

Hearing #18.004H

**STATE OF MAINE
SPECIAL EDUCATION DUE PROCESS HEARING**

Parent)
)
v.) **ORDER**
)
RSU #51)
)

A due process hearing was held at the offices of Drummond Woodsum, 84 Marginal Way, Suite 600, on September 11, 13, 19, and 20, 2017. Present and participating throughout the hearing were: Hearing Officer David Webb, Esq; Atlee Reilly, Esq. counsel to the Parent; [REDACTED] (f/k/a [REDACTED]), Parent; Hannah King, Esq., counsel to RSU #51; and Julie Olsen, Ed.D. Director of Instructional Support, RSU #51.

PROCEDURAL BACKGROUND

On July 14, 2017 the Parent (“Parent”) filed a due process hearing request against RSU #51 (“School”). On July 28, 2017 the School filed a partial motion to dismiss the Parent’s Section 504 claims against the school. Pursuant to a stipulated interim order dated August 21, 2017 and an agreement and release signed by the Parent on June 2, 2017, any existing or potential claims in this proceeding relating to Section 504 of the Rehabilitation Act of 1973, Americans with Disabilities Act (ADA) claims, or any claims against the School arising before June 2, 2017 were dismissed with prejudice.

On August 2, 2017 the School filed a due process hearing request based on similar facts that underlie the hearing request filed by the Parent. By Order dated August 8, 2017 the hearing requests filed by the parties were consolidated.

On August 17, 2017 the Hearing Officer signed a Stipulated Protective Order preventing the release or use of certain information obtained with regard to the Student for any purpose other than the instant proceeding. On August 17, 2017 the School filed a motion to vacate a subpoena served on it by counsel for the Parent on August 9, 2017. On August 24, 2017 the Hearing Officer granted the School's motion to vacate the subpoena with regard to the production of Ms. King's notes. On August 31, 2017 the School filed a motion *In Limine* to exclude certain evidence of the Student's alleged assault on May 12, 2017, which is the subject of the manifestation determination under review in this case. By order dated September 8, 2017, the Hearing Officer denied the School's motion, and specifically ordered that the Parent's appeal of the manifestation determination shall not be limited to a review of the documents or information that that IEP team had before them at the June 21, 2017 manifestation determination meeting. The Parties have stipulated that Dr. Carlann Welch is a psychologist licensed by the Maine Board of Examiners of Psychologists.

The Parent distributed 471 pages of documents (herein referenced as P-#), along with audio recordings of the June 21, 2017 IEP team and MDR meetings and July 5, 2017 IEP team meeting. The School distributed 1513 pages of documents (herein referenced as S-#). Pursuant to a post-hearing order issued on September 25, 2017, the record closed upon receipt of the parties' final closing briefs on September 28, 2017. The Hearing Officer's decision is due on October 16, 2017.

Issues: Evidence was taken on the following issues as set forth in the pre-hearing order:

- 1) Was the Student's alleged assault of a social worker at school on May 12,

2017, a manifestation of his disability, within the meaning of 20 U.S.C. §1415(k)(1)(E)?

- 2) If the expulsion of the Student was permissible, was placement in a tutorial setting with related services an appropriate interim alternative educational setting for the Student?
- 3) Did the IEP developed on July 5, 2017 comply with the Individuals with Disabilities Education Act?
- 4) Is the family entitled to an Independent Educational Evaluation at public expense?
- 5) If there were any violations of the IDEA by the School as set forth above, what remedy, if any, is the family entitled to under the IDEA?

Testifying under oath at the hearing were:

1. Christina Kilgallen Clinical Director, ██████████ School
2. Carlann Welch, Psy.D. Independent Evaluator
3. ██████████ Mother
4. JoAnn McDonald JCCO, Department of Corrections
5. Jeff Duquette Clinician, Christopher Aaron Counseling Center
6. Courtney Hale, Psy.D School Psychologist
7. Heather Blier, Ph.D Clinical Psychologist
8. Julie Olsen, Ed.D Director of Instructional Support, RSU #51
9. Jessica Moon, M.Ed. Board Certified Behavior Analyst
10. Lynda Simmons, NCSP School Psychologist
11. Mar-E Trebilcock ██████████ School Principal

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|-------------------------|----------------------------|
| 12. Peter Gillingham | Regular Education Teacher |
| 13. Rachel Loring, LCSW | School Social Worker |
| 14. Kelly Regan | Educational Technician III |

FINDINGS OF FACT

1. The Student is [REDACTED] years old (d.o.b. [REDACTED]) and resides with his [REDACTED] within the RSU #51 school district ("the School"), where he is on expelled status with tutoring. [Parent Testimony]. The Student is currently diagnosed with attention deficit hyperactivity disorder (ADHD), Disruptive Mood Dysregulation Disorder (DMDD)¹ and Unspecified Depressive Disorder². [S-A-230, P-15, S-175]. The Student receives special education services under the category of Emotional Disturbance. [S-217].
2. Since he was a young boy, the Student has witnessed and been the target of domestic violence and abuse from his father and other men brought into the home by the Student's mother. [Parent testimony, SC-135].
3. A psychological evaluation completed in 2013 by Dr. Alexis Kiburis noted that the Student had a history of "significant trauma" and a record of "notable behavior difficulties". Dr. Kiburis further noted that the Student "presents with difficulties with emotional regulation, impulsivity, oppositional behavior, aggression, and peer relations while in the school setting. [P-375].

¹ by his treating psychiatrist, Dr. Scott Galloway and consulting Psychologist Dr. Carlann Welch [S-A-230, P-15, S-175] Dr. Galloway had previously diagnosed the Student with bi polar disorder and ADHD.

² by School Psychologist Dr. Courtney Hale [S-A-230, P-15, S-175]

4. Dr. Kiburis's report noted that "given [the Student]'s emotional regulation difficulties, aggression, and history of trauma," continued social work supports should be provided "in an effort to help him develop skills related to how to cope with frustration, approach challenges, regulate his emotions when facing perceived stressors, and tolerate aggravation." [P-376].
5. A Risk Assessment Report prepared by John Stewart, Ph.D on April 9, 2014 noted that it "was the impression of this clinician that once agitated [the Student] had very little capacity to calm himself ." [SC-135-37].
6. The Student's educational history relative to his special education programming documents concerns relating to his aggressive behaviors:
 - i. A September 23, 2013 IEP noting that if [the Student] becomes escalated, "he may assault adults." [P-328].
 - ii. A Written Notice dated March 7, 2014 which states: "given unsafe and unpredictable behaviors, [the Student] will require additional time in the Gateway Program" and noting that, "should [the Student] try to run, avoid trying to corral him "for fear of him becoming violent"). [P-306].
 - iii. An IEP developed for the Student on April 1, 2014, during his [REDACTED]-grade year, indicated that [the Student] is "unable to resist aggressive impulses" and needs a day treatment setting to "assist with managing aggressive and impulsive behaviors"). [P-282-284, 290].
 - iv. A Written Notice prepared on April 1, 2014, stated that the Student is "threatening and demanding in school, essentially holding staff

hostage as well. If [the Student] is confronted, he escalates and becomes aggressive." [P-293].

