

THE STATE OF NEW HAMPSHIRE  
SUPREME COURT

No. 2019-0397

APPEAL OF RYE SCHOOL DISTRICT

---

APPEAL PURSUANT TO RULE 10 FROM A DECISION OF THE  
NEW HAMPSHIRE STATE BOARD OF EDUCATION

---

BRIEF FOR THE STATE BOARD OF EDUCATION

THE STATE OF NEW HAMPSHIRE

Gordon J. MacDonald  
Attorney General

Laura E. B. Lombardi, Bar #12821  
Senior Assistant Attorney General  
Jill A. Perlow, Bar #15830  
Senior Assistant Attorney General  
33 Capitol Street  
603-271-3658  
laura.lombardi@doj.nh.gov  
N.H. Dept. of Justice  
Civil Bureau

## **TABLE OF CONTENTS**

ISSUES PRESENTED .....	6
STATEMENT OF THE CASE AND FACTS .....	7
SUMMARY OF THE ARGUMENT .....	12
ARGUMENT .....	14
I.    Does RSA 193:3 Provide For An Appeal Under RSA 541 From A Board Finding Of Manifest Educational Hardship? .....	14
II.   Standard of Review .....	17
A.   RSA 541 Review .....	17
B.   Certiorari Review .....	18
III.  Rye School District Received Due Process. ....	19
A.   Legal Standards For Board Review Of Hearing Officer Recommendations .....	19
B.   The Board Did Not Substitute Its Judgment For That Of The Hearing Officer On The Credibility Of Witnesses. ....	20
C.   The Board Had A Sufficient Record For Review Despite The Transcription Errors. ....	23
D.   The Board Adequately Explained The Grounds For Its Decision. ....	24
E.   The Board Was Not Required To Rule On The School District's Requests For Findings Of Fact. ....	25
CONCLUSION .....	27
CERTIFICATE OF COMPLIANCE .....	28
CERTIFICATE OF SERVICE.....	28

## **TABLE OF AUTHORITIES**

### **Cases**

<i>Appeal of Dell</i> , 140 N.H. 484 (1995) .....	<i>passim</i>
<i>Appeal of Murdock</i> , 156 N.H. 732 (2008).....	18
<i>Appeal of Peirce</i> , 122 N.H. 762 (1982).....	15, 18
<i>Appeal of Plantier</i> , 126 N.H. 500 (1985) .....	22
<i>Appeal of Tamm</i> , 124 N.H. 107 (1983) .....	18
<i>Fischer v. New Hampshire State Bldg. Code Rev. Brd.</i> , 154 N.H. 585 (2006).....	18
<i>In re Appeal of Morrill</i> , 145 N.H. 692 (2001).....	16
<i>In re Hopkinton Sch. Dist.</i> , 151 N.H. 478 (2004).....	<i>passim</i>
<i>In re Hoyt</i> , 143 N.H. 533 (1999) .....	12, 14, 15, 17
<i>Landaff Sch. Dist. v. State Bd. of Ed.</i> , 111 N.H. 317 (1971).....	15, 18
<i>Petition of Dunlap</i> , 134 N.H. 533 (1991).....	14
<i>Petition of Ellis</i> , 138 N.H. 159 (1993) .....	18
<i>Petition of Grimm</i> , 138 N.H. 42 (1993) .....	12, 20, 22
<i>Petition of Smith</i> , 139 N.H. 299 (1994).....	12, 21
<i>Ron L. Beaulieu &amp; Co. v. New Hampshire Bd. of Accountancy</i> , 172 N.H. 284 (2019).....	16, 17
<i>Swain v. State Bd. of Ed.</i> , 116 N.H. 332 (1976).....	15
<i>Tasker v. New Hampshire Pers. Comm'n</i> , 115 N.H. 204 (1975) .....	19
<i>Winn v. Jordan</i> , 101 N.H. 65 (1957) .....	18

## **Statutes**

RSA 21-N:4, III .....	15
RSA 21-N:11 .....	15, 17
RSA 21-N:11, III .....	6, 12, 16, 17
RSA 21-O:14, III .....	16
RSA 186-B:15 .....	16
RSA 193:3 .....	<i>passim</i>
RSA 326-B:39, II .....	16
RSA 330-A:14, II(d) .....	20
RSA 330-A:29, VII .....	16
RSA 541 .....	<i>passim</i>
RSA 541-A:35 .....	25
RSA 541:2 .....	12, 14, 17
RSA 541:6 .....	14, 18
RSA 541:13 .....	17, 18

