id.*] None of the staff with whom the Student worked that day reported noticing anything unusual. Normally, the Student was happy at the end of the school day. [S-269 at 1039, testimony of Father] The Mother came to suspect that there might be a connection between the accusation of her spying and the Student's crying spell. [S-279 at 7] No one ever figured out what caused the Student to cry that day, but it has not happened again.

7. The following month, the Father wrote a letter to Parent B asking what her opinion was of Jessica Fournier, the Student's teacher. Parent B is the mother of a student with autism ("Student B") who was in the Student's class and had Ms. Fournier as his special education teacher. [Testimony of Parent B] The Father added that the Mother had seen Student B's school bus on the road or at school leaving for a field trip, but noticed that Student B was not on the field trips. Parent B responded that she had the utmost respect and trust in Ms. Fournier, and that Student B's learning had exploded due to Ms. Fournier's innovative teaching and unwavering commitment. She added,

> Unfortunately, due to the emotional battery Jessica has endured because of how you are treating her, we feel his education will be compromised if your harassment continues. The mental duress you have created has spread beyond Jessica and is felt by the students and parents. [S-11]

8. One of the Student's related services in his IEP is autism consultation. From 2010-2014, these services were provided by Kelly Allen, who consulted with the teachers who were working with the Student. [P-36] During this time, Ms. Allen may have seen the Student in passing and said hello, but she did not work directly with him in her capacity as autism consultant. She did, however, work with the Student as his case manager. [P-36] Ms. Allen initially took a leave of absence due to the mental and physical toll that her dealings with the Parents had taken on her, then resigned from the District, citing the stress the Parents had caused her. [P-36 at 32] Following Ms. Allen's resignation, autism consulting services were provided by Carlie Lochner and then by Lauren Radovich. [Testimony of T. Johnston, P. Moore, J. Surace, K. Anderson] These services were provided as required under the Student's IEP. [*Id.*]

9. Following the February 10, 2012 incident, the Parents stepped up their efforts to learn more about the Student's day-to-day experiences at school. Their efforts centered primarily upon

inspecting extensive records from the District, including all internal emails between the District's employees about the Student and about employee grievances, and requesting that the Student attend school with a recording device that would record his entire day. [S-279 at 8] In March 2012, the Mother sent a letter to Dr. Moore and [redacted] principal Bill Zima requesting a change in the Student's classroom teacher and explaining that she "will have a voice recording device on [the Student] whenever he is in school." [S-284 at 4] The District responded in part by suggesting that the IEP team meet to discuss the matter. The Parents declined the District's offer. [S-284 at 5] On April 13, 2012, the Parents sent the District a letter requesting that they be allowed to inspect all of the Student's "education records," pursuant to the Family Educational Rights and Privacy Act ("FERPA"). The Parents sent another request on June 13, 2012, seeking, among other things, "[a]ll electronic or written communication between or among district employees or between a district employee or employees and another person or people, related in any way to [the Student]." [S-279 at 8-9] Although there was a dispute about which documents had to be produced, the District produced extensive documents, including relevant email correspondence.[5]

10. On August 30, 2012, a few days before the start of the school year, the Mother wrote to Dr. Moore and Principal Zima informing them that she would be sending the Student to school wearing a recording device and that he would be wearing one every day. [S-284 at 5-6] Dr. Moore responded that he was requesting that the Mother not do this, and that he would like the IEP team to review this accommodation request and make a determination prior to any action by the Parents. [S-284 at 6] The Mother again declined the offer of an IEP team meeting.

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1. [5] The issue of which documents had to be produced has been litigated previously and for this reason, I dismissed Allegation C as noted above.

11. The Parents have litigated with the Department of Education in two previous due process hearings and in Federal Court issues involving student records and document production, and whether the Student should be permitted to attend school wearing a recording device at school. The due process hearing decisions are 13.070H and 14.035H.[6] In hearing 13.017H, the hearing officer considered the Parents' claim that without a recording device on the Student, they would not have enough information to participate meaningfully in the planning and implementation of the Student's IEP or to make decisions regarding the exercise of due process rights related to the Student's educational program. The hearing officer concluded that the Parents had access to sufficient information to allow them to participate in a meaningful way in all respects alleged, and that the District's refusal to allow the Student to attend school while wearing a recording device did not violate the IDEA. The hearing officer also decided that the District's failure to produce certain records requested by the Parents did not deprive them of a meaningful right to participate as IEP team members or the ability to exercise their due process rights under the IDEA, citing the Parents' extensive, meaningful involvement and advocacy on the Student's behalf. The Parents appealed this decision to Federal Court. In a decision dated April 29, 2015, Judge Torresen denied the Parents' appeal of the hearing officer's determination that the District committed a procedural violation by failing to allow the Student to wear the recording device. [Docket No. 2:13-cv-109-NT, S-279] At oral argument, the Parents conceded that they were not alleging that the District substantively denied the Student a FAPE by forbidding the recording of his school day. The Parents have consistently said that the Student is doing well educationally and making progress toward his goals. [Testimony of Mother, Father, S-264 at 13, 265 at 15, 269 at 10-11] The Father stated that this request for a recording device was never made in furtherance

[6] The Parent filed two other hearing requests, but these were settled or withdrawn.

of the Student's instruction or education, but only to tell the Parents what happened in school. [Testimony of Father, S-83, 91, P-30] Judge Torresen concluded that the additional documents sought by the Parent would not have provided them with any substantial new information, and that the failure to produce these documents did not significantly impede the Parents' right to participate in the special education decision-making process. [S-285][7]

12. The Parents' efforts to gather more information about the Student's school day had a negative effect on the other students in the Student's classroom and on the teachers as well. On December 18, 2013, Parent B asked to remove her son from the Student's classroom for the remainder of his school career in the District "due to the toxic environment in the classroom that [the Mother] and [the Father] have created through their insidious law suits and micro-management . . ." Student B had been in class with the Student from [redacted] through [redacted] grade. Parent B felt that the classroom environment was counterproductive and hazardous to her son's wellbeing. [S-59] Parent B's request was due primarily to the Mother's behavior, which she felt was creepy and threatening, as well as the Parents' desire to send the Student to school wearing a recording device. Parent B had the feeling that her son was being watched by the Mother, and noticed detrimental affect upon Student B from changes in the classroom brought about by the Parents' behavior. [Testimony of Parent B]

[7] Judge Torresen also noted in her order granting the District's Motion for Summary Judgment that the Parents' request that the Student wear a recording device at school "is relief that would be available under the IDEA." [S-284 at 6] She added,

> Had the Parents accepted the District's invitation to hold an IEP meeting on the recording device issue, a group of qualified education professionals could have sat down with [the Parents] to discuss the best way to address [the Student's] needs. . . the IEP team could have met and worked collaboratively to determine with [the Student's IEP should include his use of supplementary aids . . . " [S-284 at 7]

Parent B objected to having her son's behavior recorded, as he sometimes had tantrums and she did not want the Parents to have recordings of this.[8]

13. The following day, another parent wrote a letter requesting that his or her child be transferred to another classroom because the family's privacy was being compromised. This parent wrote that the "environment and staff . . . have suffered from a toxic mixture of anxiety, harassment and defamation," and that this has negatively affected the ability of the staff to deliver their student's IEP. [S-61] The Parents were threatening to sue Ms. Fournier, whom the other parents thought was working well with their child. [S-63, 64, testimony of Parent B]

14. In an attempt to address the Parents' concerns about knowing what was happening during the Student's day, the IEP was amended to require District employees who become aware of a problem with the Student or a failure to comply with his IEP would inform the Parents directly. [S-179 at 12]

