

STATE OF NEW HAMPSHIRE  
SUPREME COURT

NO. 2019-0397

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APPEAL OF RYE SCHOOL DISTRICT

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BRIEF OF THE APPELLANT RYE SCHOOL DISTRICT

(Appeal from the State Board of Education  
Student v Rye School District)

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RULE 10 APPEAL FROM ADMINISTRATIVE AGENCY

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## QUESTIONS PRESENTED

1. Did the state board err when it substituted its judgement for that of the hearing officer on credibility of witnesses. Rye School District's February 8, 2019 Request for Rehearing, Section 4, R. p. 00008ax. Rye School District's March 6, 2019 Request for Rehearing, Section 4, R.p. 0008ac
2. Did the state board of education err when it denied the school district's request for rehearing after reviewing a partial transcript that omitted most of the testimony of the school district's witnesses. Rye School District's May 1, 2019 Motion to Set Aside Incomplete Transcript and Accept the Findings and Recommendations of the hearing officer, R. p. 00008g. Rye School District's May 8, 2019 Motion Regarding Second Transcript, R. 00008e.
3. Did the state board of education fail to apply the correct standard for determining manifest educational hardship in the absence of evidence that student's placement at Rye Elementary School had a detrimental or negative effect on her or that unusual or extraordinary circumstances existed with regard to the particular student or that the student suffered from any difficulty not attributable to general conditions or circumstances which would affect numerous children attending Rye Elementary School. Rye School District's February 18, 2019 Request for Rehearing, R. p. 00008ax. Rye School District's March 6, 2019 Request for Rehearing, R. p. 00008ac.
4. Did the state board of education err in reversing the decision of the Rye School Board and rejecting the findings of the hearing officer when the state board's conclusions are not supported by competent evidence in the record. Rye School District's February 8, 2019 Request for Rehearing, Section 5, R. p. 00008ax. Rye School District's March 6, 2019 Request for Rehearing, Section 5, R. p. 00008ac.
5. Did the state board of education violate RSA 541-A:35 by failing to rule upon each of the hearing officer's findings of fact that the state board rejected. Rye School District's February 8, 2019 Request for Rehearing, Section 3, R. p. 00008ax. Rye School District's March 6, 2019 Request for Rehearing, Sections 2 & 3, R. p. 00008ac.

## TEXT OF CONSTITUTION, STATUTES, RULES OR REGULATIONS

These are reproduced in Appendix 2 to brief.

## CONCISE STATEMENT OF CASE

Student and her parents are residents of the Rye school district. Student attended Rye Elementary School ["Rye"] for second through most of fifth grade. In May 2017, her parents unilaterally enrolled her at the public elementary school ["New Castle"] operated by the New Castle School District. On November 22, 2017, the parents applied to the Rye School Board for placement in New Castle under the manifest educational hardship statute, RSA 193:3, I. Record ("R") p. 85. The Rye School Board unanimously denied the request on January 3, 2018. R. p. 92. The parents appealed to the state board of education which assigned the case to a hearing officer.

In his recommended decision, the hearing officer summarized his findings saying,

"[t]he parents failed to demonstrate that attendance at the Rye School had a detrimental or negative effect on the Student. She had friends and made academic progress at Rye. Her 504 Plan was implemented. The issues that the Parent alleged to have occurred at the Rye School continued at the new school. In short, the Parent's complaints were numerous and continuous, yet the school appropriately responded to them throughout the Student's time in district. There was no basis for reassignment due to manifest educational hardship." Appendix 1 ("App.1") p. 6-7, R. p. 19,

The parent complaints were bullying, Student's anxiety and problems with Student's 504 plan. The hearing officer concluded these claims were unsubstantiated and granted 45 of the district's 50 requests for findings. App.1, p. 5-7. R. p. 15.

When student was in third grade at the beginning of the 2014-15 school year, parents said other children were picking her up in the OT

(occupational therapy) tune-up class at school. R. p. 335. There is no record of complaints that this happened again. Principal Lull assigned an additional person to monitor recess interactions between Student and other students. App. 1, p. 5 & 7, Finding (“F”) 7.

The other parent complaints regarding bullying, although numerous, were based on three incidents during the 2014-15 school year, when Student was in third grade, and two during the 2016-17 school year, when Student was in fifth grade.

In January 2015, Student’s father complained to Principal Lull that student H had pinched Student’s arm. R. p. 713, App. 1, p. 5 & 8, F.2. On April 10, 2015, Student’s mother complained that Student H held Student’s arm tightly and squeezed it. R. p. 739, App. 1, p. 5 & 8, F.4. Student and Student H were good friends and wanted to be together. R. p. 585, App. 1, p. 5 & 8, F.3. Although their friendship made keeping them away from each other difficult, the principal and school staff did their best to keep them apart and monitored the situation. R. p. 585, 739, App. 1, p. 5 & 8, F. 3, F.4.