## **New Hampshire Administrative Rules**

N.H. Admin. R., Ed 210.01 (b) .....	9
N.H. Admin. R., Ed 211 .....	9
N.H. Admin. R., Ed 212.01 .....	17
N.H. Admin. R., Ed 212.02 .....	9
N.H. Admin. R., Ed 212.02 (b) .....	9
N.H. Admin. R., Ed 212.02 (c) .....	9
N.H. Admin. R., Ed 212.02 (f) .....	9
N.H. Admin. R., Ed 213.01 (a) .....	17

**Other Authorities**

2 Am.Jur.2d <i>Administrative Law</i> § 374.....	13, 20, 24, 26
--	----------------

### **ISSUES PRESENTED**

1. Whether RSA 193:3 and RSA 21-N:11, III provide for an appeal under RSA chapter 541 from a State Board of Education finding of manifest educational hardship.
2. Whether Rye School District received due process in the proceedings below.

## **STATEMENT OF THE CASE AND FACTS**

S.B. (“Student”) attended Rye Elementary School from second through most of fifth grade. RB<sup>1</sup> 5. Student suffers from a growth hormone deficiency which impedes her growth. 1A. 3, 13. In third grade, Student’s parents, Christine and Eric Blonda (“Parents”) complained to the school that another student was bullying Student and had touched Student inappropriately. 1A. 3, 5, 8. Parents met with the Rye Elementary School Principal, who told Parents there was a difference between students being mean to each other and bullying, and that what Student described was not bullying. 1A. 5, 9. The school responded to the situation by trying to keep Student and the other student apart, and by assigning an extra person to watch over them at recess. 1A. 5, 8-9. In fourth grade, the school placed the two students in separate classrooms, and Parents made no complaints of bullying. 1A. 9.

In fifth grade, Student received accommodations from the school to deal with anxiety and ADHD issues, but parents complained that the accommodations were ineffective or improperly implemented. 1A. 3-4, 11-12. Parents felt that school officials failed to meet Student’s needs and were unresponsive to Parents’ requests to meet and discuss Student’s 504 Plan. 1A. 3-4. Student also experienced two more upsetting incidents with other students, one in which a student peaked into the bathroom stall while

---

<sup>1</sup> “RB” refers to Rye School District’s brief; “1A.” refers to Appendix 1 filed with Rye School District’s brief; and “NOA App.” refers to the appendix filed with the Rye School District’s Notice of Appeal.

Student was using it, and another in which a student pushed a goldfish cracker into Student's nose. 1A. 4, 9.

In May 2017, Parents decided to transfer Student to an elementary school in New Castle. 1A. 5, 9-10. Parents claim that after changing schools, Student began gaining weight and her anxiety decreased. 1A. 4. Parents also felt that the New Castle school properly followed Student's 504 Plan, which aided in Student's learning. 1A. 4.

On September 15, 2017, Parents requested that the Superintendent of the Rye School District reassign Student for the coming year to the school in New Castle, NOA App. 29-30. The Rye School District Superintendent denied this request. NOA App. 29-30. On November 22, 2017, Parents applied to the Rye School Board for a transfer for manifest educational hardship, under RSA 193:3, I. NOA App. 30. The Rye School Board denied the request on January 3, 2018. NOA App. 12-13.

Parents appealed the Rye School Board's decision to the State Board of Education ("Board"). NOA App. 14. A State Board of Education hearing officer ("Hearing Officer") held an evidentiary hearing on October 15, 2018. NOA App. 51. He heard testimony from each of Student's parents, their advocate Christine Sununu, the Rye school principal, and the superintendent of the Rye School District. 1A. 3-5. The Hearing Officer granted most of the school district's requests for findings of fact and reached the legal conclusion that Student did not meet the conditions required for a transfer based on manifest educational hardship. 1A. 3-7.