- v. An April 1, 2014 IEP established a goal for the Student to "demonstrate greater self-control in regulating emotions by minimizing impulsive and reactive behavior"). [P-285].

7. At the start of his [redacted] grade year (2014-2015), the Student was placed by MSAD # 15 at [redacted] School, a Special Purpose Private School in New Gloucester, Maine serving students with autism spectrum disorder, reactive attachment disorder, trauma-based disabilities and cognitive delays. [Kilgallen testimony]. Upon the Student's arrival at [redacted] School, he had difficulty with emotional regulation, and explosive outbursts. [Kilgallen testimony]. At [redacted] School, the Student received 90 minutes a week of social work services, 60 minutes a month of psychological consultation, and 60 minutes a month of parent training. [S-17]. The Student experienced success at [redacted] School, with decreased incidents of aggressive behaviors [Parent testimony]. The Student attended [redacted] School for one school year.³ [Kilgallen testimony].
8. The Student transitioned to [redacted] School in October of his [redacted] grade year (the 2015-2016 school year) when the family moved to the RSU #51 school district. [Parent testimony; Kilgallen testimony]. In September 2015, RSU #51 staff attended an IEP team meeting at [redacted] School where

³ The Student was absent from School for 22% of the total class time in the 2014-2015 school year and 25% of the first three months of the 2015-2016 school year. [S-194-203].

the team developed an IEP to provide 60 minutes a week of social work services and direct instruction in executive functioning once he transitioned fully into public school. [S-35].

- 9.** During the Student's ■ grade year, school staff and the Parent reported that the Student had friends, was earning good grades and was engaging in appropriate behaviors in the classroom. [Parent testimony; S-62; P-232].
- 10.** The Student's triennial evaluation was scheduled for March 2016. [Olsen testimony; S-1]. The IEP team ordered a psychological assessment and academic achievement testing. [S-53; S-61]. The psychological assessment was completed by School Psychologist Lynda Simmons. [S-61] The Student scored in the average range on his achievement testing. [S-57-59]. Teacher-rating and self-rating scales placed the Student in the average range with regard to impulsivity, defiance, aggression, and peer relations. [S-71-73; Simmons testimony].
- 11.** The IEP team convened on May 9, 2016 and determined that based upon the Student's evaluations, he no longer met the criteria for a student with an Emotional Disturbance and therefore no longer qualified for special education services. [S-61; P-196; Olsen testimony; Parent testimony].
- 12.** A 504 plan was developed for the Student on May 18, 2016 that included access to a social worker and a positive behavioral support plan. [Olsen testimony; P-178-191]. The positive behavioral support plan noted that while aggressive behaviors had not been observed during the school day, it was

“developed to function preventatively, based on behavioral health history.” [P-184].

- 13.** During the Student's [REDACTED] grade year, his class attendance declined and some of his aggressive behaviors reemerged. [Olsen testimony, S-179-180].
- 14.** Peter Gillingham, the Student's [REDACTED] grade regular education teacher, testified that while the Student had strong social skills, several things made him angry: feeling disrespected, being given a directive by an authority figure, and knowing his sister was in distress. [Gillingham testimony; S-179; S-198]. Mr. Gillingham reported that he never observed physical violence; the Student's typical anger response was swearing, posturing, and clenching his fists. [Gillingham testimony].
- 15.** The Student also had several concerning behaviors during the school year surrounding incidents where his younger sister, who also attended [REDACTED] [REDACTED] School as a [REDACTED] grader in the 2016-2017 school year, was upset. [P-109]. On one occasion the Student physically moved the Principal's hand from the door to gain access to his sister who was “escalated” with two other school staff members. [Trebilcock testimony]. In another incident, the Student walked through a line of people to gain access to his sister. [Trebilcock testimony]. The School developed a plan to get the Student out of the building if his sister was escalated. [Parent testimony, SF-292].

- 16.** In April, 2017 the Student punched a peer multiple times in the face with a closed fist, causing the other student's face to be bloodied. [S-261]. The Student was suspended [McDonald, Olsen testimony].⁴
- 17.** On May 3, 2017 the IEP Team met to discuss the special education referral, and proposed evaluations due to academic performance and increased behavior concerns. [P-119].
- 18.** Assistant Principal Ken Marks stated in a May 10, 2017 e-mail to JoAnne McDonald that the Student "blew up at our BCBA at the end of the day yesterday...we predicted to Mom and [the Student] that this work on his triggers and strategies to deal with his escalation was non-negotiable...We need to ensure that he is SAFE before he moves to the general school population and his explosion yesterday did not validate that!" [P-471].
- 19.** On May 12, 2017, the Student's sister was involved in an incident of escalation that involved the use of several different types of restraint and the involvement of multiple school staff. [P-109, Parent testimony]. The Parent was called to school to pick her up. The Student traveled to the school with the Parent. [Parent testimony]. When the Parent and the Student arrived, the Student's sister was still in a restraint to maintain safety. [Loring testimony]. The Parent went into the room where the Student's sister was located and the Student remained in the hallway, where he was pacing and showing signs of agitation and emotional dysregulation. [Parent testimony, Loring testimony].

⁴ Following the Student's suspension, a "Terms of Return" plan was developed to address the Student's return to school. The plan incorporated behavioral skills training work with the BCBA. This plan also included regularly scheduled meetings with the social worker to assist with anger management [P-142].

As the Parent went into the room where her daughter was being restrained, she said "Get your hands off my daughter." [Parent testimony]. The Student then attempted to enter the room. Lynda Simmons, who was in the room with the Parent and sister, held the door in an attempt to prevent the Student from entering. [Simmons testimony, S-262]. The Student pushed through and Ms. Simmons went backwards. [Simmons testimony]. Rachel Loring was at the door of the Student's sister's classroom and told the Student that he could not go into the classroom. [Loring testimony]. Ms. Loring told the Student that he needed to wait, at which point the Student put his hands on her shoulders, picked her up and threw her against the wall. [Loring testimony]. Ms. Loring's suffered injuries to her head and a leg. [Loring testimony, S-263-264].