15. On December 19, 2013, and February 3, 2014, a teacher and several members of the support staff bargaining unit filed a grievances about: being "subjected to hostile and harassing working conditions at the school;" "bargaining unit employees are being required to watch and report on one another regarding compliance with IEP's for a particular student;" how these conditions have resulted in employees seeking medical treatment for stress and other health issues; and has created an environment in which teachers are unable to meet their responsibilities for all students. [S-60, 64] The "particular student" in question was the Student. Many members of the District staff have felt stressed and harassed by the Parents' behavior, including their attempts to trick or trap employees, and have used the grievance procedures provided in their collective bargaining agreement to ask the District to do more to

[8] The Father first learned about these tantrums at the hearing in this case, and alleges in his closing argument that this is one of the reasons the Parents need the recording device, as the staff have not reported about other students' behavior in the Student's daily log.

protect them from the Parents' behavior. [S-291 at 10] Dr. Moore responded to the union that the "District recognizes that the work environment has been impacted by a genuine fear amongst employees that they could get dragged personally into litigation. . . Employees have witnessed the parents' adversarial approach at times." [S-78] He informed the grievants that while the District will provide counseling and other support for the affected employees, the IEP requirement of reporting any concern about compliance with the IEP is an accommodation in the Student's IEP, and that it must be followed. [S-78] Since that time, the Parents have made many efforts to obtain these grievance documents, which were ultimately produced with the names redacted, and the names of the grievants.[9] The grievances have since been resolved, and the Father knows who at least one of the grievants is. [Testimony of Father, Fact #4]

16. Although the Parents wanted the Student to attend school wearing an audio recording device, the District would not permit this on the grounds that it would violate the District's personal electronics policies, a state wiretap statute, other students' personal privacy rights, and the school's collective bargaining agreement with its teachers. [S279 at 11] The District's electronics policy prohibits the use of electronic recording devices unless permitted by a teacher for instructional or educational purposes. [P-22 at 27, 35, P-35 at 21-22, 30-31] Teachers and parents have serious concerns that the Student's wearing of such a device would have a negative impact on the educational environment and would be a violation of the privacy and confidentiality of other students. [Testimony of T. Johnston, S. Yost, Parent B, S-270 at 11] Tanji Johnston, special education coordinator at [redacted], was concerned that having such a device would potentially increase the Student's isolation because of objections

[9] The hearing officers in the cases mentioned above both required that the documents be redacted to remove any personally identifiable information regarding the grievants.

to being recorded by other students and their parents. She also raised her concerns about the negative impact on the educational environment, including the ability to manage staff and the safety and security of staff, their stress, anxiety and worries. [Testimony of T. Johnston] Several staff members thought it would hinder the Student's education because it would be an inhibitor of natural communication with peers and staff, which is necessary for his language development. [Testimony of T. Johnston, B. Linnehan-Smith, S. Yost, K. Anderson, J. Surace]

17. During the past two years, the Student's IEP has provided 90 minutes per month of autism consulting services. [S-174, S-184, S-238] The autism consultant is a district-wide position supporting many programs at [redacted] through direct consultation with staff. [Testimony of T. Johnston] Lauren Radovich, the current autism consultant, works directly with the Student's teaching team to improve, assist, enhance or adapt instruction to help the Student achieve his IEP goals. Ms. Johnston has asked Ms. Radovich to look at the Student's shopping trips, and she has helped with creating his social story, data collection, and turning data into goals. She may occasionally join the Student on community adventures, but her role is not one of providing direct services to students. [Testimony of T. Johnston, P. Moore]

18. From the fall of 2012 until June of 2015, Kathryn Anderson was the Student's special education teacher. [Testimony of K. Anderson] While the Student was in adapted physical therapy (APE), Ms. Anderson met on a weekly basis with the autism consultant, and there were times when the consultant would observe the Student throughout the school year. Ms. Anderson did not, however, keep a log of when the autism consultant was there. [Testimony of K. Anderson] Ms. Anderson did not believe it was necessary for the Student to have a recording device to access his education. To the contrary, she thought it was a bad idea. Ms.

Anderson noted that neither students nor staff act like themselves when they know they are being recorded. [Testimony of K. Anderson]

19. Barbara Linnehan-Smith was the Student's adapted physical educator. She worked with the Student on physical fitness and to develop a fitness lifestyle for him. He used the treadmill, increasing his speed and endurance, and worked on core strengthening. Ms. Linnehan-Smith has simulated a fitness studio so the Student can operate the machines by himself. She does not think the Student needs a recording device to benefit from her work with him, and objects to it. Ms. Linnehan-Smith takes great pride in making sure the Student is safe, and feels that a having a recording device questions her integrity as a professional. [Testimony of B. Linnehan-Smith]

20. For approximately five years, Sarah McLaughlin has provided speech and language services to the Student. She works with him three days each week for 120 minutes. She also provides consultation to the Student's classroom teachers so they can reinforce in the community what the Student is learning. The Student has a voice output communication device on which he touches buttons on a screen, and this produces words. The Student uses some words and some sign language to communicate, and works on language goals such as using complete sentences and communicating with his peers. [Testimony of S. McLaughlin] Ms. McLaughlin thinks the Student is doing well on achieving his goals, and has made progress each year. He works very hard and is very focused. Ms. McLaughlin does not think the Student needs a recording device to benefit from his education, and feels it would be intrusive. She finds thought of being recorded every minute of every day stressful. She does not see how recording the Student's day would improve his education. Ms. McLaughlin uses visual supports, including picture icons, touch cues around her mouth, and so forth, and these

would not show up on the recording. She is concerned that the listener could easily take things on the recording out of context. [Testimony of S. McLaughlin]

21. Throughout the past two years, the Student continued to attend school regularly. He is doing well in school, is very happy there, and is making good progress in his educational program. [S-269 at 10, 11, Testimony of Father, Mother, S. McLaughlin] Although most special education teachers have as many as 20 students on their caseload, the Student is the only student on Ms. Surace's caseload, and the only student in the District who has a certified special education teacher dedicated exclusively to him. [Testimony of T. Johnston, J. Surace] The Parent believes Ms. Surace is qualified and honest, and that the Student is safe in her care. [Testimony of Father]

22. Over the years, there were a handful of events about which the Parents felt the District was not providing them with complete information. On April 29, 2013, the Mother noticed bruises on the Student's arms after school. There was no report or indication that the Student had been injured at school. At the Parents' request, the District hired an attorney to investigate the matter, but the attorney was unable to determine the cause of the bruising. [S-279 at 12-13] There was also an instance when the Sister saw the Student in the hallway with other students when his daily report said he was in his classroom. [S-279 at 13] His special education teacher told the Parents that the Student had been taking a five-minute motor break called for in his IEP. The Sister also saw the blinds drawn in the Student's classroom one day. [Testimony of Sister] Ms. Johnston explained that this was done occasionally to reduce a student's distractions when there was a lot of activity in the hallway, and to allow a child privacy. [S-48] Another day, the Sister saw the Student get hit with a soccer ball, although she did not recall where it hit him. The other students felt terrible about this, and apologized

to the Student. The Student seemed fine. Whenever the Sister sees the Student at school, she reports it to the Parents. [Testimony of Sister] The Parents told the Sister to make recordings during the school day without permission and without school officials knowing that she did this. [Testimony of Father, Sister] The Sister complied and has made these recordings without District permission or knowledge.