Parents filed exceptions to the Hearing Officer's decision pursuant to Board administrative rules, and the Board placed the matter on its agenda for its January 10, 2019 meeting. NOA App. 51-54; *see* N.H. Admin. R.,



Ed 210.01 (b) and Ed 211. At the January meeting, the Board heard oral arguments by the Rye School District and Parents about the Hearing Officer's decision. 1A. 19. New Hampshire Administrative Rules, Ed 212.02, grants each party the right to hold a ten-minute oral argument on the record before the Board of Education, focusing on "(1) The findings of the decision; (2) Any errors of fact or conclusions of law in the decision; and (3) Any information which the party can show is relevant which the decision omits." N.H. Admin. R., Ed 212.02 (b) and (c). The Board did not enforce the time limits for oral arguments during this hearing, and the Board failed to record the proceedings as required by Ed 212.02(f). 1A. 23. Following oral argument, the Board voted that Parents had established that Student's attendance at Rye Elementary School constituted manifest educational hardship. 1A. 19.

On February 8, 2019, the Rye School District filed a motion for rehearing. NOA App. 57-68. Parents filed a letter in opposition to the request for rehearing. NOA App. 69-70. On February 22, 2019, the Board denied the motion without prejudice as premature because the school district filed the motion prior to the Board issuing its written order. 1A. 20-21.

On February 15, 2019, the Board issued its final written order. 1A. 19. The Board accepted the Hearing Officer's report but rejected his recommendations, issuing a decision in favor of the transfer of Student for manifest educational hardship. 1A. 19

On March 6, 2019, Rye School District filed another request for rehearing, alleging fault in the Board's procedure for failure to record the January 10, 2019 oral argument, failure to follow the correct standard for manifest educational hardship, failure to adhere to the ten-minute time limit

for appeals to the Board, and for wrongfully rejecting the Hearing Officer's findings of fact and conclusions. App. 73-86. On March 20, the Board granted the School District's request for a rehearing for the limited purpose of rehearing oral arguments before the Board because the Board had failed to record the hearing. 1A. 23. The Board held this rehearing on April 11, 2019. 1A. 25.

During the April 11, 2019 rehearing, the Board requested a transcript of the October 15, 2018 hearing before the Hearing Officer and postponed its decision until after it could review the transcript. NOA App. 90. A transcript was created, but the recording of the testimony given by the Rye School District's Principal and Superintendent was muffled, resulting in omissions of their testimony. RB 15.

On May 1, 2019, Rye School District filed a motion objecting to these problems with the transcript, attaching an affidavit from the Rye superintendent summarizing the missing testimony. NOA App. 90-99. In response, the Board ordered a second transcript. NOA App. 100. This transcript corrected some minor errors, but it still omitted much of the testimony of the school district's two witnesses. NOA App. 100. The school district filed a second motion regarding the transcript issues, asking the Board to either accept the factual findings and recommended decision of the Hearing Officer, or remand the case to him for a new hearing to create a proper record. NOA App. 100-01.

On July 11, 2019, the Board issued its Rehearing Final Order, upholding its prior decision to overturn Rye School District's decision to deny Student a transfer to Newcastle for manifest educational hardship. 1A. 25-26. The Board accepted the Hearing Officer's finding that the Rye

School District had offered accommodations to address Parents' concerns, but disagreed that those accommodations had been sufficient to meet Student's unique educational and social needs. 1A. 25. The Board concluded that the conditions for manifest educational hardship were satisfied. 1A. 25-26. Rye School District did not file another motion for rehearing following the decision. This Rule 10 Appeal followed.

## **SUMMARY OF THE ARGUMENT**

An appeal under RSA chapter 541 can be made only “[w]hen so authorized by law.” RSA 541:2; *In re Hoyt*, 143 N.H. 533, 534 (1999). There is no reference to RSA 541 within RSA 193:3, the manifest educational hardship statute. *See* RSA 193:3. While RSA 21-N:11, III references RSA 541 in identifying what constitutes a “final decision” of the Department of Education, in other contexts, the legislature has used clear language to declare that a party may appeal under RSA 541 when creating such an appeal right. Accordingly, the Board seeks clarification as to whether a party can appeal, under RSA 541, a Board finding of manifest educational hardship under RSA 193:3.