- 20.** The Student was suspended for 10 days as a result of this incident. [S-117]. A section 504 manifestation determination meeting was held on May 17, 2017 where it was determined that the Student's conduct on May 12 was not a manifestation of his disability under section 504. [S-118].
- 21.** The Parent requested that a manifestation determination meeting be held to determine whether the Student's conduct on May 12, 2017 was a manifestation of his disability under the IDEA. [S-143].
- 22.** On May 22, 2017, the Parent signed the consent to evaluate the Student in the following areas: Academic/Development, Psychological Evaluation, Observation, Functional Behavior Assessment and Risk/Threat assessment. [S-126].

23. The Parties reached an interim agreement that resulted in the completion of the School's proposed evaluation with Dr. Hale and followed by a meeting to discuss eligibility for special education services. [S-150-153]. The Agreement also required the School to hold an IDEA manifestation determination review, and to make an IEP team placement for the 2017-2018 school year by July 21, 2017. [S-151].

24. In conducting her evaluation of the Student, Dr. Hale noted as follows with regard to her interviews with school staff:

All staff interviewed identified [the Student's] behavior as a primary concern (e.g., volatility, aggression, quick and intense escalation, swearing, noncompliance, posturing in an aggressive manner, threatening to beat up a peer). Last school year, [the Student] dragged a student out of the cafeteria and threw him into a bathroom stall. This year, he assaulted a peer and picked up a staff member and threw her against the wall. As an [REDACTED] grader, the Student has been suspended four times for assaulting a peer, assaulting a staff member, swearing at a teacher and touching a girl's breast. [The Student] has expressed to staff that he values fighting. His assaults were described as calculated (e.g., announcing his intention, counting to three, taking off his watch and ring). Other concerns included resistance to engaging in therapeutic work, his reports of feeling very angry, exposure to media violence, attendance (e.g., 13 unexcused absences this year), work completion, his wanting to help when his sister struggles at school and substance use (e.g., reports to staff that he smokes weed and has access to alcohol)... Anyone confronting [the Student], causing him to perceive his reputation as tarnished or standing in the way of what he wants to do, can trigger agitation. [S-179].

25. Dr. Hale noted as follows with regard to her findings concerning the Student's aggression and anger:

Based on frequency and severity, childhood aggression is predictive of later delinquent behavior, substance abuse and mental health disabilities. [The Student]'s mother and three teachers completed a standardized assessment of aggression. When compared to a normative sample of same-age and same-gender peers, parent and teacher ratings of physical aggression fell in the very elevated range. At school, ratings of initiated

and provoked physical aggression were both high. [The Student]'s ratings of state anger [sic] fell in the elevated range. State anger is the intensity of angry feelings and the extent to which he feels like expressing anger at a particular time. ...Examples included: I feel like hitting someone and I feel like throwing something...While overall results indicated a low risk, currently, for a targeted act of violence, a composite measure assessing internalizing behaviors, externalizing behaviors, his self perceptions and characteristics commonly associated with school violence fell in the range of significant clinical risk. More specifically, [the Student]'s ratings of depressed mood (e.g., feeling sad, suicidal ideation) and aggression (e.g., affinity for violence, having access to weapons) fell in very high range. [S-184].

26. Dr. Hale, in conducting the District's evaluation on June 15, 2017, noted that the Student demonstrated symptoms of Disruptive Mood Dysregulation Disorder DMDD ("temper outbursts that manifest as verbal rages and physical aggression, persistently irritable or angry mood between temper outbursts"), as well as symptoms of a Major Depressive Disorder ("irritable and depressed mood, decrease in appetite, and recurrent suicidal ideation.") [S-176]. Dr. Hale concluded that the diagnosis of Unspecified Depressive Disorder "may best capture this current presentation" [S-176]. Dr. Hale indicated in her report that the Student evidences significant mental health and behavioral distress, which when coupled with highly limited coping ability, has a detrimental impact on his safety and the safety of others. [S-175]. She stated that the Student's diagnostic profile is evolving and will need to be monitored closely. [S-177].

27. A June 21, 2017 IEP team meeting was held to discuss the Student's eligibility for special education and whether the May 12, 2017 behavior was manifestation of his disability under the IDEA. At this meeting, the IEP Team

determined that the Student was eligible for special education and related services as a Student with an Emotional Disturbance. [S-217]. Dr. Hale stated that on three different rating scales, the Student's physical aggression was noted to a marked degree, including a predisposition to violent themes and that the Student's teachers report that they are observing physical aggression on a monthly or weekly basis. [audio recording of June 21, 2017 IEP team meeting at 56:07].

- 28.** Immediately following the eligibility determination at the June 21, 2017 IEP team meeting, the team conducted a manifestation determination review (MDR) of the Student's behavior on May 12, 2017. [S-216]. At this meeting, Dr. Hale was unwilling to give her opinion on whether the Student's unspecified depressive disorder diagnosis was substantially related to the incident since she wasn't present during the incident, nor did she have other information about it. [Audio recording of June 21, 2017 manifestation determination review meeting at 1:22 (hereinafter MDR or MDR at__)].
- 29.** At the June 21, 2017 MDR, the Parent questioned whether the Student's diagnostic history was being considered. [audio recording of June 21, 2017 IEP team meeting at 1:26]. The meeting concluded approximately 10 minutes later with no substantive discussion of whether the Student's behavior was related to his ADHD and disruptive mood dysregulation disorder (DMDD) diagnosis. [MDR at 1:26-1:40]. Over the Parent's objection, the IEP team determined that the Student's behavior on May 12, 2017 was not a manifestation of his disability under the IDEA. [*Id.*].

