

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 [REDACTED] 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 [REDACTED] program? The [REDACTED] program is an alternative program run by the District called "[REDACTED]" Should there be an assessment of the Student in connection with the [REDACTED] 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.

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

1. Letter from [REDACTED] dated April 9, 2013.
2. Letter from [REDACTED] dated July 30, 2012.
4. October 1, 2012 Report on IEP.
5. Case Manager's document dated November 7, 2012.
7. Prior Written Notice of Decision dated January 18, 2013.
8. Letter from [REDACTED] dated February 1, 2013.
9. Parent copy of IEPs including 4/28/11, 11/7/12, and 1/18/13.
10. Grade [REDACTED] 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. [REDACTED] who is the mother of the Student, [REDACTED] and [REDACTED] the father.

The following witnesses testified for Respondents.

1. [REDACTED] the Student's Case Manager since January, 2013. [REDACTED] has a BA in Science and Education and an MS in Education. [REDACTED] has worked eight years as a Special Ed Facilitator. [REDACTED] supervises the paraprofessional staff. [REDACTED] is licensed as a Special Educator for grades K and up.
2. [REDACTED] [REDACTED] is a paraprofessional who began working with the Student in September, 2012. [REDACTED] is licensed in Elementary Education in Vermont for grades K-6.
3. [REDACTED] [REDACTED] has a BA in History and a Masters in Education. [REDACTED] is a licensed special educator. In November, 2012, [REDACTED] began working as a processor dealing with the Student and meeting with [REDACTED] almost daily.
4. [REDACTED]. [REDACTED] has a BA and an MA in Educational Administration. [REDACTED] has worked in the Middle School for many years, first as an English Teacher and in the last two years as an Assistant Principal.
5. [REDACTED] [REDACTED] 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 [REDACTED] home for mumbling inappropriate statements under [REDACTED] breath. She asserted that the School is not giving [REDACTED] the chance [REDACTED] needs to get through the day and get [REDACTED] 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 [REDACTED] the instruction [REDACTED] needs.

Both Parent and [REDACTED], Student's father, testified that it is the School's fault that Student is sent home so many times for disciplinary problems. They are convinced that Student must have been provoked, or was otherwise innocent. [REDACTED] testified that [REDACTED] believes Student's accounts of disciplinary situations because "when [REDACTED] does something wrong [REDACTED] takes the blame for it." Parents have asked that the School not allow assistant principal [REDACTED] or teacher [REDACTED] to associate with Student on the theory that they trigger behavior issues.

Respondents do not agree that [REDACTED] Lee or [REDACTED] should be excluded. They maintain that the best way to break the cycle of behavioral problems is to implement the February 13, 2013, IEP, conduct a safety assessment, and place Student into the STEP program.

#### Findings of Fact

1. The Student, [REDACTED], (DOB [REDACTED]) is [REDACTED] years of age and currently in the [REDACTED] grade at Mount Anthony Union Middle School. CE 29.
2. The Student has Special Learning needs as defined by 20 USC 1401 et seq., is eligible for and has received special education programming and services as an individual with an [REDACTED] [REDACTED] [REDACTED] - [REDACTED] - [REDACTED]. CE 29, P1. [REDACTED] is [REDACTED], a recognized basis for Special Education.
3. In the [REDACTED] grade, the Student was on a full time schedule and did poorly, failing English and Social Studies. P10. At that time Student was on medication which made [REDACTED] drowsy and tired. As a result, Parent discontinued the medication. Student's [REDACTED] grade report card (P10) also indicates that Student "was very disrespectful", made "unnecessary comments in class", and "has a negative attitude."
4. In order to get Student back on track, Parent arranged for Student to see a psychologist, [REDACTED], who was helpful. However, at some point [REDACTED] was unable to fit Student into [REDACTED] schedule and this counseling ended.
5. Based in part on a recommendation from [REDACTED], Student was placed into a program with a shorter school day. In addition a detailed framework was instituted whereby inappropriate and disruptive behavior and other causes could, after a series of intermediate steps, lead to the Student exiting the school before completing his classes for that day.
6. Student's progress reports indicate that, in the second trimester of [REDACTED] grade, Student had an incomplete in Science and a 44 in Math. In contrast, [REDACTED] had an 80 in Language, a 90 in Social Studies, and a 100 in Physical Education. CE 428. Although Student is [REDACTED] years of age, [REDACTED] is at the level of an [REDACTED] to [REDACTED] year old academically. CE 91, 53. Student currently functions at a [REDACTED] grade level, which means that the teachers need to spend extra time with [REDACTED] in order for [REDACTED] to master concepts in the [REDACTED] grade curriculum. Although there was testimony that Student was intelligent, [REDACTED] fall 2012 NECAP test results showed [REDACTED] functioning substantially below proficient in mathematics and writing.