The Board provided Rye School District due process in adjudicating this matter. The Board did not substitute its judgment for that of the Hearing Officer on the credibility of witnesses. The record in this case is largely documentary, and, unlike in *Petition of Grimm*, 138 N.H. 42 (1993) and *Petition of Smith*, 139 N.H. 299 (1994), the evidentiary hearing before the Hearing Officer did not involve conflicting testimony between witnesses about the facts of the case. Because resolution of the matter did not boil down to the credibility of witnesses, the Board was free to “examine the entire written record in th[e] case and accept, reject or modify the hearing officer’s findings of fact and conclusions of law.” *In re Hopkinton Sch. Dist.*, 151 N.H. 478, 482 (2004). In rejecting the Hearing Officer’s recommendation, the Board adequately explained the grounds for its decision, and was not required to “engage in a point by point refutation

of the [hearing officer's] findings and conclusions. . . ." *Appeal of Dell*, 140 N.H. 484, 493-94 (1995) (quoting 2 Am.Jur.2d *Administrative Law* § 374).

## **ARGUMENT**

When a party appeals to this Court from a Board order in a contested case, the Board does not typically participate on appeal. As such, this brief does not address the merits of the case, which the parties have fully briefed. The Board submits this brief for the limited purpose of defending the process it followed in adjudicating this matter and seeking clarification on whether a party can appeal to this Court, under RSA 541, a Board finding of manifest educational hardship under RSA 193:3.

### **I. DOES RSA 193:3 PROVIDE FOR AN APPEAL UNDER RSA 541 FROM A BOARD FINDING OF MANIFEST EDUCATIONAL HARDSHIP?**

At the outset, the Board seeks clarification from this court as to whether a petition for a writ of certiorari, rather than an appeal under RSA 541:6, would have been the proper format for the Rye School District to appeal a decision of the Board regarding manifest educational hardship.

An appeal under RSA chapter 541 can be made only “[w]hen so authorized by law.” RSA 541:2; *In re Hoyt*, 143 N.H. 533, 534 (1999). Referring to this clause of RSA 541:2, this Court in *In re Hoyt* stated:

We have interpreted this clause to mean that the provisions of [chapter 541] do not provide an appeal from the determination of every administrative agency in the state. Unless some reference is made to chapter 541 in any given statute, an appeal under the provisions of chapter 541 is not authorized by law.

*Id.*; see also *Petition of Dunlap*, 134 N.H. 533, 548 (1991) (“Where a statutory scheme provides no mechanism for direct appeal of an agency decision . . . this court has held that a petition for writ of certiorari is the

proper vehicle for obtaining review.”). RSA 193:3, the manifest educational hardship statute, makes no reference to RSA 541. *See* RSA 193:3.

While this Court has previously considered manifest educational hardship and other school assignment appeals under RSA 541, those cases did not specifically address the question of whether the appeals were properly before the Court in accordance with RSA 541. *See Appeal of Peirce*, 122 N.H. 762, 764 (1982); *Swain v. State Bd. of Ed.*, 116 N.H. 332, 333 (1976). In contrast, in *Landaff*, this Court addressed the lack of an appeal right under RSA 193:3 when it accepted a petition for a writ of certiorari in a manifest educational hardship suit. *Landaff Sch. Dist. v. State Bd. of Ed.*, 111 N.H. 317, 317 (1971). The Court observed that RSA 193:3 at that time made “no provision for appeal from orders of the State board, but on the contrary provides: ‘The decision of the state board shall be final and binding.’” *Landaff*, 111 N.H. at 318 (citing RSA 193:3). While the language of RSA 193:3 no longer expressly provides that a Board finding of manifest educational hardship is “final and binding,” nor does the statute reference RSA 541, which is required to provide a right of appeal. *See Hoyt*, 143 N.H. at 534; RSA 193:3.

In 1986, the legislature enacted RSA 21-N:11, which provides, in pertinent part, that the Board shall,

Hear appeals and issue decisions, *which shall be considered final decisions of the department of education for purposes of RSA 541*, of any dispute between individuals and school systems or the department of education, except those disputes governed by the provisions of RSA 21-N:4, III.

RSA 21-N:11, III (emphasis added). In construing statutes, where possible this Court ascribes the plain and ordinary meaning to the words used and interprets intent from the statute as written and “will not consider what the enacting body might have said or add language that the enacting body did not see fit to include.” *Ron L. Beaulieu & Co. v. New Hampshire Bd. of Accountancy*, 172 N.H. 284, 288 (2019).

