STATE OF VERMONT DEPARTMENT OF EDUCATION

Special Education Case # DP-13-14 (D.M.)

Due Process Hearing

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Nature of the Case, Witnesses and Exhibits

A Due Process complaint was filed in this matter on February 22, 2013, by the Parent acting pro se. Respondents Southwest Vermont Supervisory Union and Mt. Anthony Union Middle School filed a response on March 4, 2013, through their attorney, Dina L. Atwood, Esq., of Stitzel, Page & Fletcher, P.C.,

The parties identified the following issues to be decided at the hearing. Is the Student's time in school adequate? If not, what changes need to be made to correct this? Is the Student's IEP adequate? If not, what changes need to be made to the IEP? Should the IEP be expanded to address educational issues? Should the IEP be clarified or revised regarding disciplinary issues as well as teacher and classroom placements? What notice should be given for future IEP meetings? Should the District implement the February 13, 2013 IEP by placing the Student in the program? The program is an alternative program run by the District called "The program of the Student in connection with the program despite the Parent's objections?

The hearing took place on May 1 and May 2, 2013, at the Bennington Free Library at 101 Silver Street, Bennington, Vermont.

At the hearing Respondents Core Exhibits were all admitted into evidence except the pages marked 190, 296-308, 338, 340, and 341. The Core Exhibits will be designated herein as CE followed by the stamped page number. Respondents' five day exhibits were all admitted into evidence and these will be designated herein as R followed by the stamped page number.

hereinafter termed Parent, introduced the following exhibits which were admitted into evidence.

- 1. Letter from dated April 9, 2013.
- 2. Letter from dated July 30, 2012.
- 4. October 1, 2012 Report on IEP.
- 5. Case Manager's document dated November 7, 2012.
- Prior Written Notice of Decision dated January 18, 2013.
- 8. Letter from distributed February 1, 2013.
- 9. Parent copy of IEPs including 4/28/11, 11/7/12, and 1/18/13.
- 10. Grade Report Card.

- 11. Letter dated September 1, 2012.
- 12. Letter dated September 4, 2012.
- 15. Undated letter regarding February 6, 2013 circumstances.
- 16. Notice from Mt. Anthony dated February 17, 2012.
- 18. Fall 2012 NECAP Test Results.
- 20. Seventeen photographs.

Parent's exhibits will be designated herein by P followed by the applicable number.

The following two witnesses testified for Parent. who is the mother of the and Student. the father. The following witnesses testified for Respondents. the Student's Case Manager since January, 2013. has a BA in Science and Education and an MS in Education. The has worked eight years as a Special Ed Facilitator. supervises the paraprofessional staff. is licensed as a Special Educator for grades K and up. is a paraprofessional who began working with the Student in September, 2012. is licensed in Elementary Education in Vermont for grades K-6. has a BA in History and a Masters in Education. special educator. In November, 2012, **s** began working as a processor dealing with the Student and meeting with almost daily. has a BA and an MA in Educational Administration. worked in the Middle School for many years, first as an English Teacher and in the last two years as

worked in the Middle School for many years, first as an English Teacher and in the last two years a an Assistant Principal.

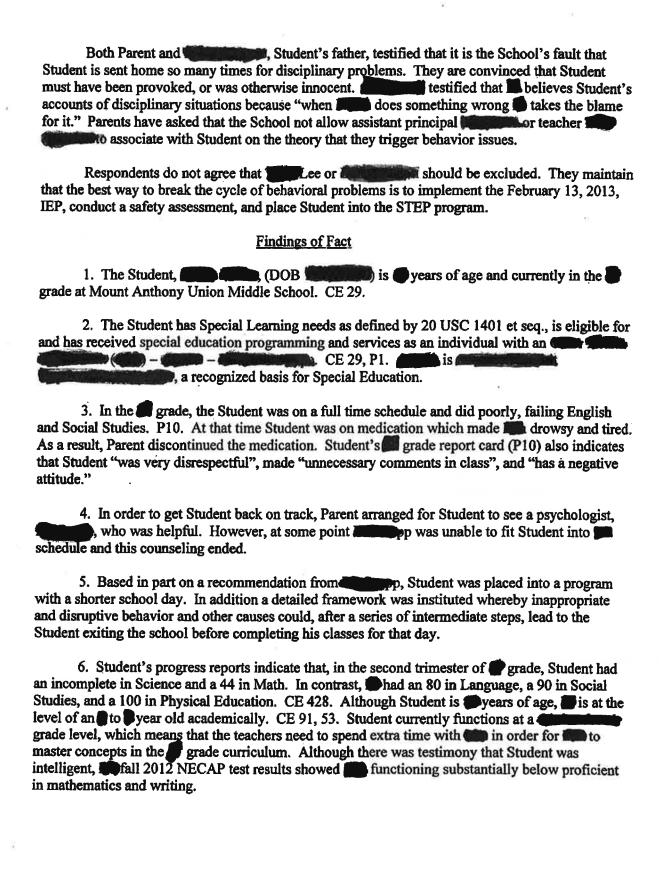
5. has a Masters in Education and has been the Principal at Mount Anthony Union High School for the last 10 years.