- 30.** An IEP dated July 11, 2017 was developed for the Student. The IEP noted that the Student had functional needs in the following areas: school attendance, work production, coping and anger management strategies and verbal and physical aggression. [S-323]. The IEP referenced the Student's inability to deescalate, noting that he “is not able to participate in a de-escalation or exit routine when prompted by an adult in the school setting (multiple prompts with no success)” and that during times of emotional dysregulation, the Student is “unable to implement” any anger management strategies. [S-323]. The IEP goals include: "reduce occurrences of physical aggression"; “support the use of alternative coping strategies in the place of physical and verbal aggression”; participate in a de-escalation exit routine”; and identify and use at least three coping strategies "that maintain his safety and the safety of others when emotionally escalated.” [S-324-325].
- 31.** On July 10, 2017 the School requested consent from the Parent to further psychologically evaluate the Student and conduct a functional behavior assessment. [S-310]. By e-mail dated July 21, 2017, the Parent stated that she is requesting an “independent provider to do any further evaluations. [S-341].
- 32.** The Parent consulted with Dr. Carlann Welch to perform an independent psychological examination of the Student. Dr. Welch completed her examination in August, 2017. [P-01]. In her report, Dr. Welch stated:

One of the skill deficits in disruptive mood dysregulation disorder, which is associated with temper outbursts (verbal rages and physical aggression), is limited emotional regulation. This skill involves the capacity to tolerate an emotional experience and regulate one's expression of such (in terms of language and/or action). Individuals who have problems with emotional

regulation express their emotions in impulsive, poorly modulated ways (such as, explosive outbursts, temper tantrums, etc...). This often equates with having extremely low frustration tolerance... It is my impression that The Student's action of pushing through the doors to see his sister, which included physically aggressing against Ms. Loring, reflected impulsive, poorly modulated actions based on a "zero to 100" experience of fear for his sister and his protective anger. His difficulty regulating his emotional response appears directly related to his diagnosis of disruptive mood dysregulation disorder (per Dr. Galloway and this examiner) and unspecified depressive disorder, as described by Dr. Hale. [P-15-16].

SUMMARY OF THE PARTIES' ARGUMENTS

Position of the Parent:

The School failed to consider all of the Student's diagnoses as required by the IDEA when conducting the MDR, including his Disruptive Mood Dysregulation Disorder diagnosis offered by his treating psychiatrist. Instead, the School limited the discussion at the MDR to whether the conduct in question was a manifestation of the Student's recently diagnosed Unspecified Depressive Disorder. Additionally, the School failed to consider the Student's trauma history, the nature of the difficulties the student has exhibited over time as reflected in his IEPs and other educational records.

Due to this failure, the Parent requests that the Student be restored to his status prior to his expulsion: that of a student in good standing and entitled to a full day of services through the District or in the alternative that the Student be placed at the [REDACTED] School where the Student has demonstrated a great deal of success.

The Parent also alleges that the School has denied the Student a FAPE by failing to develop an appropriate IEP for the Student and instead only developing an IAES based on the Student's expelled status. Specifically, all education offered through the IAES is in a 1:1 setting and the Student has no access to peers.

Finally, the School should pay for the Parent's Independent Educational Evaluation since the School's evaluation was incomplete and did not address concerns with school attendance that had been discussed for over a year. The evaluator conducting the FBA was not made aware of this problem and, as a result, failed to adequately speak to the relationship between the Student's disabilities and his aggressive behaviors.

Position of the School:

The IEP team correctly determined that the Student's behavior on May 12, 2017 was not substantially related to his only valid current mental health diagnosis of an Unspecified Depressive Disorder. The symptoms caused by or substantially related to his disability are irritability, verbal temper outbursts, pervasive mood of unhappiness, and loss of appetite. No one testified that the Student was evidencing any of these symptoms during the assault.

The descriptions of the Student's verbal outbursts during his [REDACTED] and [REDACTED] grade year all referenced unpredictable outbursts that included posturing and swearing, however, none of these verbal outbursts resulted in physical violence. The only other act of physical violence during the Student's [REDACTED] grade school year—the assault of a peer in the cafeteria—did not include a verbal outburst, but instead was preceded by the Student calmly removing his rings and warning the peer. Each instance requires a careful analysis of the circumstances of the individual and the relationship of the specific behavior to his or her specific condition.

Even if physical temper outbursts, as opposed to verbal temper outbursts, were related to the Student's disability, such outbursts in the context of a mental health diagnosis are defined as unpremeditated, impulsive and not goal-oriented. Additionally,

a diagnosis of a trauma-based disability, including PTSD and other trauma and stress-related disorders, requires the presence of at least some of the symptoms of PTSD, which the Student does not have.

The Student does not have Disruptive Mood Dysregulation Disorder. In order to meet the DSM-V criteria for Disruptive Mood Dysregulation Disorder, an individual must exhibit “severe recurrent temper outbursts manifested verbally and/or behaviorally that are grossly out of proportion in intensity or duration to the situation or provocation on average 3 times a week in 2 settings (community, home, school). Dr. Welch conceded that neither she nor Dr. Galloway had the data to support such a diagnosis. The Parent, who bears the burden, did not present any evidence to support a finding that the Student was engaging in an average of three physically aggressive outbursts a week, in two settings, over the course of 12 months without a period of more than three months without symptoms in that period.

The Student does not have ADHD and, even if he did, the assault would not have been a manifestation of that disability. In her evaluation, Dr. Welch includes a diagnosis for ADHD “by history” and indicates that impulsivity may have played a role in the assault on Ms. Loring. However, Dr. Welch did not do any standardized assessment to assess impulsivity and, in 2016 and 2017, standardized assessments administered by Ms. Simmons and Dr. Hale to assess impulsivity placed the Student in the typical or average range.

The Student’s tutorial placement is an appropriate interim alternative educational setting and the IEP developed on July 5, 2017, outlining that placement, complies with the Individuals with Disabilities Education Act. While children with disabilities removed

for more than 10 school days in a school year for disciplinary reasons must continue to receive FAPE, the Act modifies the concept of FAPE in these circumstances to encompass those services necessary to enable the child to continue to participate in the general curriculum and to progress toward meeting the goals set out in the child's IEP. A school district is not required to provide children suspended for more than 10 school days in a school year for disciplinary reasons, exactly the same services in exactly the same settings as they were receiving prior to the imposition of discipline.

In the present case, there was no evidence presented to suggest that the Student could not access the general education curriculum in a 1:1 tutoring setting. The Student has average cognitive abilities and scored in the average range on all measures on the June 2017 achievement testing despite missing a significant amount of school during his █ grade school year. The Parent did not meet her burden to establish that the Student has a disability-related need for peer interaction. The Student was safe and successfully accessed mainstream programming when he was engaged in his IEP services at █ █ School and for most of the time he was on a 504 plan.