The express language of RSA 21-N:11, III does not appear to create a substantive appeal right as it does not state that all Board decisions are subject to appeal under RSA 541. *But see In re Appeal of Morrill*, 145 N.H. 692, 695 (2001) (assuming without deciding that RSA 21-N:11, III permitted an appeal under RSA 541 where State acquiesced that appeal was properly before this Court in accordance with RSA 541). Rather, the language of RSA 21-N:11, III merely identifies what constitutes a “final decision” of the Department of Education in circumstances where the applicable statute provides for an appeal pursuant to RSA 541. In other contexts, statutes creating a right to appeal under RSA 541 use clear language to declare that a party may appeal pursuant to RSA 541. *See, e.g.*, RSA 326-B:39, II (Appeals from a decision of the board of nursing “shall be by appeal pursuant to RSA 541.”); RSA 330-A:29, VII (“Final licensure and disciplinary actions of the board [of mental health practice] may be appealed to the supreme court under the procedures set forth in RSA 541.”); RSA 21-O:14, III (“Any party aggrieved by the disposition of an administrative appeal before any [environmental] council established by this chapter may appeal such results in accordance with RSA 541.”); RSA 186-B:15 (“Any person aggrieved by a decision of blind services under this subdivision may apply for rehearing and appeal pursuant to RSA 541.”). If



the legislature had intended to create a substantive right to appeal under RSA 541 for all final decisions of the Board, it would have so stated in the language of RSA 21-N:11.

While New Hampshire Administrative Rule Ed 213.01 (a) provides that “[a]ll appeals of final action by the state board shall be taken in accordance with RSA 541,” the application of this rule must be limited to those cases where an applicable statute authorizes an appeal under RSA 541. *See Beaulieu*, 172 N.H. at 289 (“The authority to promulgate rules and regulations is designed to permit the Board only to fill in the details to effectuate the purpose of the statute. Thus, administrative rules may not add to, detract from, or modify the statute that they are intended to implement.” (Citation omitted)). Therefore, unless this Court interprets RSA 21-N:11, III as authorizing appeals of manifest educational hardship decisions despite RSA 193:3’s silence on the issue, then Ed 212.01 does not apply. *See* RSA 541:2; *Hoyt*, 143 N.H. at 534.

Accordingly, the Board seeks clarification as to whether a party can appeal to this Court under RSA 541 a Board finding of manifest educational hardship under RSA 193:3.

## **II. STANDARD OF REVIEW**

### **A. RSA 541 Review**

If this Court finds that RSA 541 does apply to this appeal, the standard for an appeal under RSA 541 is set forth in RSA 541:13. That statute states in relevant part that the petitioner bears the burden of showing that the Board’s decision is clearly unreasonable or unlawful and shall not be set aside or vacated except for errors of law. *See Appeal of Peirce*, 122

N.H. 762, 765 (1982) (“[The Supreme Court] must uphold an agency’s decision, in the absence of an erroneous ruling of law, unless [it] find[s] by a preponderance of the evidence that the decision was unjust or unreasonable.”).

Under RSA 541:13, this Court is the final arbiter of the meaning of state laws and will set aside erroneous rulings of law. Nevertheless, the Court gives deference to an agency’s interpretation of its laws and rules. *E.g.*, *Appeal of Murdock*, 156 N.H. 732, 735 (2008); *Fischer v. New Hampshire State Bldg. Code Rev. Brd.*, 154 N.H. 585, 589 (2006); *New Hampshire Retire. Sys. v. Sununu*, 126 N.H. 104, 108 (1985). The Court reviews the agency’s interpretation to “determine if it is consistent with the language of the regulation and with the purpose which the regulation is intended to serve.” *Murdock*, 156 N.H. at 735.

#### **B. Certiorari Review**

If this Court holds that there exists no right to appeal a Board finding of manifest educational hardship under RSA 541, then it should treat this appeal as a petition for writ of certiorari. *See Petition of Ellis*, 138 N.H. 159, 159 (1993) (allowing for an appeal incorrectly filed under RSA 541:6 to be treated as a petition for writ of certiorari); *Appeal of Tamm*, 124 N.H. 107, 110 (1983).