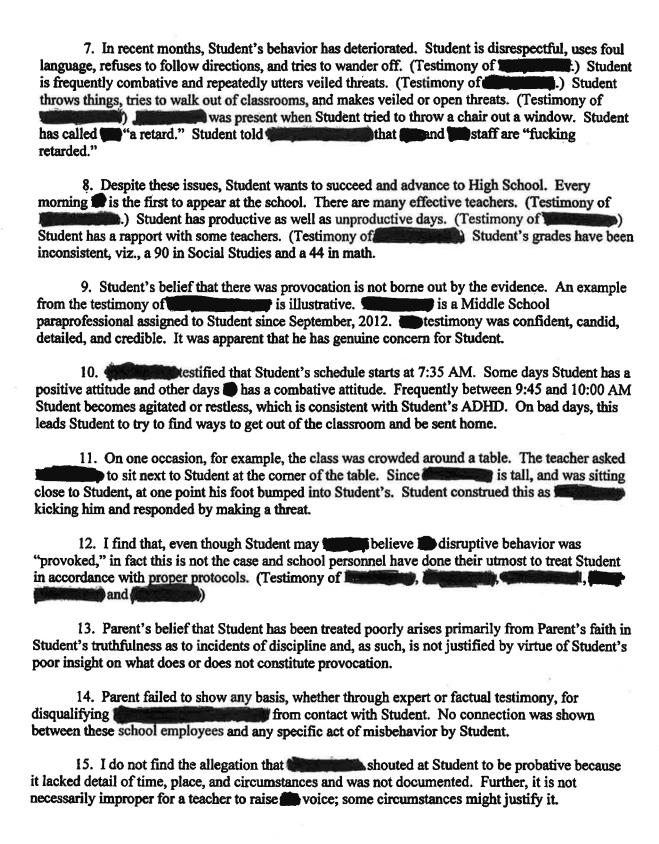
Positions of the parties and relief sought

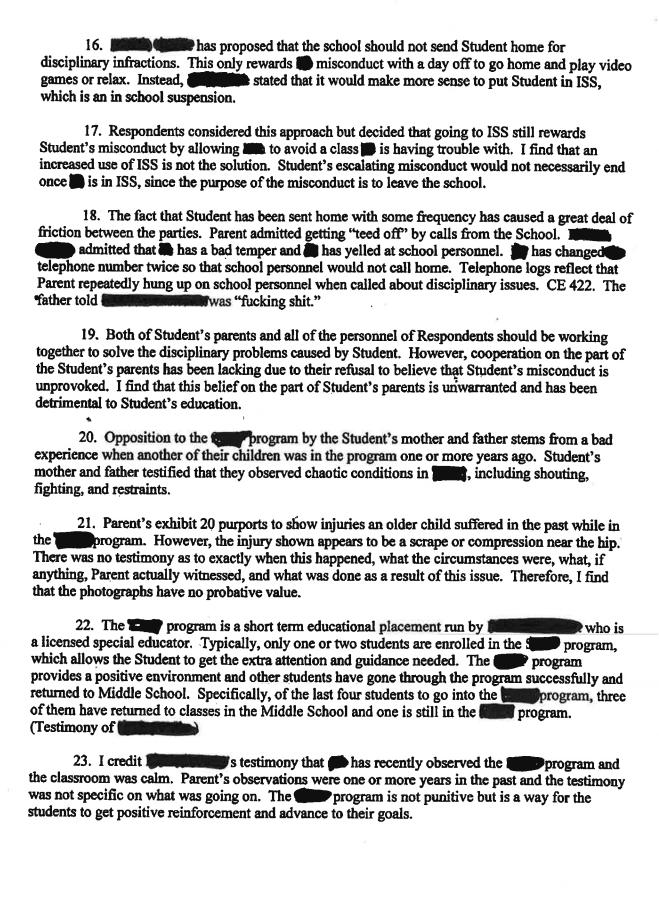
Both parties agree that Student has not been successful academically under the current system. However, the parties strongly disagree on the cause and remedy for this situation.