On May 19, 2015, Student’s mother sent an email to Guidance Counselor, Maloney, with a copy to other staff members and Principal Lull, saying, “I just told them [Student and Student H] that they can play together...” R. p. 589, App. 1, p. 5 & 8, F.5.

On June 4, 2015, Student’s mother sent Guidance Counselor Maloney an email complaining Student H had placed her hand under Student at an off-campus girl scout meeting and that Student said this had also happened at school. R. p. 593-595, App. 1, p. 5 & 9, F.6. School staff did not see that behavior. Tr. P. 43. Ms. Maloney said she would continue to monitor outside every day at recess. R. p. 593, App. 1, p. 5 & 9, F.6.

In fourth grade, Student and Student H were placed in separate classrooms; the parents did not make any claims that Student was bullied

during fourth grade. App. 1, p. 5 & 9, F.8. During fifth grade, Student's mother complained that Student's friend, Student C, peeked at Student through the gap in the bathroom stall and/or opened the door to the stall while Student was using it. App. 1, p. 5 & 9, F.9. Principal Lull spoke with Student C, and there are no reports that this happened again. App. 1, p. 5 & 9, F.9. The mother said that on May 4, 2017 Student C stuck a goldfish cracker in Student's nose. R.p.855.

The principal and the guidance counselor both gave the mother a copy of the district's bullying policy, JICK, and explained how to file a bullying complaint. R. p. 586, App. 1, p. 5 & 9, F4, F.10. During the time Student attended Rye Elementary School, the parents never filed a formal bullying complaint, and did not complain to Superintendent Petralia that Student was being bullied at Rye Elementary School, or about the response of the Rye Elementary school principal and staff to their complaints, until they met with Superintendent Petralia in May 2017. App. 1, p. 5 & 9, F 11. By that time the parents had decided to withdraw Student from Rye. App. 1, p. 5 & 9, F 11.

After Student began school in New Castle, Student's mother complained Student was being bullied by other New Castle students. App. 1, p. 5 & 10, F.12. On September 21, 2017, the mother emailed Student's teacher saying Student has been talking about having issues with Student D in gym class. R. p. 702, App. 1, p. 5 & 10. F.12. On October 19, 2017, Student's mother emailed Principal, David Latchaw, complaining that according to Student, "Student C waves his butt in her face 1-2 times per week." [and] "kept taking her food yesterday after repeatedly asking him to stop (and this occurs with a lot of other students as well)." R. 702, App. 1, p. 5 & 10, F.12

Student was often upset and in tears about school issues and bullying while attending school in New Castle. See October 2, 2017 parent email,

R. p. 701; October 19, 2017 parent email, R. p. 702; December 14, 2017 parent email, R. p. 705; and March 23, 2018 parent email, R. p. 709. See also App1, p. 5 & 10, F.14.

Student complained to her counselor on November 29, 2017 of being bullied in Newcastle by a “teacher and classmates calling her demeaning names, indicating how short she is,” ( R. p. 497) and on May 23, 2018, about a classmate who teases her. R. p. 500.

In their March 12, 2019 letter to the state board opposing the school district’s request for rehearing, the parents explained away the incidents at New Castle saying;

“Although there were some incidents at [New Castle] School, which may or may not have risen to the level of “bullying” under the school policy, the different manner in which these incidents were promptly and adequately addressed at her new school shows that Rye Elementary School was a detrimental placement.” (Parents’ March 12, 2019 letter to the state board, R. 00008Z.

There is no evidence in the record of corrective action taken by New Castle to deal with the parents’ bullying complaints. The New Castle principal said several of the complaints were so vague as to be impossible to investigate or in circumstances where sufficient detail was provided to investigate were found to be unsubstantiated. R. p. 350, App. 1, p. 5 & 10, F.13. Rye took corrective action promptly after each incident reported by the parent. App. 1, p. 7.

In their March 12, 2019 letter, the parents also said “we never said that RES ‘caused’ Sydney’s anxiety... RES did not effectively help and support Sydney and their inaction exacerbated her anxiety.” R. 00008Z.

At the hearing, the parents did not identify any requests to which the principal or school staff did not respond. Student’s school problems



predate her attendance at Rye and continued while she attended school in New Castle. Student experienced difficulties while attending kindergarten and first grade in Portsmouth, and her parents told Rye's Teacher Assistance Team that Student "hated" school while attending school in Portsmouth. R. p. 414.

During the 2013-14 school year, while in second grade, Student received outside counseling for general anxiety, stress, lability/mood swings, family tensions/conflict, empathic difficulties, parent-child conflict, sibling conflict, self-doubt, and impulsivity/hyper-activity, poor self-regulation, defiance, cognitive inflexibility, executive functioning, inattention/distractibility, sensory/developmental, work/school problems. R. p. 486-488. App. 1, p. 6 & 13, F.33. Although Student had made only modest progress as of May 15, 2014 with a prognosis of "fair", She did not receive outside counseling during the 2014 -15 or 2015-16 school years, because she did not like going to counseling. R. p. 596, App. 1, p. 6 & 13, F.34.