On certiorari, the Court cannot “make de novo findings or [] revise those made by the commission.” *Winn v. Jordan*, 101 N.H. 65, 67 (1957). “[C]ertiorari will not lie to review issues of fact, except upon the inquiry of law whether the finding or verdict could reasonably be made.” *Landaff*, 111 N.H. at 318 (1971) (internal quotations and citations omitted). The only

question the court shall review is whether the board “has acted illegally in respect to jurisdiction, authority or observance of the law, thereby arriving at a conclusion which could not legally or reasonably be made.” *Tasker v. New Hampshire Pers. Comm'n*, 115 N.H. 204, 206 (1975).

### **III. RYE SCHOOL DISTRICT RECEIVED DUE PROCESS.**

Rye School District argues that the Board denied it procedural due process by allegedly substituting its judgment for that of the Hearing Officer on the credibility of witnesses, RB 16-18, failing to consider the full record due to the transcription errors, RB 18-20, failing to provide an adequate explanation for rejecting the Hearing Officer’s recommendation, RB 32-35, and failing to rule on each of the school district’s requests for findings of fact as presented to the Hearing Officer, RB 35. All of these arguments fail for the reasons set forth below.

#### **A. Legal Standards For Board Review Of Hearing Officer Recommendations**

“Consistent with an administrative agency’s duty to hear and decide all cases over which it has jurisdiction, the general rule is that a hearing officer’s decision is merely advisory, and not binding.” *Appeal of Dell*, 140 N.H. 484, 493 (1995). The final decision is that of the Board. *Id.* When considering a hearing officer recommendation, the Board “may examine the entire written record in th[e] case and accept, reject or modify the hearing officer’s findings of fact and conclusions of law.” *In re Hopkinton Sch. Dist.*, 151 N.H. 478, 482 (2004) (citing *Dell*, 140 N.H. at 493). “When an administrative agency rejects a hearing officer’s advisory decision, it must adequately explain the grounds for its decision and fully set out the

agency's decision based upon an independent examination of the record.”  
*Id.* However, the Board “need not engage in a point by point refutation of the [hearing officer's] findings and conclusions and the reasons stated.”  
*Dell*, 140 N.H. at 493–94 (quoting 2 Am.Jur.2d *Administrative Law* § 374).

“In general, the board may resolve evidentiary conflicts by using its own expertise and technical judgment in evaluating opinion evidence contained in the record.” *Hopkinton Sch. Dist.*, 151 N.H. at 482. “This procedure is not proper, however, ‘where the board elects to make factual determinations as a hearing panel and disposition turns on the credibility of the witnesses’ testimony.’” *Id.* (quoting *Dell*, 140 N.H. at 495). “When the resolution of disputed facts depends upon the fact finder’s assessment of witnesses’ credibility, as shown by their demeanor or conduct at a hearing, all members of the hearing panel acting as fact finders must be present for the testimony.” *Id.*

**B. The Board Did Not Substitute Its Judgment For That Of The Hearing Officer On The Credibility Of Witnesses.**

First, Rye School District argues that the Board inappropriately substituted its judgment for that of the Hearing Officer on the credibility of witnesses. RB 16-18. The record does not support this contention.

Cases in which this court has held that board members must be present for testimony involved disputed issues the resolution of which depended upon whom the adjudicators believed. For instance in *Petition of Grimm*, 138 N.H. 42 (1993), a psychologist appealed from a licensing board finding that he engaged in sexual relations with a patient and thereby acted unprofessionally within the meaning of RSA 330-A:14, II(d). The

only direct evidence concerning whether Grimm and the complaining patient engaged in sexual relations was the conflicting testimony of the complainant and Grimm. *Id.* at 47. Therefore, resolution of the conflicting testimony depended on the hearing panel's assessment of their credibility. *Id.* This Court held that the failure of every member of the hearing panel to be present for the testimony violated Grimm's right to due process. *Id.*