7. In recent months, Student's behavior has deteriorated. Student is disrespectful, uses foul language, refuses to follow directions, and tries to wander off. (Testimony of [REDACTED].) Student is frequently combative and repeatedly utters veiled threats. (Testimony of [REDACTED].) Student throws things, tries to walk out of classrooms, and makes veiled or open threats. (Testimony of [REDACTED].) [REDACTED] was present when Student tried to throw a chair out a window. Student has called [REDACTED] "a retard." Student told [REDACTED] that [REDACTED] and [REDACTED] staff are "fucking retarded."

8. Despite these issues, Student wants to succeed and advance to High School. Every morning [REDACTED] is the first to appear at the school. There are many effective teachers. (Testimony of [REDACTED].) Student has productive as well as unproductive days. (Testimony of [REDACTED].) Student has a rapport with some teachers. (Testimony of [REDACTED].) Student's grades have been inconsistent, viz., a 90 in Social Studies and a 44 in math.

9. Student's belief that there was provocation is not borne out by the evidence. An example from the testimony of [REDACTED] is illustrative. [REDACTED] is a Middle School paraprofessional assigned to Student since September, 2012. [REDACTED] testimony was confident, candid, detailed, and credible. It was apparent that he has genuine concern for Student.

10. [REDACTED] testified that Student's schedule starts at 7:35 AM. Some days Student has a positive attitude and other days [REDACTED] has a combative attitude. Frequently between 9:45 and 10:00 AM Student becomes agitated or restless, which is consistent with Student's ADHD. On bad days, this leads Student to try to find ways to get out of the classroom and be sent home.

11. On one occasion, for example, the class was crowded around a table. The teacher asked [REDACTED] to sit next to Student at the corner of the table. Since [REDACTED] is tall, and was sitting close to Student, at one point his foot bumped into Student's. Student construed this as [REDACTED] kicking him and responded by making a threat.

12. I find that, even though Student may [REDACTED] believe [REDACTED] disruptive behavior was "provoked," in fact this is not the case and school personnel have done their utmost to treat Student in accordance with proper protocols. (Testimony of [REDACTED], [REDACTED], [REDACTED], [REDACTED] and [REDACTED].)

13. Parent's belief that Student has been treated poorly arises primarily from Parent's faith in Student's truthfulness as to incidents of discipline and, as such, is not justified by virtue of Student's poor insight on what does or does not constitute provocation.

14. Parent failed to show any basis, whether through expert or factual testimony, for disqualifying [REDACTED] from contact with Student. No connection was shown between these school employees and any specific act of misbehavior by Student.

15. I do not find the allegation that [REDACTED] shouted at Student to be probative because it lacked detail of time, place, and circumstances and was not documented. Further, it is not necessarily improper for a teacher to raise [REDACTED] voice; some circumstances might justify it.

16. [REDACTED] has proposed that the school should not send Student home for disciplinary infractions. This only rewards [REDACTED] misconduct with a day off to go home and play video games or relax. Instead, [REDACTED] stated that it would make more sense to put Student in ISS, which is an in school suspension.

17. Respondents considered this approach but decided that going to ISS still rewards Student's misconduct by allowing [REDACTED] to avoid a class [REDACTED] is having trouble with. I find that an increased use of ISS is not the solution. Student's escalating misconduct would not necessarily end once [REDACTED] is in ISS, since the purpose of the misconduct is to leave the school.

18. The fact that Student has been sent home with some frequency has caused a great deal of friction between the parties. Parent admitted getting "teed off" by calls from the School. [REDACTED] admitted that [REDACTED] has a bad temper and [REDACTED] has yelled at school personnel. [REDACTED] has changed [REDACTED] telephone number twice so that school personnel would not call home. Telephone logs reflect that Parent repeatedly hung up on school personnel when called about disciplinary issues. CE 422. The father told [REDACTED] was "fucking shit."

19. Both of Student's parents and all of the personnel of Respondents should be working together to solve the disciplinary problems caused by Student. However, cooperation on the part of the Student's parents has been lacking due to their refusal to believe that Student's misconduct is unprovoked. I find that this belief on the part of Student's parents is unwarranted and has been detrimental to Student's education.

20. Opposition to the [REDACTED] program by the Student's mother and father stems from a bad experience when another of their children was in the program one or more years ago. Student's mother and father testified that they observed chaotic conditions in [REDACTED], including shouting, fighting, and restraints.

21. Parent's exhibit 20 purports to show injuries an older child suffered in the past while in the [REDACTED] program. However, the injury shown appears to be a scrape or compression near the hip. There was no testimony as to exactly when this happened, what the circumstances were, what, if anything, Parent actually witnessed, and what was done as a result of this issue. Therefore, I find that the photographs have no probative value.