State and federal special education regulations provide for independent evaluations at public expense when the school "has failed to perform its own evaluation well enough for it to be deemed 'appropriate.'" A parent is not entitled to an independent education evaluation at public expense if the purpose of the evaluation is to seek additional information. Each of the evaluators in this case was qualified to conduct the assessments that they conducted, and the Student was assessed in every area of suspected disability. An Independent Educational Evaluation at public expense must meet state regulatory criteria. *MUSER V.6(E)(1)*. Dr. Welch's failure to comply with MUSER,

alone, is enough to deny the Parent's request that the school pay for the evaluation.

A. Burden of Proof

Although the IDEA is silent on the allocation of the burden of proof, the Supreme Court has held that in an administrative hearing challenging an IEP, the burden of persuasion, lies with the party seeking relief. *Schaffer v. Weast*, 126 S.Ct. 528, 537 (2005). Accordingly, the Parent bears the burden on issue 1, 2, 3 and 5. The School bears the burden on issue 4.

1. The Student's alleged assault of a social worker at school on May 12, 2017, was a manifestation of his disability within the meaning of 20 U.S.C. §1415(k)(1)(E).

The federal special education law provides specific special protections regarding student discipline for children with disabilities. *Honig v. Doe*, 484 U.S. 305, 324, 108 S. Ct. 592, 559 IDELR 231 (1988). In *Honig*, the United States Supreme Court expressly declined a request by a school district to create a "dangerousness" exception into the discipline protections established by the Act. *Honig v. Doe*, supra, 484 U.S. at 323.

Among the protections provided in the IDEA is the requirement that students with disabilities not be punished by means of a change of placement for conduct that is a manifestation of their disability. 34 C.F.R. Section 300.530(f). MUSER §XVII.1. Thus, a manifestation determination is required for proposed discipline that would change the placement of a student with a disability. *See, In re: Student with a Disability*, 52 IDELR 239 (WV SEA 2009).

The IDEA provides detailed procedures that a local educational agency must follow when dealing with discipline issues. The Act gives schools the authority to

suspend a student with a disability for up to 10 days without providing the child with an “alternative educational setting”. *See* 20 U.S.C. § 1415(k)(1)(A)(i). The IDEA also permits a school to discipline a student with a disability for more than 10 days, just as it would discipline a non-disabled child, provided the disabled student’s misbehavior was not a “manifestation” of his or her disability. *See* 20 U.S.C. § 1415(k)(5)(A).

Maine has issued regulations regarding the manifestation determination process, in connection with the federal mandates, requiring school districts to review “all relevant information in the student’s file, including the child’s IEP, any teacher observations, and any relevant information provided by the parents” to determine: (a) if the conduct in question was caused by, or had a direct and substantial relationship to, the child’s disability; or (b) If the conduct in question was the direct result of the SAU’s failure to implement the IEP. MUSER §XVII.1.E.

If it is determined that the student's misconduct was a manifestation of his disability, the IEP team must either conduct a FBA and implement a BIP for the student or, if a BIP has already been developed, review the BIP and modify it as necessary to address the behavior. The student must also be returned to the placement from which he was removed unless the parent and the school district agree to a change of placement. MUSER §XVII.F.(2).

In this case, the Student has had a complex milieu of diagnosis, including Oppositional Defiant Disorder, Disruptive Mood Dysregulation Disorder, an Unspecified Depressive Disorder and a possible Conduct Disorder [P-13, S-181].

At the June 21, 2017 manifestation determination review (MDR) meeting, the evidence demonstrates that the School did not adequately review all information in the

Student's file, nor did the School fully consider whether the conduct was a manifestation of the Student's diagnosed Oppositional Defiant Disorder, Disruptive Mood

Dysregulation Disorder, ADHD or possible Conduct Disorder as required by MUSER

§XVII.1.E. [MDR].⁵

⁵ The June 21, 2017 manifestation determination review meeting started approximately 1 hour and 13 minutes after the eligibility determination portion of the meeting. Dr. Olsen: I don't see [information from the additional evaluations with regard to any additional information from the 504 MDR] but I would like to open to the team to see if there are different opinions than when we first met..." [1:14]. The School's attorney [Hannah King]: "ED is an umbrella that captures a lot of different disabilities, but right now we are talking about whether the conduct in question was caused by or had a direct and substantial relationship to the Student's emotional disability." [1:15] Dr. Olsen (referring to the manifestation determination review form [S-209]: "was the conduct in question caused by or have a direct and substantial relationship to the student's disability...I will start by saying I stand by the decision of the 504 team. I do not have any new information that would change my opinion..." [1:17] One member of the team asks: "to clarify, are we considering the new diagnosis at this time and the diagnosis that were understood to be at play at the time." [1:18:46]. Dr. Olsen: "we are considering his cognitive profile and the information we have for him. Is there any additional information that the team should consider?" [1:19] Mr. Reilly: Was there any relationship between Dr. Hale's diagnosis of unspecified depressive disorder (UDD) and the Student's behaviors? Dr. Hale: "I can't speak to that. I did not get any information from [the Student] nor did school staff comment on that to me...I was not there...I cannot assess what his mental status was...I would be happy to ask the people there whether he looked depressed that day." [1:20:40-1:20:15; 1:24:05] Ms. King: "one of the diagnoses was ruled out...because...although the other diagnosis captures the physically aggressive behaviors, you have to see them on a much more frequent basis. [1:21:47]. (unidentified) "and you do note that he has a trauma history...and that could have played a role in just thinking about him diagnostically...but you didn't feel he met the full criteria for PTSD..." [1:21:59] Dr. Hale: "his trauma history contributes to some of his challenges", however, "that is not what I think I'm being asked right now." Dr. Olsen: "is there a causation between students who have UDD to throw people against the wall under a DSM-V diagnosis is that something that there is a link between those two pieces. [1:23:06]. Dr. Hale: "assaultive behavior is not part of the diagnostic criteria of a mood disorder." [1:24:05] The Parent: "this is part of the Student's disability..." [1:26] Dr. Olsen: "of the depressive disorder?" [1:26:22]. Parent: "[the Student] wasn't diagnosed with depressive disorder before meeting Courtney Hale. Before that he was diagnosed with bi polar disorder, ADHD, ODD and disruptive mood dysregulation disorder. [1:26:45] Dr. Olsen: "Dr. Galloway is saying that the Student is not being treated for bi-polar and that you have not been in touch with him." [1:27:02] Parent: "I have been in touch with him." Dr. Hale: "I have summarized my discussions with Dr. Galloway in my report and his diagnosis is disruptive mood dysregulation disorder and Oppositional Defiant Disorder." Parent: "[the Student] is on disability for bi-polar, which came from Dr. Galloway." [1:27:29]. Mr. Reilly: "As of March, 2017 what he had was disruptive mood dysregulation disorder, without a rule out, ADHD, combined presentation, without a rule out, and sleep apnea, without a rule out." [1:27:51]. Dr. Olsen: "that's not the information Dr. Galloway provided to the School...is there other information that the team should consider?" [1:28:04]. Mr. Reilly: "Yes-Ms. Moon's report identifying as a common antecedent that if someone takes or touches something that belongs to [the Student]...or to harm his family...it seemed that [he] had a reduced ability to control his actions...because of his disability." [1:28:22]. Ms. King: "There is nothing diagnostic about Ms. Moon's report...[which was meant to] to identify behaviors and make determinations regarding antecedents that happen for regular and special education" [1:29:09]. Ms. Moon: "that's correct....this may be related to my interview with [the Student] where he expressly named...'these are my rules of how I operate'...I'll read a couple of quotes...'no one is going to talk shit about me or they will get their ass kicked...if people take something