23. In January or February of 2014, two of the three students who worked in the Student's classroom were moved upstairs and out of the room where the Student received his instruction. Jessica Fournier, a special education teacher, and several ed techs, none of whom worked with the Student, also moved to this new classroom. The Parents had requested previously that Ms. Fournier be removed as the Student's teacher, and they did not want her in the room with the Student.[10] [Testimony of Mother, Father, S-22, 29, 30, 34, 264, P-12, 17] The District told the Parents that Ms. Fournier was being moved to protect her from harassment from the Parents. [Testimony of Father] Ms. Fournier had filed a harassment lawsuit against the Mother. Ms. Fournier had stopped working with the Student in 2012, and the Parents did not want the Student to be left alone with her, except in cases of emergency. [Testimony of Father] Also removed to the other classroom were Ms. Fournier's book nook and a fish tank, but the physical items that the Student was using remained in his classroom. [Testimony of T. Johnston, K. Anderson] The Student continued to receive his instruction in the same room, his desk was in the same location, and he worked with the same personnel and materials required by his IEP. [Testimony of J. Surace, T. Johnston, K. Anderson S-58] His program and routine did not change, and he was not isolated, as other students were brought into the room for instruction and therapy. The percentage of time he spent with

[10] The Mother felt so strongly about not having the Student work with Ms. Fournier that she said things like, "I want to vomit just thinking about having to interact with her. There is too much damage to be repaired . . .Two years is enough, I want and need to be free of Jessica." [S-22] She also filed suit against Ms. Fournier.

nondisabled peers did not change. [Testimony of J. Surace, T. Johnston, K. Anderson] The Student still had all of the same materials, the same instruction, and the same people working with him. [Testimony of K. Anderson] Ms. Anderson moved one of her students into the classroom. Despite these changes, the Student still loved going to school and was excited about it most days. He continued to do well at school. [Testimony of Father]

24. Beginning in the fall of 2014, District staff increasingly involved the Student in activities that were more oriented towards functional living skills, such as community-based lunches, grocery shopping trips and other community based activities to practice the generalization of skills in real-life settings. [Testimony of T. Johnston, K. Anderson, P. Moore]. Initially, the Parents did not want the Student to participate in field trips. [Testimony of K. Anderson] The Student's November 2014 IEP contained these trips and the functional skills to support the Student in the community, including learning community and grocery words and the ability to use money. [S-90] Cooking lessons were also added.

25. On November 3 and 11, 2014, the IEP Team met to discuss the Student's annual review and transition planning. Transition plans involve a coordinated process of activities to prepare a student for life after public school. They evolve, change and are refined over time as goals are achieved. [Testimony of P. Moore] The participants were given a draft IEP. [S-81, 90] At the request of the Parents and by agreement of the IEP Team, the Student did not enter [redacted] grade at [redacted] School, but remained an [redacted] grade student at [redacted]. [Testimony of P. Moore, T. Johnston; S-82; S-91 at 2]. At that time, the parties anticipated that the Student would remain in District schools for another five years. [Testimony of T. Johnston] The Written Notice for the two meetings noted that according to evaluations and data collection, the Student was making progress in all areas of programming. [S-91] Again the Parents

requested that the Student be permitted to wear a recording device or camera to provide them with a record of the Student's day. This request was denied by the team as unnecessary in light of communication already provided to the Parents and school concerns that the device would negatively affect the educational environment to the detriment of students and educators. [S-91] The Parents' other concerns included the lack of social interactions, and their desire for the Student to do cooking and shopping. Beginning formal transition planning was also discussed, and the team considered how to assess the Student's preferences and the development of a more detailed transition plan. [Testimony of T. Johnston, P. Moore, S-91]. The Student had not yet turned [redacted] at the time, but would do so on [redacted]. Julie Williams, the [redacted] school transition coordinator, was invited to the meeting to assist with transition planning because she had more experience with it than staff at [redacted]. The Parents were simply not ready, however, to discuss post-secondary transition planning at that meeting. [Testimony of K. Anderson]. The formal written notice following the fall 2014 IEP meeting provides as follows:

> The possibility of beginning formal Transition Planning was discussed with the suggestion of considering the Student as a [redacted] grader. The team agreed, however, to continue to consider him an [redacted] grader and to use this year to assess the Student's preferences as well as to begin discussion about where parents envision the Student over the next 5 years and as an adult. [S-91].

26. Following these two IEP team meetings, the District provided the Parents with written notice stating that it was proposed that the Student continue his programming at [redacted]. The IEP was implemented, including the goals and objectives shown on the draft IEP provided to the Parents. [S-91]

27. In February 2015, in connection with litigation involving the District, the Father told the Federal District Court that the failure to allow the Student to wear a recording device did not involve a substantive denial of FAPE. The Parents have both stated that the Student is

making progress toward his academic goals. [Testimony of Father, Mother] During their depositions involving federal litigation in June of 2015, both Parents again mentioned that the Student loved school, was doing well academically, and was a very happy child. [S-263 at 15, 264 at 13-14] When asked whether he felt the Student was safe with Ms. Linnehan-Smith, the Father responded, "we don't necessarily have reason to believe he's not safe, but our concern is that you never know, basically." [Testimony of Father, S-264 at 20] The Father also testified that if the Student were permitted to record his school day, the Parents did not even plan to listen to the recordings, and would probably just store them and listen to them if there was some concern or might listen to them randomly. [S-263 at 108-09] The Mother's deposition testimony was similar: that she did not intend to listen to the recordings, and has not even figured out what she would do with them other than save them. When asked whether she would listen to the recordings to be able to participate in educational activities, she responded, "I don't know." [S-264 at 149]

28. At the hearing, both Parents testified that the Student's special education teachers and providers are qualified and honest, and that the Student is safe in their care. [Testimony of Mother, Father]

29. On April 14, 2015, the IEP Team met and again discussed transition planning at length, agreeing to conduct informal interviews with the Student and Parents and the Student's teachers to have a better sense of the vision of the Student and his family for his adulthood. The team agreed that a more detailed transition plan would be formulated at the next annual IEP meeting in November of 2015. [S-111, S-127, Testimony of Father].

30. On April 29, 2015, U.S. Chief District Judge Nancy Torresen rendered her decision on the Parents' appeals of two due process hearing decisions, cases 13.107H and 14.035H. [S-279]

In her decision, the Judge denied the Parents' appeal in 13.107H of their claim that they had a right to send the Student to school wearing a recording device. Although the hearing officer concluded that the Parents failed to establish that the District significantly impeded their opportunity to participate in the decision-making process concerning the Student's education, Judge Torresen affirmed the decision on a simpler ground: the Parents failed to identify a procedural violation at all. [S-279 at 19]

31. The District was looking for a transition assessment that accurately reflected the qualitative approach for determining the future hopes and dreams for the Student, and wanted to conduct the Autism Speaks assessment, a math assessment done by Ms. Surace and a literacy assessment by Candace Bray[11], who was not available to do the assessment until the spring of 2016. [Testimony of T. Johnston, P. Moore] In May of 2015, the Parents were given a Parent Transition Survey to assist with planning for the Student's transition into post-secondary life. [S-135] When four months passed without the Parents returning the survey, the District followed up in August of 2015, at which time the Parents requested another copy of the assessment. [S-146-147, testimony of Father] Around that time, Dr. Moore emailed the Parents, stating that he hoped they would have many opportunities to reflect upon transition goals for the Student, which would be reviewed at the next IEP team meeting. [S-149] As the Parents had not yet returned the transition survey by September 24, 2015, Ms. Surace sent another reminder to the Parents. [S-157, testimony of Father, J. Surace, K. Anderson] The Parents returned the survey on September 25, 2015. [Stipulation]

32. Although the staff at [redacted] really enjoys working with the Student, and they find him to be a very loving, wonderful child, they experience anxiety and worry about their relationship