22. The [REDACTED] program is a short term educational placement run by [REDACTED] who is a licensed special educator. Typically, only one or two students are enrolled in the [REDACTED] program, which allows the Student to get the extra attention and guidance needed. The [REDACTED] program provides a positive environment and other students have gone through the program successfully and returned to Middle School. Specifically, of the last four students to go into the [REDACTED] program, three of them have returned to classes in the Middle School and one is still in the [REDACTED] program. (Testimony of [REDACTED])

23. I credit [REDACTED]'s testimony that [REDACTED] has recently observed the [REDACTED] program and the classroom was calm. Parent's observations were one or more years in the past and the testimony was not specific on what was going on. The [REDACTED] program is not punitive but is a way for the students to get positive reinforcement and advance to their goals.

24. There was uncontradicted testimony that [REDACTED] is a tremendous asset to the [REDACTED] program. Former students go back to [REDACTED] and continue a cordial relationship with [REDACTED]. Since the Student has fallen into a bad pattern of behavior, the change into the [REDACTED] program would help break the cycle. This is a way for the Student "to have a great education." (Testimony of [REDACTED])

25. At present, Student's grades are low, and the [REDACTED] program could help [REDACTED] improve academically, to increase Student's chances of graduating and going on to High School. (Testimony of [REDACTED])

26. I find that the testimony of the Respondents' witnesses about the [REDACTED] program is credible. They are qualified educational professionals. Their testimony was free of any anger or animus towards Student despite [REDACTED] many incidents of misbehavior. It was particularly obvious that [REDACTED] and [REDACTED] had a genuine concern for Student's well being and wanted to see [REDACTED] succeed and advance to the High School. [REDACTED] testified: "I've seen [REDACTED] work miracles. [REDACTED] has a very good way with kids."

27. Accordingly, I find that the February 13, 2013 IEP should be implemented and that Student should be placed in the [REDACTED] program.

28. Respondents have requested in their post-hearing submittal of proposed Findings of Fact that there be a finding that "Student's disruptive behavior is a learned behavior and not part of [REDACTED] disability." (para. 12). I am not making a finding with respect to this issue because it was not squarely presented by the pleadings nor was it one of the issues set forth in the Prehearing Order. A manifestation determination should be based upon a complete record with applicable factual and expert input. In the present case evidence of disruptive behavior was admitted for the purpose of addressing the adequacy of the IEP and the propriety of the [REDACTED] program. It was not admitted for the purpose of issuing a manifestation determination on any specific alleged misconduct.

29. There was a consensus by the parties that a new special education evaluation of student is needed. (Testimony of [REDACTED]; Consent by Parent CE 317). Even if the manifestation issue were properly presented, which it was not, there was insufficient evidence at the hearing to make a manifestation determination with respect to any specific behavior.

30. As Student's behavior has deteriorated, there has been an increasing tendency on the part of Respondents to find that the behavior is not a part of Student's disability. (Testimony of [REDACTED]) In order for Student to pull [REDACTED] grades up, [REDACTED] needs to avoid suspensions or other discipline which would reduce [REDACTED] class time. Therefore, for Student to achieve [REDACTED] goal of graduating and entering High School, it becomes all the more urgent for Student to break the cycle of disruptive behavior by enrolling in the [REDACTED] program and for all parties to cooperate to motivate Student to achieve passing grades in the subjects in which he is deficient.

31. On the issue of causes of behavioral problems, I did not give any weight to the Confidential Behavioral Assessment dated November 11, 2011, by [REDACTED] CE 21-28. This report was unsigned and seventeen months old. [REDACTED] did not testify. [REDACTED] made

reference to the report in her testimony. I did consider [REDACTED] testimony except for one objectionable question noted at the hearing. However, [REDACTED] testimony was admitted to address the issues presented by the pleadings and Prehearing Conference Order and was an insufficient basis upon which to base a manifestation determination. (See especially Testimony of [REDACTED] on the need for a complete three year evaluation. [REDACTED] also testified on this point.)

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 [REDACTED] was going to provide a written safety assessment but for unknown reasons [REDACTED] never did so. (Testimony of [REDACTED])

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 [REDACTED].) It was proposed by Respondents that the safety assessment be completed by [REDACTED] (Testimony of [REDACTED].) While Parent expressed opposition to any safety assessment being done, no objection was made to [REDACTED]'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 [REDACTED] program.

(3) Is the Student's IEP adequate? The February 13, 2016 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 [REDACTED] 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, [REDACTED] 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 [REDACTED] 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 [REDACTED] own misconduct has not been acute. Further, the February 13, 2013 IEP, providing for placement in the [REDACTED] program, presents the best opportunity for the Student to break out of [REDACTED] cycle of disruptive conduct, to concentrate on [REDACTED] 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 [REDACTED] 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. Mauclore 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 [REDACTED] 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 [REDACTED] 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.

A handwritten signature in cursive script, appearing to read "Bruce Hesselbach", written over a horizontal line.

**Bruce Hesselbach, Hearing Officer**