Even after the Parent asked about the Student's other disabilities, including bipolar disorder, ADHD, ODD and disruptive mood dysregulation disorder, the School responded by questioning whether the Student was in fact diagnosed with bipolar, without substantively considering whether the Student's behavior on May 12, 2017 was related to the other disabilities in the Student's file. [MDR-1:27:02]. The School then directed the discussion back to the UDD diagnosis by asking Dr. Hale if she felt that there was a substantial relationship to his disability "of a depressive disorder" [MDR-1:34:33]. Dr. Olsen, when wrapping up the meeting 22 minutes after it began, concluded: "we have a diagnosis that has been brought forward, we have a destabilizing condition that has been brought forward."⁶ [Audio recording of June 21, 2017 MDR review].

In her June 15, 2017 report, Dr. Hale concluded that the Student demonstrated symptoms of disruptive mood dysregulation disorder, including "temper outbursts that manifest as verbal rages and physical aggression, persistently irritable or angry mood

out of my hands then (smack-and he did this movement) and if someone threatened him he said it kind of like this: 'I'm going to *murder* them if they threaten me...I don't care your age...'"[1:30]. Mr. Reilly: "...are people saying there is no relationship to any of this kid's disability related needs, things that have been in effect since he was seven?"[1:31]. Dr. Olsen: "I want to ask Lynda, and then we need to wrap this up..."(Lynda Simmons gives her account of the May 12, 2017 incident).[1:33:40]. Dr. Hale: do you believe that there was a substantial relationship between his disability...the depressive disorder?" [1:33:57]. Lynda Simmons: "Could you define the depressive disorder, because what I saw was that anger piece." (Dr. Hale then describes the depressive disorder) [1:34:24] Ms. Simmons: "I see it as part of the agitation, not the depressive disorder. [1:34:33]. Dr. Olsen: "do you feel there is a substantial relationship to his disability of a depressive disorder?").[1:34:33]. Ms. Simmons: "No." Mr. Reilly: "agitation and a relationship to a mood disorder...the antecedents you just heard..I know you weren't there but does that...?" [1:34:37]. Dr. Hale: "I'm not going to change what I've just said in terms of my role." Parent: "is there someone who can do that?).[1:34:53]. Dr. Olsen: "the team was here. The team saw it, we have documentation around that, we have a diagnosis that has been brought forward, we have a destabilizing condition that has been brought forward. It sounds to me that we have disagreement ...so I'm going to say that we are upholding the decision of the 504 team that there is not a substantial relationship to the depressive disorder for him." [1:35:21].

⁶ Dr. Olsen stated within the first five minutes of the MDR, that she "stands by the decision of the 504 team. [MDR-1:17]. This comment, before any further discussion, suggests that the school had predetermined the result of 'no manifestation' before considering input from other members of the team.

between temper outbursts. [S-176].⁷ The evidence demonstrates that the IEP team did not fully review the components of the unspecified depressive disorder (UDD) diagnosis offered by Dr. Hale to determine if the Student's behavior was a manifestation of this disability. *Id.*

In her August, 2017 psychological evaluation, Dr. Welch noted that disruptive mood dysregulation disorder, a diagnosis offered by the Student's treating psychiatrist, is associated with temper outbursts (verbal rages and physical aggression) and limited emotional regulation. [P-15]. Dr. Welch further notes:

This [emotional regulation] skill involves the capacity to tolerate an emotional experience and regulate one's expression of such (in terms of language and/or action). Individuals who have problems with emotional regulation express their emotions in impulsive, poorly modulated ways (such as, explosive outbursts, temper tantrums, etc...). This often equates with having extremely low frustration tolerance. [P-15-16].

The Hearing Officer finds Dr. Welch's testimony credible when she opined that the Student's behavior on May 12, 2017 demonstrated more impulsive behavior, and reflected his difficulty regulating his emotional response which appears directly related to his diagnosis of disruptive mood dysregulation disorder and unspecified depressive disorder. [P-15-16, Welch testimony].

The Hearing Officer rejects the School's argument that the Student's conduct must be caused by or be substantially related to his specific mental health disability as diagnosed by the DSM-V. While the MUSER requires Emotional Disturbance evaluators

⁷ Dr. Hale noted that all staff interviewed identified [the Student's] behavior as a primary concern and that during his [redacted] grade school year the Student has been suspended four times for assaulting a peer, assaulting a staff member, swearing at a teacher and touching a girl's breast. [S-176]. Dr. Hale stated at the Student's June 21, 2017 IEP team meeting that teachers are reporting that they are observing physical aggression on a monthly or weekly basis and that on 3 different rating scales, aggression was noted to a marked degree, including physical aggression. [June 21, 2017 IEP team meeting 56:07].

to be qualified to make diagnostic impressions, there is no corresponding requirement that a child be diagnosed with a DSM code in order to be eligible under this category.⁸ MUSER §VII.2.E.1. The School has provided no authority to support the proposition that an IEP team must find a separate “condition” other than the condition of an emotional disturbance.⁹

Rather, the IDEA requires the manifestation committee to deliberate and "review all relevant information" 34 C.F.R. § 104.35 and MUSER §XVII.1.E. Even if the MDR team had reviewed all relevant information available to them at the time, Federal law directs a hearing officer to make a determination as to the correctness of the manifestation determination, which may involve information that was unavailable to the IEP team during the MDR. *Robbinsdale Public Schools, ISD 281*, 109 LRP 23911, (Minn. SEA 2008) *See, In re: Student with a Disability, 54 IDELR 209*, (Wis. SEA 2010).¹⁰