[11] The parties agreed to have Dr. Bray conduct this assessment, but her availability was limited. [Testimony of Father] Dr. Bray had conducted an assessment of the Student three years earlier.

with the Parents. Staff members feel like they are disrespected and dismissed, and that they are under scrutiny from the Parents, who are trying to find something that the staff did wrong. [Testimony of T. Johnston] Normally, there are two staff with the Student at any given time. The Parents have been told that they are welcome to observe the Student in the classroom within reason.[12]

33. Ms. Surace, the Student's current special education teacher, meets with Ms. Radovich for autism consulting for an average of 90 minutes each month, and discusses strategies that will help the Student. [Testimony of J. Surace] Ms. Surace believes the Student is doing very well, and has seen him make a lot of progress over the past two years. She does not think the Student needs a recording device to access his education, and that it would be more detrimental than helpful. Ms. Surace believes it would change her teaching, as she would be more reserved and self-conscious. [Testimony of J. Surace]

34. The Student's annual IEP review was scheduled for October 28, 2015. In advance of this meeting, Parents were sent a 28-page draft IEP that included a summary of the transition surveys returned by Parents. [S-174]. Additionally, reports were prepared showing the Student's progress in APE and speech and language. [S-178, 179, 181] At this meeting, Ms. Radovich explained the autism consulting work she had done with Ms. Surace on the Student's behalf. [S-180] Because the consultant's role was to support the direct service providers, and not to provide direct services to students, the autism consultant did not prepare formal progress reports. [Testimony of P. Moore] Separate reports of consultation were not typically generated in the District. At the Father's request, however, Dr. Moore agreed to

[12] It was apparent at the hearing that the Mother wanted to be able to visit the Student's classroom on a daily basis. The speech therapist, Sarah McLaughlin, testified that the Student did not need a recording device to benefit from his education, but that observing the Student in class would be useful. The Mother then interjected, "Well, I'm putting that on my calendar every day." Her tone and demeanor when making this statement was intimidating.

prepare a report showing the autism consultant services provided to the Student. [S-180, Testimony of P. Moore] Rather than discussing transition planning and the Student's educational programming for the coming year at this meeting, however, the Parents asked a lot of questions about issues that were pending in their litigation with the District.[13] [S-180, testimony of P. Moore]. The Father requested that the IEP team identify any individual currently working with the Student who was part of a group of employees who exercised their rights under their collective bargaining agreement and filed grievances in late 2013 and early 2014. [S-180] Although the District would not provide this information, the other IEP team members assured the Parents that they would have no hesitation complying with the provision of the IEP requiring them to alert the Parents directly of any concerns they may have regarding the IEP's implementation, even if those concerns pertain to the actions of other teachers or staff. [S-180] Ms. Johnston confirmed that she does not believe anyone on her staff has not complied with this provision. [Testimony of T. Johnston] Additionally, at this meeting, the Parents for the first time stated that the Student needed to wear a recording device to further his education. The team did not review the academic part of the IEP. [S-180, 185]

35. Dr. Moore prepared a list of autism consulting services provided between December 2014 and February 2016, and gave this list to the Father. [S-249] Although during some months, there were fewer than 90 minutes of services provided, other months exceeded 90 minutes. Over the course of the past 13 months of school, the autism consultant provided a total of 1560 minutes of consulting services for an average of 120 minutes per month. Shortly before the hearing, Ms. Radovich also provided the Father with a copy of her handwritten notes

[13] This included the Parents' request that the District identify the names of employees who filed a grievance under the collective bargaining agreement two years earlier, whether the Parents should be entitled to place a recording device on the Student while he was at school, and the provision of autism consulting services. [S-180]

concerning her consulting.[14]

36. The IEP meeting continued on November 11, 2015, at which time the Team discussed transition goals at length. The Parents were provided with a written proposed transition plan, including post-secondary goals developed by Ms. Johnston with assistance from Ms. Williams and Ms. Surace. [Testimony of T. Johnston, P. Moore, S-296]. Although the team was unable to reach consensus on the post-secondary transition goals, the IEP team chair determined that the plan and goals as proposed would be included in the IEP. [S-198 at 2]. The Father objected on the grounds that he did not believe it was appropriate to talk about transition goals or fill in the transition section of the IEP until after additional formal evaluations were performed and representatives of different agencies attended an IEP team meeting to discuss transition services. [Testimony of P. Moore, Father, S-189] At that meeting, the Parents were asked to sign a release to permit the District to invite a representative of the Maine Department of Labor's Division of Vocational Rehabilitation to attend the next IEP team meeting. The Parents did not sign the release, and Dr. Moore had to follow up with them to remind them to sign it. [S-204] Ms. Surace had to resend the release to the Parents on or around January 4, 2016, and they returned it that day. [S-206] The Team agreed to proceed with additional evaluations, including the required triennial evaluations and an evaluation specific to transition goals. [Testimony of T. Johnston, P. Moore]. Dr. Moore also met with the Father to discuss different frameworks for transition plans and

[14] These notes were marked as S-295. The Father objected to the admission of this exhibit into evidence under the five-day rule, and I sustained the objection. This rule prohibits a party from introducing any evidence at a due process hearing that has not been disclosed to the opposing party at least five business days before the start of the hearing. 34 CFR 330.512(a)(3), MUSER §XVI(9)(D). It does not prevent the parties from agreeing to disclose relevant information fewer than five days in advance, and documents were admitted into this hearing record by agreement that would otherwise have been excluded under this rule. I consider the five-day rule to be a right each party has that is absolute unless waived, although under some circumstances, I will grant a continuance when requested by the nondisclosing party to allow for the introduction of the document and an opportunity to investigate its contents and call witnesses to testify about it before the hearing record closes.

additional transition assessments. [Testimony of J. Surace].

37. In the draft transition plan, the Student's educational goal was to participate in an in-home or center-based program designed to provide vocational training, and his employment goal after graduation was to participate in volunteer work with supported job development services, such as vocational rehabilitation. His independent living goal was to participate in community-integrated recreational/leisure activities, such as going to the YMCA, movies or shopping. [S-206] These were very similar to the goals stated by the Father at the hearing, which were for the Student, "to be as independent as possible, hopefully have some sort of job or if need be, a volunteer activity. I don't know that he'll ever be able to live independently but hopefully semi-independently." [Testimony of Father].

38. On November 20, 2015, Dr. Moore emailed the Parents stating that because the IEP team did not review the academic part of the IEP, the team needed to schedule a third meeting. He asked the Parents to identify dates they were available after the Thanksgiving break. [S-189] The Father responded:

> We do not believe that it is appropriate to talk about academic goals and the services to be provided without the required transition assessments. Once those are all done, we will be happy to meet and properly determine transition goals and then talk about academic goals and the services to be provided. [S-189, testimony of P. Moore]

39. Most of the additional transition assessments were completed by the time of this hearing, and were provided to the Parents. These assessments included: (1) an interdisciplinary team process utilizing an assessment model developed by Autism Speaks to look at where the Student might need an additional level of adult support; (2) a communication assessment as part of Autism Speaks; and (3) a communication assessment by Pine Tree Society. [Testimony of J. Surace]. Additionally, due to her schedule, Dr. Bray had been unable to complete her literacy assessment, but it was scheduled for the spring of 2016. [Testimony of

P. Moore]. The District had also scheduled two separate IEP Team meetings, on March 9 and March 21, 2016. Before the March 9 meeting, the District provided the Parents with an IEP draft including the transition section. [S-184, S-238]. At the March 9 meeting, the team did not discuss the transition plan, but spent two hours attempting to resolve this due process hearing, and the March 21, 2016 meeting was cancelled due to a snowstorm [Testimony of P. Moore].