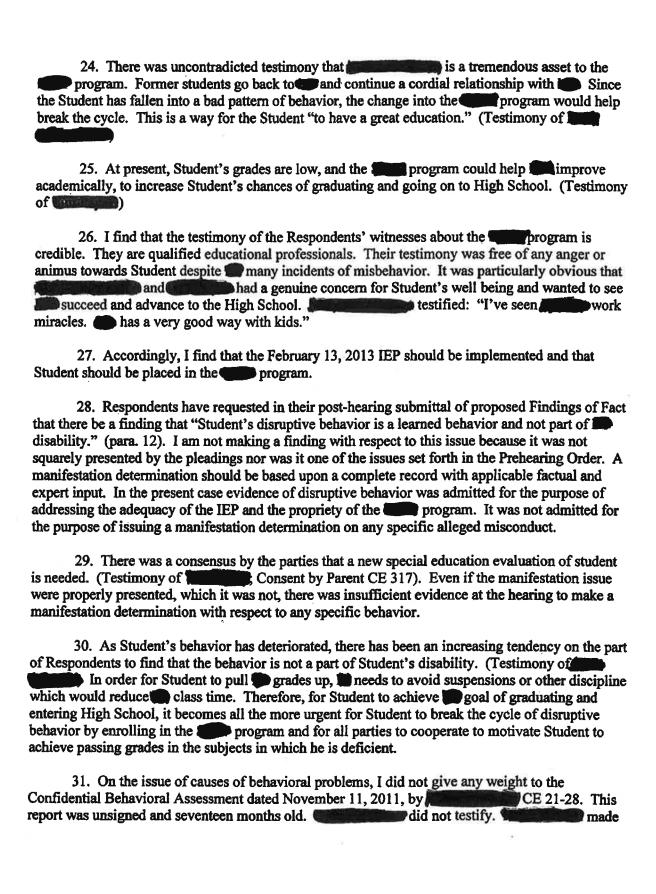
Parent testified that it is "nitpicking" for the school to discipline the Student and send home for mumbling inappropriate statements under breath. She asserted that the School is not giving the chance needs to get through the day and get academic work in.

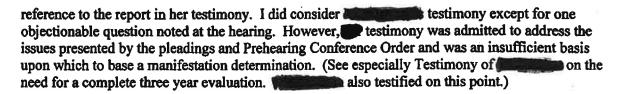
Parent particularly drew attention to P4, a summary of a meeting on October 1, 2012, in which the School reviewed Student's progress and stated: "Science – science time had been used for resolving behavior issues." Parent interpreted this as an admission that the School would rather spend time disciplining Student than giving the instruction needs.











- 32. While Parent has consented to a new IEP evaluation prior to Student entering High School, Parent has steadfastly refused to consent to the safety assessment sought by Respondents.
- 33. At some point in the past was going to provide a written safety assessment but for unknown reasons never did so. (Testimony of
- 34. The purpose of the requested safety assessment is to provide the Student's IEP team with current and relevant information that can be used for planning purposes. (Testimony of Carlotte and Parent expressed opposition to any safety assessment being done, no objection was made to Carlotte and Student's qualifications or impartiality.
- 35. In view of the detailed, credible, and documented evidence of Student's escalating misconduct, a safety assessment is clearly needed. See, e.g. CE 213 (Student saying, "I'm going to kick your ass ..." on 2/12/13), CE 415, CE 424, CE 425 (pushed another student and called him retarded on 2/6/13, "slammed" a chair on 2/7/13).
 - 36. In summary, my findings of fact on the issues presented are as follows.
 - (1) Is the Student's time in school adequate? No.
- (2) If not, what changes need to be made to correct this? Student should be enrolled in the program.
- (3) Is the Student's IEP adequate? The February 13, 20163 IEP is adequate and should be implemented.
 - (4) If not, what changes need to be made to the IEP? Not applicable.
- (5) Should the IEP be expanded to address educational issues? No, the IEP is proper as it is.
- (6) Should the IEP be clarified or revised regarding disciplinary issues as well as teacher and classroom placements? No. Parent's request to exclude contact with is unreasonable and unwarranted. Giving Student the power to veto teachers or administrators would only increase his contemptuous and disrespectful behavior towards school personnel. There was testimony that Student would benefit from psychological counseling. However, testified without contradiction that Parent had opposed getting counseling,

- (7) What notice should be given for future IEP meetings? The testimony indicated that Respondents have acted reasonably in trying to obtain Parent's participation. Therefore, Parent has not shown an entitlement to any relief on this issue.
- (8) Should the District implement the February 13, 2013 IEP by placing the Student in the program? Yes.
- (9) Should there be an assessment of the Student in connection with the STEP program despite the Parent's objections? Yes.