In the instant case, even Dr. Hale’s report supports a finding that the Student’s conduct was substantially related to the Student’s disability. Dr. Hale specifically notes in her report that the Student demonstrated symptoms of Disruptive Mood Dysregulation

⁸ Definition. *Emotional Disturbance* means a condition which exhibits one or more of the following characteristics over a long period of time and to a marked degree that adversely affects the child’s educational performance:

- (a) An inability to learn that cannot be explained by intellectual, sensory, or health factors;
 - (b) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
 - (c) Inappropriate types of behaviors or feelings under normal circumstances;
 - (d) A general pervasive mood of unhappiness or depression;
 - (e) A tendency to develop physical symptoms or fears associated with personal or school problems.
- MUSER §VII.2.E.1

⁹ In it’s brief, the School asserts that the team determined, after considering Dr. Hale’s evaluation and the criteria for eligibility under a coding of Emotional Disturbance, that the Student only had a disabling mental health *condition* of Unspecified Depressive Disorder.

¹⁰ *See*, Order on Motion in Limine, September 8, 2017.

Disorder DMDD ("temper outbursts that manifest as verbal rages and physical aggression, persistently irritable or angry mood between temper outbursts") and that the Student's diagnostic profile is evolving and will need to be monitored closely. [S-177].

Dr. Hale further reported that:

“All staff interviewed identified [the Student's] behavior as a primary concern (e.g., volatility, aggression, quick and intense escalation, swearing, noncompliance, posturing in an aggressive manner, threatening to beat up a peer). Last school year, [the Student] dragged a student out of the cafeteria and threw him into a bathroom stall. This year, he assaulted a peer and picked up a staff member and threw her against the wall. As an [REDACTED] grader, the Student has been suspended four times for assaulting a peer, assaulting a staff member, swearing at a teacher and touching a girl's breast. [S-179].¹¹

Dr. Hale further noted in her report that “currently, for a targeted act of violence, a composite measure assessing internalizing behaviors, externalizing behaviors, [sic] his self perceptions and characteristics commonly associated with school violence fell in the range of significant clinical risk.” [S-184]. The record reflects additional recent incidents of the Student’s violent and physically aggressive behaviors that appeared to be overlooked by the MDR team.¹²

In short, the School’s failure to carefully consider all relevant information about the Student, including all information from its own evaluators, was a substantive error and denied the Student a FAPE. *In re Student with a Disability*, 114 LRP 39929 (VA SEA 2014). Accordingly, the Parent has met her burden to prove that the Student's

¹¹ Dr. Hale’s report noted that the Student also had aggressive behaviors during the school year surrounding incidents where his younger sister was upset. [P-109]. On one occasion the Student physically moved the Principal's hand from the door to gain access to his sister who was “escalated” with two other school staff members. [Trebilcock testimony]. In another incident, the Student walked through a line of people to gain access to his sister. [Trebilcock testimony].

¹² Assistant Principal Ken Marks stated in a May 10, 2017 e-mail to JoAnne McDonald that the Student "blew up at our BCBA at the end of the day yesterday... We need to ensure that he is SAFE before he moves to the general school population and his explosion yesterday did not validate that!" [P-471].

behavior was related to his disability.¹³

MUSER §XVI.21.B. provides that a Hearing Officer under Section XVI.13 shall hear, and make a determination regarding an appeal of a manifestation determination. In making the determination, the hearing officer may:

- (a) Return the child with a disability to the placement from which the child was removed if the hearing officer determines the removal was a violation of Section XVII.1 or that the child's behavior was a manifestation of the child's disability, or
 - (b) Order a change of placement of the child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of the child is substantially likely to result in injury to the child or others.
- MUSER §XVI.21.B.(2).

As the previous section explains, the June 21, 2017 manifestation determination review should have concluded that the student's behavior was a manifestation of his disabilities. The Student must be returned to the placement from which he was removed and the IEP team will need to meet and update the Student's functional behavioral assessment and behavioral intervention plan. MUSER §XVII.F.(2).¹⁴

Despite the Student's history of aggression, the evidence does not support a finding that maintaining the Student's current placement is substantially likely to result in

¹³ Further evidence of School's concern about the Student's aggressive behavior is demonstrated by the July 11, 2017 IEP developed for the Student. The IEP noted that the Student had functional needs in ... coping and anger management strategies and verbal and physical aggression. [S-323]. The IEP references the Student's inability to deescalate, noting that he "is not able to participate in a de-escalation or exit routine when prompted by an adult in the school setting (multiple prompts with no success)." [S-323]. The IEP noted that during times of emotional dysregulation, the Student is "unable to implement" any anger management strategies. [S-323]. The IEP goals include: a goal designed to "reduce occurrences of physical aggression"; a goal designed to support the use of alternative coping strategies in the place of physical and verbal aggression; a goal to participate in a de-escalation exit routine; and a goal to identify and use at least three coping strategies "that maintain his safety and the safety of others when emotionally escalated. [S-324-325].

¹⁴ The Parent requests that the Student be placed at [REDACTED] School where he has demonstrated success. The record does not support a finding that the Student's placement at [REDACTED] School is the Student's LRE, nor has the Parent has cited authority that allows a hearing officer to order any other placement than the returning the Student to the placement from which he was removed.

injury to himself or others if he is provided with an appropriate IEP and supportive services.¹⁵ Accordingly, the Student shall be returned [REDACTED] School where he shall be placed as a [REDACTED] grader in good standing.

- 2. The expulsion of the Student was not permissible, therefore, placement in a tutorial setting with related services was not an appropriate interim alternative educational setting for the Student.**
- 3. The IEP developed on July 5, 2017 failed to comply with the Individuals with Disabilities Education Act.**

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

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

The Least Restrictive Environment (LRE) requirement reflects the IDEA's

¹⁵ During the Student's [REDACTED] grade year, school staff and the Parent reported that the Student was earning good grades, was engaging in appropriate behaviors in the classroom as well as in unstructured settings, and had friends. [Parent testimony, S-62; P-232].