40. The draft IEP with an effective date of March 22, 2016 included transition services in the areas of education and related services, career and employment, community experiences, and daily living skills. [S-184 at 26-27] It also included things like exploring school job opportunities, cooking in the school café to learn independent living skills and for career readiness, grocery shopping and money skills in the community, writing dates on the calendar, participating in volunteer opportunities or clubs, and other skills. There were many things the Student enjoyed doing that could translate well into worksite or volunteer opportunities. [Testimony of T. Johnston]

IV. DISCUSSION AND CONCLUSIONS

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 Parent must prove that the evidence supports his position on the issues before the hearing officer.

1. Did the District violate state or federal special education law by failing to provide postsecondary transition planning consistent with the requirements of the law?

Position of the Parent: The IEP team has no discretion regarding when transition planning has to be done, and the Parent's actions cannot affect the District's legal

responsibilities. Consequently, the District was required to have a transition plan in the Student's IEP by his [redacted] birthday, but there was none. Furthermore, the postsecondary goals were not based upon appropriate transition assessments. The failure to obtain necessary assessments constitutes a denial of FAPE because it is not possible to develop a plan reasonably calculated to provide educational benefit without them. The District did not begin any age-appropriate assessments until after the November 2015 IEP team meeting. This does not meet the requirements of the IDEA and constitutes a denial of FAPE.

Position of the District: The District already had in place numerous age appropriate evaluations and assessments, including most recently, the parental assessment survey, as well as significant information and knowledge concerning the Student's capabilities that were used to develop the transition plan as first adopted. Both the IDEA and First Circuit precedent make clear that appropriate transition services need not be separate or independent from the services provided elsewhere in an IEP. The Student's transition goals and services are similar to the educational goals and services contained in his IEP, particularly those relating to communication, literacy, the generalization of skills in a community setting, and the community-based education goals that supported independence. These are all part of the transition toward more community-focused education for post-secondary purposes. Although Section 8 of the IEP form was not completed in the fall of 2014, this was because the IEP team decided to treat the Student as an [redacted] grader and use the year to assess his preferences and those of the Parents. The heart of the inquiry, in any event, is whether the IEP is reasonably calculated to provide FAPE to the Student. As adequate transition services were in place before the Student's [redacted] birthday, there is no violation of the IDEA.

DISCUSSION: The IDEA requires that, beginning not later than the first IEP to be in

effect when a child turns [redacted], and updated annually thereafter, the IEP must include appropriate measurable postsecondary goals based upon age-appropriate transition assessments related to training, education, employment, and if appropriate, independent living skills, and transition services needed to assist the student in reaching those goals. 34 CFR 300.320(b). The requirements for postsecondary IEP goals apply, whether or not the student's skill levels related to training, education, and employment are age appropriate. In all cases, the IEP Team must develop the specific postsecondary goals for the student in light of his unique needs as determined by age-appropriate transition assessments of the student's skills in these areas.

The Maine Special Education Regulations (MUSER) state, "Beginning not later than 9th grade, the IEP Team will start the transition plan and it will be updated annually thereafter . . ." MUSER §VI(2)(C)(3)(b).

There is no dispute that there was no formal transition plan set forth in the IEP at the time of the Student's [redacted] birthday, although the IEP team did start the transition planning process prior to then. While the District was prepared to move forward with transition planning at the IEP team meeting before the Student's [redacted] birthday, and in fact brought someone to the IEP team from [redacted] School to help with this, the Parents were not ready to do so and did not wish to do so. To accommodate the Parents' preference, however, the IEP team agreed to allow the Student to remain in [redacted] grade, and use the coming year to assess the Student's transition preferences as well as to begin discussion about where the Parents envision the Student to be over the next five years and as an adult. In other words, the Parents made an agreement with the District not to develop the Student's transition plan for another year. Given that the Student was expecting to remain in the District's schools for four more years, there was still plenty of time to engage in transition planning. Despite the Parents seeking and receiving the

District's agreement to postpone the development of the formal transition plan, the Father now seeks to blame the District for not having a transition plan in place in a timely manner.

There was evidence in the record that many members of the District staff have felt stressed and harassed by the Parents' behavior, including their attempts to trick or trap employees and catch them making mistakes. Bringing this claim under these circumstances is an example of this.

During my first few years as a due process hearing officer, I had a case involving parents who, like the Parents in this case, obstructed the IEP development process, then complained that the school department had violated the IDEA. In the case of *Parents v. Five Town CSD,* 106 LRP 13690 (2005), the Parents delayed returning the consent to evaluate form for the student and then chose to remove her from the school district and place her in a school in Utah before the school district had the opportunity to evaluate her. The Parents then filed a due process complaint claiming that the school district failed to offer the student FAPE. The school district could not evaluate the student, as she was on the other side of the country. I concluded that it was due to the parents' lack of cooperation that the school district was unable to evaluate the student and consequently offer her appropriate educational programming, and that this was not a violation of the IDEA. The Federal District Court and the First Circuit upheld my decision, with the latter noting:

> Congress deliberately fashioned an interactive process for the development of IEPs. In so doing, it expressly declared that if parents act unreasonably in the course of that process, they may be barred from reimbursement under the IDEA. See 20 U.S.C. § 1412(a)(10)(C)(iii)(III) (providing that "[t]he cost of reimbursement ... may be reduced or denied ... upon a judicial finding of unreasonableness with respect to actions taken by the parents").

CG and BS v. Five Town CSD, 513 F. 3d 279 (2008). Judge Selya, writing for the court, added:

> To sum up, the district court found that the October 18 IEP was incomplete and that the parents' unreasonable actions had frustrated the completion of the IEP process. Given

> these warrantable findings of fact, section 1412(a)(10)(C)(iii)(III) provides a solid ground for resolving the case against the parents. Their unreasonable obstruction of an otherwise promising IEP process fully justifies a denial of reimbursement under the IDEA.

In the case at hand, I will give the Parents the benefit of the doubt and assume they did not purposely obstruct the process. Because the Student was still in [redacted] grade, the District and the IEP team, engaging in this "interactive process," accommodated the Parents' preference to wait. The IEP team agreed to use the coming year to complete the formal aspects of the transition planning process, rather than doing it before the Student's [redacted] birthday. In light of the Parents' contentious relationship with the District, it is understandable that the District would want to accommodate the Parents' preference by not moving forward with the full transition process against the Parents' will. For unexplained reasons, the Parents further hindered the process by failing to return the parental preference assessment for about half a year, and also delayed their return the Division of Vocational Rehabilitation Services release as well. District staff provided the Parents with repeated reminders to comply with their own obligations in the transition planning process. This frustrated the completion of the transition planning process. As in *Five Town CSD*, the Parents, in both requesting a delay in the transition process and failing to return assessments and releases, played a major role in the inability of the District to complete the transition section of the Student's IEP. From an equitable perspective, it would be unfair to penalize the District for its actions under the circumstances.

From a substantive perspective, there is no allegation that the transition services are deficient, only that additional assessments are needed, as well as a more detailed Section 8 of the IEP. The District has now completed all of the assessments except one that is with one of Maine's foremost literacy experts whose availability is limited, and whose services both parties preferred. Without this assessment, the Student's IEP nonetheless has included substantial

services that support the Parent's and IEP team's goals of increased independence. These independent living activities are appropriate for the Student's unique needs.