Similarly, in *Petition of Smith*, 139 N.H. 299 (1994), a psychologist appealed from a licensing board decision permanently revoking his certificate to practice psychology for engaging in unprofessional conduct while treating a patient over a number of years. The six-member hearing panel held nine days of hearing, but only one member attended all the meetings in their entirety. *Id.* at 303. "Members were absent during crucial testimony, including considerable portions of Dr. Smith's direct testimony and both the complainant's and Dr. Smith's cross-examination." *Id.* The testimony of the complainant and Smith conflicted, and the resolution of that conflict depended on the panel members' assessment of their credibility. *Id.* at 302-03. The panel made explicit findings on the credibility of both the complainant and Smith, which led to an acceptance of the complainant's account of her treatment rather than Smith's account, and the ultimate determination that Smith had engaged in unprofessional conduct. *Id.* at 303-04. This Court held that Smith's due process rights were violated because not all members of the hearing panel were present during the testimony used to evaluate the credibility of the complainant and Smith. *Id.* 04-05.

In contrast, this Court found no due process violation in *Appeal of Dell* where the Board of Registration of Medicine rejected a hearing

officer's recommendation based solely on a record review of an evidentiary hearing that board members did not attend. *Dell*, 140 N.H. at 496. In rejecting Dell's due process claim, the Court observed that the record in that case was largely documentary, and that the conflict was "between the opinions of experts drawn from facts documented in medical records and other evidence over which there [was] little dispute." *Dell*, 140 N.H. 484.

This appeal falls closer to *Dell* than *Grimm* and *Smith* because the resolution of the matter did not turn on the credibility of the witnesses. The record in this case is largely documentary, consisting primarily of numerous emails between Parents and school officials, school records, and medical records. The witnesses' testimony essentially summarized the factual information documented in the records and provided opinions as to whether attendance at the Rye School had a detrimental or negative effect on Student. Unlike in *Grimm* and *Smith*, the evidentiary hearing did not involve conflicting testimony between witnesses about events, and neither the Hearing Officer nor the Board made findings regarding the credibility of witnesses in reaching their decisions.

Resolution of this matter did not "boil[] down to the question of 'who do you believe.'" *Petition of Grimm*, 138 N.H. at 47 (1993) (quoting *Appeal of Plantier*, 126 N.H. 500, 507 (1985)). Therefore, the Board was free to "examine the entire written record in th[e] case and accept, reject or modify the hearing officer's findings of fact and conclusions of law." *In re Hopkinton Sch. Dist.*, 151 N.H. at 482 (citing *Dell*, 140 N.H. at 493)). The Board properly reviewed the entire record and did not substitute its judgment for that of the Hearing Officer on the credibility of witnesses in reaching its conclusion.

**C. The Board Had A Sufficient Record For Review  
Despite The Transcription Errors.**

Next, Rye School District argues that the Board was unable to review the entire record due to the errors in the transcript of the evidentiary hearing and the lack of any transcript at all for the January 10, 2019 oral argument. RB 18-20. The Board disagrees that it lacked a sufficient record to adequately review the Hearing Officer's recommendation and issue its final decision.

Preliminarily, the Board notes that it resolved the issue relating to the lack of a transcript for the January 2019 hearing by granting the school district's motion for rehearing, in part, and rehearing oral argument on April 11, 2019. 1A. 23. The only question before the Court, therefore, is whether the Board's review of the record violated the school district's due process rights because the transcript of the evidentiary hearing before the Hearing Officer is incomplete.

As discussed above, the record in this case was largely documentary, and the witnesses' testimony primarily discussed the facts documented in the various exhibits reviewed by the Board. Rye School District submitted an affidavit from the Rye superintendent summarizing the missing testimony, none of which involved any material disputed facts not otherwise documented in the exhibits. *See* NOA App. 96-99. Moreover, the Board accepted the Hearing Officer's finding that the Rye School District offered accommodations to address Parents' concerns. 1A. 19, 25.

Rye School District fails to demonstrate that the Board lacked a sufficient record to review the Hearing Officer's recommendation and issue its final decision.

**D. The Board Adequately Explained The Grounds For Its Decision.**

Rye School District further argues that the Board erred in rejecting the Hearing Officer's recommendation without adequately explaining the basis for its decision. RB 32-35. The Board disagrees. Its final order clearly explains why the Board reached the conclusion that it did. *See* 1A. 25-26.