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

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

Although an IEP was developed for the Student on July 11, 2017, it was developed for the Student’s expelled status and did not involve a discussion of the services and supports and placement necessary to provide a FAPE to the Student. [S-326]. In its post hearing brief, the School contends that the Parent has not asserted that the Student cannot, though his interim alternative educational placement, participate in the general educational curriculum. This argument misses the point, however. The

wrongful disciplinary change of placement by the school district deprived the student of the benefit of his entire educational plan, not just of its special education components. In the Student's most recent IEP from March, 2016, his IEP team determined that he benefitted from inclusion with his same aged peers as well as from his entire educational program. [P-227]. The record evidence reveals that the student was deprived of the educational benefit of his IEP by being placed in the IAES where he was deprived of peer interaction and the other benefits of his IEP.¹⁶

Accordingly, the Student shall be awarded services comparable to what he would have been receiving from his unlawful removal from that placement from the period beginning after June 2, 2017, less the education received in the IAES, until a new IEP and behavioral intervention plan is developed by the IEP team pursuant to the Order herein.¹⁷

4. The Parent is not entitled to an Independent Educational Evaluation at public expense.

A parent has a right to an independent educational evaluation (IEE) at public expense if the parent disagrees with an evaluation obtained by a school MUSER §V.6.B; 34 CFR § 300.502(b)(2). If a parent requests an IEE at public expense, the school must either: (i) initiate a hearing to show that its evaluation is appropriate; or (ii) ensure that an IEE is provided at public expense, unless the school demonstrates in a hearing that the evaluation obtained by the parent did not meet agency criteria. MUSER §V.6.B.

¹⁵ The School also cites the case of *Farrin v. MSAD No. 59*, 165 F.Supp.2d 37, 52 (2001) to support the proposition that an “expulsion IEP” complied with the IDEA even though the student was not able to access programming that was available to non-expelled peers. The *Farrin* decision is not applicable in the present case as it upheld the finding that the Student’s conduct was not related to his disability and that his expulsion was therefore valid. *Id.*

¹⁷ Reference is made to the agreement and release dated June 2, 2017. [S-150].

Upon receiving the Parent's request for an IEE, the school denied the request and filed a due process hearing on August 2, 2017 to defend their evaluations as appropriate. [S-341]. In her post-hearing brief, the Parent argues that the School's evaluation was incomplete as it did not contain data with regard to the Student's attendance and that none of the District's evaluators were able to speak comprehensively to the relationship of the Student's disabilities to his aggressive behaviors.

In the present case, the School has met its burden to prove that its evaluations were appropriate. The record supports a finding that Ms. Moon's June 2017 FBA references the Student's poor attendance record, noting that he missed over 70 days of school during his [REDACTED] grade year, and that "patterns of absenteeism and truancy are unclear at this time." [S-195, 203, Moon testimony]. While Dr. Hale was unwilling to offer her opinion at the manifestation determination meeting about whether the Student's behavior on May 12, 2017 was substantially related to the Student's disability, her evaluation covered the suspected areas of concern and employed a variety of assessment tools and strategies, as required by state and federal regulations. [S-176]. MUSER §V.3. Dr. Hale's evaluation also considered the Student's behavior when she concluded that the diagnosis of unspecified depressive disorder "may best capture this current presentation" [S-176].

Each of the district's evaluators meet state licensure and certification standards, and are qualified to administer and interpret the tests given to the student.¹⁸ Complete and comprehensive reports were provided to the IEP team that summarized the evaluation

¹⁸ Dr. Hale has a Ph.D. in psychology, is licensed by the Board of Examiners of Psychologists, and has spent the last 15 years conducting special education evaluations for schools.

procedures employed, the results of each evaluation and the results and diagnostic impressions. *See, M.S.A.D No. 17, 39 IDELR 281 (SEA Me. 2003).*

Although the School did request an additional psychological and functional behavior assessment, the regulations state that school districts may use "a variety of assessment tools and strategies" to make up an evaluation. MUSER §V.2.B.(1).

Moreover, a recommendation for a follow-up evaluation is not, in and of itself, sufficient to trigger a right to an independent educational evaluation at public expense. 34 CFR 502; MUSER V.6; *South Kingston School Committee v. Joanna S.*, 773 F.3d 344, 347 (1st Cir. 2014).¹⁹ The independent evaluation may be more extensive, or may detail specific programming strategies not recommended in the school's evaluation. This, however, does not give the independent evaluation more weight, nor does it render the school's evaluation inappropriate. *Lincolnvill Sch. Dist.*, 102 LRP 7183 (SEA Me. 7/10/2001).

The School's evaluation was appropriate, the Parent is therefore not entitled to an independent evaluation at public expense. *34 CFR 502(b)(3); MUSER V.6 (B)(3).*

ORDER

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

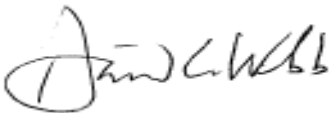
- 1.** The Student's conduct on May 12, 2017 was a manifestation of his disability. The School shall immediately vacate the determination that the Student's conduct on May 12, 2017 was a not a manifestation of his disability. All references to the Student's expulsion shall be removed from the Student's

¹⁹ The Parent's reference to *Letter to Carroll*, 68 IDELR 279, *2 (OSEP 2016) in which OSEP clarifies that the IDEA affords a parent the right to an IEE at public expense and does not condition that right on a public agency's ability to cure the defects of the evaluation. *Carroll* is distinguishable from the present case as the school district in *Carroll* did not fully identify all areas needed to be evaluated.

educational record.

2. The Student shall be returned to his placement as a ■ grade student in good standing within the RSU #51 School District.
3. Within 14 calendar days of the date of this Order, unless otherwise agreed by the parties, the School shall update the Functional Behavioral Assessment (FBA) for the Student and update and implement the Behavior Intervention Plan (BIP) with positive behavior supports and strategies to address the Student's academic and non-academic behaviors impeding his learning and others;
4. Within 7 calendar days of receiving the updated FBA and BIP, convene an IEP meeting to revise the Student's IEP so that identifies the Student's placement and all services and supports consistent with current and updated evaluations and other supporting data;
5. The Student shall be awarded compensatory education and supportive services comparable to what he would have been receiving had he not been inappropriately removed from his placement from the period beginning after June 2, 2017, less the education received in the IAES, until a new IEP and behavioral intervention plan is developed by the IEP team pursuant to this Order.
6. The School's evaluation was appropriate. The Parent is not entitled to an independent educational evaluation at public expense.

Dated: October 16, 2017



David C. Webb, Esq.
Hearing Officer