This case is akin to *Board of Educ. Of Tp. High School Dis. No. 211 v. Ross,* 486 F.3d 267, 276 (7th Cir. 2007), where the decision to defer transition planning, while a procedural flaw, did not result in a denial of FAPE where the record showed that the student needed the basic skills and services already included in the IEP. Although there may be procedural flaws in not completing Section 8 and not having all of the assessments done, there was no evidence that this negatively affected the Student's educational programming. While the IEP must be "custom tailored to address the handicapped child's unique needs . . ." *Lenn v. Portland Sch. Comm.*, 998 F.2d 1083, 1086 (1st Cir. 1993), I disagree with the Parents that the goals were not drafted to meet the Student's specific needs. In fact, the goals met the needs stated by the Parent at the hearing, and were appropriately focused on preparing the Student for post-secondary life.

It is well established that procedural flaws do not automatically render an IEP legally defective in any event. *Roland M. v. Concord School Comm.* 910 F.2d 983, 994 (1990). A procedural violation will rise to the level of a denial of FAPE only in limited circumstances:

> In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies (I) impeded the child's right to a free appropriate public education; (II) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents' child; or (III) caused a deprivation of educational benefits." 20 U.S.C. §1415(f)(3)(E)(ii).

None of these are present in the case before me.

I agree with the District that the cases cited by the Parent in support of his position that the lack of complete evaluative information constituted a FAPE violation are quite distinguishable from the situation at hand. Here, the Parent has presented no evidence to support

a claim that the Student has been deprived of educational opportunities as a result of the procedural violation. The Parent has been fully involved in the IEP team process and was he actually a significant factor in the lack of a fully complete transition plan. There is no FAPE violation.

2. **Did the District fail to complete a timely annual review of the Student's IEP in violation of state or federal special education law?**

Position of the Parent: The annual review is not optional, but the IEP team had not completed it by the time of the hearing, despite it being due in November 2015. Although failure to develop the annual IEP is a procedural violation of the IDEA, it rises to the level of a denial of FAPE because the IEP is the primary vehicle for compliance with the IDEA and failure of the IEP team to complete the review results in the impairment of the parents' ability to participate in the process of determining what services are to be provided to the student. As of the end of the hearing, the last completed IEP was dated November 13, 2014. Although the IEP team held meetings in October and November of 2015, it only discussed speech and adaptive physical education (APE) goals and parent concerns, but did not determine any academic goals or objectives.

Position of the District: There were two IEP team meetings before the expiration of the November 2014 IEP, during which the Parents were provided with progress reports and a draft IEP containing the Student's present levels of academic achievement and related developmental needs, and based upon reports of the Student's providers, proposed goals and services for the Student. Following the second meeting, the District provided the Parents with written notice and the IEP was implemented, including the goals and objectives on the draft IEP. The Parents objected to two proposed changes: a reduction in the amount of APE time and a discontinuation of direct PT services in favor of PT consult services. These two services were continued at the

levels in effect in the November 2014 IEP under the "stay put" provisions, pending resolution of this hearing.

DISCUSSION: MUSER §VI(2)(J)(5) sets an IEP team responsibility as

> To review, at least annually, the Individualized Education Program of each child with a disability to:
> (a) Determine whether the annual goals for the child are being achieved;
> (b) Revise the IEP as appropriate to address any lack of expected progress toward the annual goals and in the general curriculum, where appropriate;
> (c) Consider the results of any reevaluation;
> (d) Consider any information about the child provided to, or by, the parents

This is another instance of the Parent complaining about the District's failure to comply with the IDEA when the main impediment to completing the IEP process was the Parents' own actions and lack of cooperation. Under the IDEA, the District was required to convene an IEP team meeting at least once before the expiration of the IEP to formulate a new program, even in circumstances where it is clear that all of the services provided to the Student will remain the same. 34 CFR 300.324(b)(1)(i). The District initially held two such meetings. The District also drafted a proposed IEP, provided the APE and speech and language reports for discussion, and the Student's educational team met with the Parents at two IEP team meetings to discuss the Student's programming and needs for the future. Because the Parents' focus at these meetings was elsewhere, largely upon their litigation with the District, the participants spent very little time discussing academic goals. Consequently, Dr. Moore attempted to schedule another IEP team meeting to finish the process and the District was prepared to do so in a timely manner. It was because the Parents were unwilling to meet again, however, that the IEP was not completed on time. While the Father is certainly free to make his views known to the IEP team about the need for additional assessments, he was not in a position to complain when the lack of them was due to his request to wait a year before considering transition and his delay completing the

Parents' assessment. There was no rational reason why the participants could not have considered the Student's academic goals for the coming year before the transition assessments were completed.

Fortunately, the Student nonetheless continued to receive educational programming and services appropriate to his needs, and continued to make educational progress. The District correctly maintained current services while this dispute was pending.

While the District could have, by decision of the IEP team chair, completed the IEP without the Parents' cooperation, this would undercut two important aspects of the IEP team process: the collaborative nature and the role parents should play in it. The District chose not to do this. The Parent cannot unreasonably prevent the completion of an IEP by refusing to discuss the lion's share of its content, then complain that the annual review was untimely. *Five Town CSD,* 513 F.3d. at 287. As the First Circuit said, if parents act unreasonably in the course of this interactive IEP development process, they may be barred from a remedy under the IDEA. Because the Parent's unreasonable behavior caused the failure to complete a new IEP at the time of the annual review, there is no violation of the IDEA.

3. Did the District violate the IDEA by failing to provide documents related to autism consultant services provided to the Student?
6. Did the District violate state or federal special education law by failing to provide the Student with autism consulting services under the Student's IEP?

These two issues will be considered together, as the facts are interrelated.

Position of the Parent: The Parent asked for any records relating to autism consulting services. The only record that the District provided was Dr. Moore's typewritten list of dates and times that consulting might have occurred. This record is at best a summary that is insufficient to constitute records the District was required to produce. This failure to provide records is particularly troubling because the Student could not tell the Parent when the consultant talked

with teachers and the District did not make the autism consultant available at the hearing.

Regarding the provision of these services, the District has materially failed to provide autism consulting services because there is no reliable evidence that the District provided the amount of consultant time required. Additionally, the District failed to provide the required services because whatever services were provided were done in consultation time and not in direct services to the Student. The IEP requires "direct" services to the Student.

Position of the District: The IEP calls for 90 minutes per month of autism consultation services. The autism consultant works directly with the Student's special education staff to assist them in providing services that will allow the Student to achieve his IEP goals. District special education teachers and the special education coordinator all testified that these services had been provided consistent with the requirements of the IEP. At the October 28, 2015 IEP team meeting, consultant Ms. Radovich explained the work she had done with Ms. Surace.

The reason there were no formal progress reports available was that the consultant's role was to support the direct service providers, not to provide direct services to the Student that would generate progress reports. Nonetheless, Dr. Moore, at the Parent's request, prepared a list of services provided. The Parent was also provided with handwritten notes kept by Ms. Radovich concerning her consulting time, including running logs, but the Parent objected to the introduction of this evidence at the hearing. Lastly, there was no evidence that the alleged failure to provide these services in any way prevented the Student from receiving FAPE or prevented the Parent from participating in the special education process.

DISCUSSION: As an initial matter, the Parent had the opportunity to call whomever he chose as a witness, including Ms. Radovich. He did not list Lauren Radovich among his witnesses. He did subpoena at least one witness, and knew that this was available to him, should

the District have been unwilling to make Ms. Radovich available for the hearing. The fact that the District chose not to call Ms. Radovich, although she was listed as a potential witness on the District's witness list, is irrelevant. No party is required to call every witness on that party's witness list, and the Father did not call every witness he listed. When the Father filed a motion on April 11, 2016 to reopen the record to allow him to take the testimony of Ms. Radovich, I denied his request because he already had the opportunity to call her and did not.