"When an administrative agency rejects a hearing officer's advisory decision, it must adequately explain the grounds for its decision and fully set out the agency's decision based upon an independent examination of the record." *In re Hopkinton Sch. Dist.*, 151 N.H. at 482 (citing *Dell*, 140 N.H. at 493). This Court has stated that in rejecting a hearing officer recommendation, a board "need not engage in a point by point refutation of the [hearing officer's] findings and conclusions and the reasons stated." *Dell*, 140 N.H. at 493-94 (quoting 2 Am.Jur.2d *Administrative Law* § 374).

In this case, the Board "accepted the Hearing Officer's finding that the Rye School District offered accommodations to address the parent's concerns, but disagreed that those accommodations were sufficient to meet the student's unique educational and social needs." 1A. 25. Based on a review of the full record, the Board found that "the district's ongoing attempts to fit the student into the school's program did not alleviate the many problems faced by the student . . . [and that] the student's issues were satisfactorily addressed only when the student was placed in another school." *Id.* The Board explained its reasoning as follows:



The student had an unusual and extraordinary combination of physical, social, and academic challenges that made her school assignment detrimental to her. The record showed that the student's assignment aggravated her anxiety for a number of reasons, including ongoing bullying that was never adequately resolved, and the stress of trying to navigate a school structure for which she was not developmentally ready. The school's offered accommodations were designed to fit the student into an educational environment to which her developmental delays and anxiety made her ill-suited. The failure of those accommodations only increased the student's anxiety. The record shows that placing the student in a different educational environment resolved or alleviated the issues that prompted the parents to pursue the new placement.

Therefore, the State Board rejects the Hearing Officer's Recommendations and voted to overturn the Rye School Board's decision to deny re-assignment.

1A 25-26. The Board's order adequately explains the grounds for its decision.

**E. The Board Was Not Required To Rule On The School District's Requests For Findings Of Fact.**

Finally, Rye School District argues that the Board violated RSA 541-A:35 by not ruling on each of the school district's requests for findings of fact. RB 35. The Board was not required to rule on those requests, which the school district had presented to the Hearing Officer, not the Board.

RSA 541-A:35 provides, in pertinent part: "If, in accordance with agency rules, a party submitted proposed findings of fact, the [final] decision [in a contested case] shall include a ruling upon each proposed finding." The school district submitted requests for findings and rulings to the Hearing Officer following the October 2018 evidentiary hearing, and

the Hearing Officer ruled on all of the requests. 1A. 5-17. As discussed above, in rejecting the Hearing Officer's recommendation, the Board was not required to "engage in a point by point refutation of the [hearing officer's] findings and conclusions and the reasons stated." *Dell*, 140 N.H. at 493-94 (quoting 2 Am.Jur.2d *Administrative Law* § 374). The Board did not need to independently rule on the requests for findings that the Hearing Officer had already addressed; rather, it needed to "adequately explain the grounds for its decision and fully set out [its] decision based upon an independent examination of the record." *Hopkinton Sch. Dist.*, 151 N.H. at 482 (citing *Dell*, 140 N.H. at 493). That is precisely what the Board did.

## **CONCLUSION**

For the foregoing reasons, the Board respectfully requests that this Honorable Court affirm the decision below. It is the Board's position that oral argument is not necessary. Should the Court request oral argument, Senior Assistant Attorney General Jill A. Perlow will present oral argument on behalf of the State Board.

Respectfully submitted,

NEW HAMPSHIRE STATE BOARD  
OF EDUCATION

Gordon J. MacDonald  
Attorney General

May 7, 2020

/s/ Laura E. B. Lombardi  
Laura E. B. Lombardi, Bar #12821  
Senior Assistant Attorney General  
Jill A. Perlow, Bar #15830  
Senior Assistant Attorney General  
33 Capitol Street  
(603) 271-3650  
laura.lombardi@doj.nh.gov  
N.H. Dept. of Justice  
Civil Bureau  
NH Bar ID No. 12821

### **CERTIFICATE OF COMPLIANCE**

This brief complies with the word limitation set out in Supreme Court Rule 16(11), and contains 5,212 words.

### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the State's brief shall be served on counsel for the Rye School District, Barbara Loughman, Esq., through the New Hampshire Supreme Court's electronic filing system, and a paper copy shall be served through mail on Parents, Eric and Christine Blonda.

May 7, 2020

/s/Laura E. B. Lombardi  
Laura E. B. Lombardi