Conclusions of Law

In accordance with the federal Individuals with Disabilities in Education Act (IDEA) 20 U.S.C. § 1400 et seq., and Vermont's implementing regulations, Department of Education Regulations 2360 et seq., children with disabilities in the State of Vermont are entitled to receive a free, appropriate public education (FAPE). The Act requires that the education provided must be tailored to the unique needs of the disabled student by means of an individualized educational program (IEP).

In the present case the Student's lack of academic success and continuing behavioral problems raise the question of whether the Respondents have provided a FAPE. Under the leading case of *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed. 2d 690 (1982), the requirements of law are met when the school provides "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." 458 U.S. at 203. Additionally, the IEP "should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade."

In the present case, the testimony and exhibits establish that the Student has benefited from instruction in those classes where wown misconduct has not been acute. Further, the February 13, 2013 IEP, providing for placement in the program, presents the best opportunity for the Student to break out of cycle of disruptive conduct, to concentrate on studies under close supervision, and to advance into High School. Said IEP is therefore approved.

Because Respondents have provided Student with a FAPE, Parent has not met her burden of proof to show that she is entitled to any relief under the IDEA.

Significant issues remain with respect to the lack of parental consent for a safety assessment and for enrollment in the program.

Under 34 CFR 300.300 (c), the school district may pursue a reevaluation in the absence of parental consent, as is the case here. See also Vermont Special Education Rule 2365.1.3(d) which is substantially similar. Moreover, a hearing officer "has the authority to override lack of parental consent for a reevaluation." M.L. v. El Paso Independent School Dist., 610 F. Supp. 2d 582 (W.D. Tex, 2009).

It is clear, then, that a reevaluation can be ordered, but the statute does not specify what kind of reevaluation. Does a reevaluation include a safety assessment, as is sought here? The answer is found in Lillbask ex rel. Mauclaire v. Conn. Dept. of Educ., 397 F. 3d 77 (2d Cir. 2005) which interpreted the IDEA to include safety concerns as part of the matters to be addressed that might "interfere with a disabled child's right to receive a free appropriate public education." 397 F.3d at 93. See also Jonathan G. v. Caddo Parish School Board, 875 F. Supp. 352 (W.D. La 1994) where the Court noted that, given the Student's "ongoing behavioral problems, a reevaluation could and should have been completed ..."

Consequently, it is evident that the statutes, regulations and cases authorize, and the facts amply warrant, an order that a safety assessment be performed and that Parent shall cooperate to effectuate said assessment.

In approving the February 13, 2013, IEP, which contains a provision for the enrollment of Student in the program, I note that Parent retains the right under 34 CFR 300.300 (b) to refuse consent for special education services, thereby absolving Respondents of any duty "to make FAPE available to the child because of the failure to provide the child with further special education and related services ..."

ORDER

Based upon the foregoing, it is ordered that:

- 1. Respondents are authorized to conduct a safety assessment and Parent shall cooperate to effectuate said assessment.
- 2. The February 13, 2013, IEP shall be implemented, including the enrollment of the Student in the STEP program.
- 3. Parent retains rights to refuse consent for special education services as provided in 34 CFR 300.300 (b).

NOTICE OF APPEAL RIGHT

Pursuant to Vermont Department of Education Rule 2365.1.8:

- "(a) The decision of a hearing officer is final unless appealed to a state or federal court of competent jurisdiction within 90 days of the decision.
- (b) Parties have right to appeal the hearing decision by filing a civil action in a federal district court or a state court of competent jurisdiction. An appeal from a due process hearing

decision to a court of competent jurisdiction in accordance with Rule 2365.1.9 shall be commenced within 90 days from the notice of the final decision, and not after."

Dated this 8th day of May 2013 at Brattleboro, Vermont.

Bruce Hesselbach, Hearing Officer