Regarding the substantive issues, MUSER defines "consultation services" as follows:

> (1) Consultation Services. Consultation as a related services may be provided to general education teachers of children with disabilities by special education teachers or speech/language clinicians or pathologists to assist them in modifying and/or adapting their general education curriculum to enable children to appropriately progress in the general curriculum and to appropriately advance toward achieving the goals set out in their IFSP/IEP. Consultation services shall be provided by an appropriately qualified special education professional employed or contracted by an SAU.
>
> MUSER §X(2)(A)(1).

Although Dr. Moore explained at the October 29, 2015 IEP team meeting how autism consulting services were provided, the Parent apparently misunderstood the nature of consulting services under special education law. According to the definition above, and in my experience, consulting services are provided to assist the direct service providers, usually teachers and ed techs, in doing a better job of meeting the student's needs. The educators then use what they learn from the consultant to provide high quality services to the student. It is not defined to mean providing services directly to students. There was no evidence that the District made any representation to the Parent that the nature of autism consultant services would be direct services to the Student.

The Parent suspected that these services were not provided because the District did not keep detailed records of when the services were delivered. The lack of records, however, does not

prove that the services were not provided. The Student's two special education teachers who worked with him during the period at issue in this hearing testified about receiving these services in the amounts required under the IEP. There was also evidence that Ms. Radovich explained to the Parent at an IEP team meeting how she was delivering her services.

To prove his claim, the Parent must offer some evidence. He had none. On the other hand, the District provided first hand testimony that the services were delivered as required under the IEP. Although during some months, fewer than 90 minutes were provided, in other months, the autism consultant exceeded the IEP's requirements. Overall, the Student received an average of 120 minutes of autism consulting services. Therefore, I find no violation of issue #6.

Autism consultant records: The Parent argues that the District denied him records of these services. He asserts that because the Student is nonverbal, he would not be aware of when these services were being provided. The fact that the Student is nonverbal is irrelevant here, as it would be surprising if other disabled students with considerably less significant disabilities would be aware of the delivery of consulting services.

There was no evidence that the District actually denied the Parent any records. To the contrary, the District did not prepare or maintain the records the Parent would have liked the District to keep. The Parent did not point to any requirement in the IDEA that school departments must keep the records he was seeking.

As Dr. Moore testified, separate reports of consultation are not required. The Parent cites the case of *Amanda J. ex rel. Annette J. v. Clark Cty. Sch. Dist,* 267 F.3d 877, 892-93 (9th Cir. 2001) as support that a summary record, such as the one provided by Dr. Moore, is insufficient to constitute the provision of records to the parents. The situation in *Amanda J.* is not comparable to the case at hand. Unlike *Amanda J.*, this is not a situation involving the District purposely

cleansing documents in its possession or choosing to summarize them rather than producing them. The records sought from the District by the Parent simply did not exist.

The Parent has not shown that the District failed to provide records in its possession. The IDEA does not require the District to prepare and maintain certain records to assuage the Parent's unfounded suspicions. As the Parent noted, the District has been very accommodating of the Parent's many requests over the years. Moreover, at the Parent's request, the District even created a record after the fact.

There was no evidence presented at the hearing that the Student was not receiving FAPE, or that the alleged lack of autism consulting services and records thereof somehow deprived the Student of FAPE. In fact, there was considerable evidence to the contrary. As there was no failure to provide requested records, there was no violation of the IDEA.

4. Did the District's actions in not permitting the Student to wear a recording device while at school deprive the Parent of his right to participate in the IDEA decision-making process to the extent that it deprived the Student of a free appropriate public education (FAPE) in violation of state or federal special education law?

Position of the Parent: The IDEA requires that the Student be permitted to use a recording device if it will allow him to protect himself at school or to effectively communicate and advocate for himself. There have been several instances over the past four years in which the District has failed to inform the Parents of things about the Student that should have been communicated to them. There were also several instances when the Parents learned information from District employees that was inaccurate. The District cannot be trusted to provide full and accurate information where its interests may suffer. Because the District does not provide and resists providing the complete and accurate information that the Parents and Student need to be able to fully advocate for the Student, the Student must be able to advocate for himself by gathering and communicating to the Parents his own information about what happens to him

during the school day. Due to his communication disabilities and inability to answer questions about events that have happened to him, the only mechanism that he has to protect himself and advocate for himself is to record his day at school.

Position of the District: The evidence could hardly be clearer that the Student does not require a passive recorder to benefit from his education or to receive FAPE. The Student will not use the device to communicate with anyone, and there was no evidence nor was it even clear how this device would enhance the Student's communication.

It was the opinion of the District's administrators and educators that such a recording device would be detrimental to the Student's education in many ways. It would be disruptive to the educational environment and add to the potential for the Student's isolation. It would interfere with the interactive learning process and the ability of other students in the Student's vicinity to learn without being subjected to passive observation by the Parents and whomever they chose to share their recordings with. Other parents do not want their children to be recorded by the Parents. Additionally permitting the device would burden the District's relationship with its employees and their collective bargaining agreements.

DISCUSSION: In my March 9, 2016 Order on the District's Motion to Dismiss, I granted the District's motion regarding whether the Parent was deprived of his right to participate in the IDEA decision-making process due to the District's prohibition against the Student wearing a recording device during the school day. I dismissed that claim on the ground that it was previously decided by Hearing Officer Peter Stewart in 13.017H and affirmed by the U.S. District Court, and is thus barred by *res judicata.* In that case, the hearing officer heard three days of evidence, including most of the same examples set forth in the Parent's closing argument in the case before me, regarding the District's alleged failures in communication. Hearing

Officer Stewart ruled that the evidence of these incidents did not support the Parents' view regarding a need for the recording device and that the Parents were not excluded from the IEP team process, but were "intimately and significantly engaged" in the Student's education. [S-270 at 12-13]

This leaves for decision the Parent's claim that not permitting the Student to wear a recording device at school deprived the Parent of his right to participate in the IDEA decision-making process so as to deprive the Student of FAPE. This issue appears almost identical to the argument I ruled was barred by *res judicata.*

The IDEA provides that 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 Student's educational program contained in his IEP must be "reasonably calculated to enable the student to receive educational benefit." *Board of Educ. v. Rowley*, 458 U.S. 176, 207 (1982). In *Town of Burlington v. Department of Education,* the First Circuit explained that an appropriate education must be directed toward "the achievement of effective results – demonstrable improvement in the educational and personal skills identified as special needs – as a consequence of implementing the proposed IEP." 736 F.2d 773, 788 (1st Cir. 1984), *aff'd*, 471 U.S. 359 (1985). The educational benefit must be meaningful and real, not trivial or *de minimus* in nature. As the First Circuit stated in *Lenn v. Portland School Comm.*, the law sets a fairly modest goal of an appropriate, rather than an ideal, education. The benefit conferred does not need to reach the highest attainable level or even the level needed to maximize the child's potential. 998 F.2d 1083, 1086 (1st Cir. 1993). The *Lenn* court also stated that the IEP must be designed to target, "all of a child's special needs, whether they be academic,

physical, emotional, or social." 998 F.2d 1083, 1096.

No doubt it must be difficult to send a child who has a limited ability to communicate into the care of others. It requires a certain level of trust. The Student has attended school in the District for 12 years without a recording device, and throughout his entire educational career, he has been happy, has loved school, and has made continuous and significant progress. There have been only a handful of incidents of concern to the Parents, and the Parents have stated under oath that they felt the Student was safe at school. [Fact #28] The need for a recording device is therefore not a safety issue. The District has provided and continues to provide the Parents with the highest level of detail about the Student's day that I have seen in my 14 years presiding over due process disputes, and this includes cases involving students with disabilities even more severe than the Student, including a blind student with autism and severe cognitive disabilities. I was impressed with the affection and dedication the District staff has for the Student and for the high level of care and effort that the District puts into assuring that the Student receives a high quality education that meets his unique needs. Everyone, including the Parents, agrees that the Student has been making good progress in his educational program. That is precisely what FAPE requires. The Student is receiving FAPE.

From a practical perspective, it is impossible for the District staff to report on every aspect of the Student's day, and it is not necessary. In the Parent's closing argument, he lists some examples where information should have been included in the daily log but wasn't, and most were essential in his eyes but not in mine or the other adjudicators who have denied his attempts to send the Student to school with a recording device.

It is unnecessary for the Student to wear a recording device to benefit educationally. As noted above, there is no dispute that the Student is already receiving FAPE without the recording device.

There is wealth of evidence from both educators and the parent of another child with autism (Parent B) that the recording device actually would be disruptive and detrimental to the education of the Student and would interfere with the learning process. It is also understandable, given the Parents' unusually high level of scrutiny over the actions of the District, that District staff would be concerned about how the Parents would use the recordings, and that things could be taken out of context from a recording of a nonverbal child.[15]

Based upon the evidence, I conclude that allowing the Student to wear a device that would record his day at school, either by audio or video means, would interfere with his ability to receive FAPE. The Parent was unable to state how or whether the Parents would use the recordings. There is simply no demonstrable benefit, and there is the potential for harm.

In conclusion, the Parent has failed to provide any evidence that the Student is not receiving FAPE and no evidence to support the assertion that wearing a recording device could benefit him educationally.

5. Did the District's changes to the students or staff in the Student's classroom during the winter of 2014 constitute a change of the Student's placement in violation of state or federal special education law?

Position of the Parent: In February 2014, following the Parents' request for a due process hearing in December 2013, the District moved Ms. Fournier, an ed tech, two of the four students in the Student's program and a few classroom items to another classroom. This was a change in the Student's whole environment. Since that time, the Student has less social interaction with

[15] At the hearing, the Father testified that the recorded information was needed so that he could advocate *against* the District staff, rather than advocating for the Student. [Testimony of Father]

peers. This is contrary to a continuing major goal of the IEP that the Student have more opportunities for social interaction. This was a change in the Student's educational placement in violation of the IDEA.

Position of the District: The Parent's complaint is that the District did not convene the Student's IEP team to discuss a change in the programming of two other students. The Student's placement was not changed because of the departure of two students and personnel who did not work with him. These two students were benefitting from instruction by Jessica Fournier, a special education teacher who had been subjected to vitriolic accusations by the Mother in the spring of 2012, and whom the Parents insisted have no supervisory authority over the Student in any event. The Student continued to receive the same services called for in his IEP and he continued to work with the same personnel. The staff responsible for the Student uniformly testified that there was no change in his program as a result of the two students and other staff with whom the Student did not work moving to another room. There has been no change in the percentage of time the Student spends with nondisabled peers. The Parent's allegations that the Student is isolated in an office with no social interaction is incorrect.

DISCUSSION: According to the Office of Special Education Programs, in determining whether a "change in educational placement" has occurred, it is necessary to examine whether the change substantially or materially alters the child's education program. This includes considering whether the educational program in the IEP has been revised, whether the child will be able to be educated with nondisabled children to the same extent, whether the child will have the same opportunities to participate in extracurricular services, and whether it represents a significant change in position along the continuum from the most restrictive to the least restrictive placement options. *Letter to Fisher,* 21 IDELR 992 (1994). If the change substantially

or materially affects the composition of the Student's educational program and services, then it is a change in placement. *Veacey v. Ascension Parish Sch. Bd.*, 42 IDELR 140 (5th Cir. 2005, *cert. denied.* 546 US 824 (2005). The change must affect the Student's learning experience in some significant way. *DeLeon v. Susquehanna Cmty. Sch. Dist.* 747 F. 2d 149, 153 (3rd Cir. 1984).

There was no evidence to support a conclusion that the Student's placement was changed when two students, Ms. Fournier, the other students' ed techs, a fish tank and a book nook were removed from his classroom. As a preliminary matter, it is remarkable that the Parent is actually complaining that Ms. Fournier has been removed from the Student's classroom, given how much the Mother despised Ms. Fournier and *demanded* that the Student not interact with her except in cases of emergency. As a result of the Parents' requests regarding Ms. Fournier, the Student did not have any kind of significant interaction with the people who had left the classroom even before they left it. The evidence demonstrated that the Student's educational program remained unchanged in every significant respect. As set forth in Fact #23, the Student continued to work with the same personnel, the same materials, the same schedule and the same program that he had all along. Although the Parent alleged, based primarily upon speculation, that the Student had less contact with his nondisabled peers as a result of the change, this was contradicted by direct evidence from his teachers. There was no change in the Student's placement in violation of the IDEA.

7. **Does the IDEA require the District to provide the Father, upon demand, with the names of educators who participated in a union grievance over two years ago?**

The District moved to dismiss this claim in its aforementioned motion, and at the time, I deferred ruling on it. I previously ruled that the Parent was not entitled to receive unredacted copies of the grievance documents.

At the hearing, the Father testified that he believed the District was required to provide him with the names of staff who filed grievances referred to in Facts #4 and 15 because of a provision in the Student's IEP that requires staff to tell the Parents if there is a concern about compliance with the IEP, and that part of the grievance involved this requirement. [Testimony of Father] He was concerned that anyone grieving this IEP requirement would be hesitant to comply with it, and for this reason, it was important that he have the names of the grievants.

As with the other issues in this hearing, the Father needs more than mere suspicion or speculation to prove his point. He has provided no such evidence. The Father has said on several occasions that he knows who is the grievant in the teacher grievance. As this teacher, Kelly Allen, is no longer employed by the District, providing actual confirmation of the grievant's identity at this point is senseless.

Regarding the grievants in the other grievance, the Parent has produced no concrete evidence that this provision of the IEP has not been complied with. On the other hand, the District has presented evidence that the staff is complying. When weighing the importance of honoring the confidentiality of teachers and ed techs under their respective collective bargaining agreements and the District's evidence that the staff is in compliance, against the Parent's mere suspicion that the staff would not comply because they filed a grievance about this over two years ago, I find no compelling reason to require the identification of the grievants. Therefore, I deny this request and dismiss this allegation.

8. **If the hearing officer finds a violation of applicable special education law, what remedies, if any, are appropriate?**

As I have found no violations of the IDEA, no remedy is necessary.

V. ORDER

1. The District did not violate state or federal special education law by failing to provide postsecondary transition planning consistent with the requirements of the law.

2. The District did not violate state or federal special education law by not completing the annual review of the Student's IEP.

3. The District did not violate the IDEA by failing to provide documents related to autism consultant services provided to the Student.

4. The District's actions in not permitting the Student to wear a recording device while at school did not deprive the Parent of his right to participate in the IDEA decision-making process or deprive the Student of a free appropriate public education (FAPE).

5. The District's changes to the students or staff in the Student's classroom during the winter of 2014 did not constitute a change of the Student's placement in violation of state or federal special education law.

6. The District provided the Student with autism consulting services required under the Student's IEP.

7. The IDEA does not require the District to provide the Father with the names of educators who participated in a union grievance over two years ago.

SHARI B. BRODER. ESQ.
Hearing Officer