On September 30, 2015 Student participated in an intake interview, listing the presenting problem as "[Student] reported she is in therapy because of worries" and that mother "reported [Student] has anxiety about things like monsters and aliens as well as that [mother] will leave her in the middle of the night, ...ADHD and anxiety." R. p. 540. That therapist recommended individual and family therapy. R. p. 540. Those services were not provided until after the parents decided to enroll Student in New Castle in May 2017. App. 1, p. 6 & 14, F.36.

On May 2, 2017 parent sent an email, saying "[w]e no longer feel we can send [student] to Rye Elementary School." R. p. 723-4, App. 1, p. 6 & 14, F.38. On that same date, Student had another intake interview with a therapist. R. p. 483, APP. 1, P. 6 & 14, F.37. Student's counseling records

indicate that Student continued to suffer from anxiety during the 2017-18 school year while attending school in New Castle. R. P. 489-501.

Parents claimed that: “[although] [Student] had 504 accommodations while attending Rye Elementary, the accommodations were insufficient and ineffective. Ultimately, the hardships at Rye Elementary led to [Student] refusing to attend school.” R00008Z.

The refusal to attend school was after Student missed six or seven days of school because her parents took her on a family trip and Student fell behind in her schoolwork. App. 1, p. 6 & 12. F. 26. At the parents’ request and contrary to normal school practice, when a student takes a trip while school is in session, Student’s teachers provided her parents with work for Student to do while away, so she would not get too far behind. Student did not do the work. App. 1, p. 6 & 12, F.27.

When Student returned to school after the trip, the mother reported difficulty completing the missed schoolwork because of a family emergency and jet lag. App. 1, p. 6 & 12, F. 28. The teachers reduced the amount of work required and extended the deadline for submission of schoolwork. R. p. 662, App. 1, p. 6 & 12, F.28. How many days Student was absent is unclear, however, Student was in school in early May. R. p. 855.

The parents also claim that “[s]ince placement at [New Castle] School, there have been no issues with accommodations and there have been zero issues related to school refusal.” R. 00008AU, p.2. There are numerous references in Student’s counseling notes to difficulty getting her to school in New Castle: January 3, 2018, [Student] stalls in the bathroom on school mornings (R. p. 498); February 14, 2018, mother reported Student continues to struggle with the morning routine and mother’s stress and frustration with getting Student off to school (R. p. 498); April 11, 2018, mother reported on continued stress getting Sydney to school (R. p.

499); May 23, 2018, Student continued to struggle with getting up in the morning (R. p. 500); June 6, 2018, still struggling with the morning routine (R. p. 500).

While Student's Rye fifth grade 504 plan included accommodations to alleviate anxiety, including reducing homework load, and offering and encouraging Student to take breaks if distracted, lost and overwhelmed, her New Castle 504 plan did not. R. p. 424-431 (Rye 504 Plan), R. 432-434 (New Castle 504 Plan).

The parents' claim that Student's anxiety while attending Rye Elementary School interfered with weight gain is not substantiated by the records. The only medical records provided to the Rye School Board were letters from an ARPN, an endocrinologist, Dr. Putnam, and a licensed social worker. R. p. 227-8, p. 229, p. 230. App. 1, p. 6 & 15. F.42. None of those providers recommended that Student be reassigned to a different elementary school. App. 1, p. 6 & 15. F.42.

According to ARPN, Student had been followed by her office for the past several months for abdominal pain, poor weight gain and anxiety and had recently demonstrated steady weight gain and decreased symptoms. R. p. 227-8. Based on the medical records obtained later through discovery, the ARPN had seen Student only once, on July 13, 2017, after she was no longer attending Rye elementary School, and the informant is listed as the mother, not Student. R.p. 514-543, App. 1, p. 6 & 13. F.30. There are only two references to abdominal pain in the records, an August 16, 2016 note, "unspecified abdominal pain" and a February 8, 2017 note that mother says abdominal pain has not been an ongoing issue. R. p. 516 and p. 520.

According to Dr. Putnam's letter, Student has difficulty with weight gain, short stature and delayed bone age, was diagnosed with growth hormone insufficiency and has anxiety "around those issues." (R. p. 229). Student gained weight between February and May 2017, while still

attending school in Rye. R. p. 506, App. 1, p. 6 & 13, F32. The statement in Dr. Putnam's report that the weight gain was partially the result of school change cannot be correct, because Sydney did not change schools until May 17, 2017, the date of her appointment with Dr. Putnam. R. p. 506, App. 1, p. 6 & 13, F32.

The counselor's October 18, 2017 letter said that, according to the mother, many of Sydney's challenges regarding anxiety, worry, difficulty focusing, following through with assignments and social skills have been reduced since moving to a new school. R. p. 230. App. 1, p. 6 & 15, F.42. The counselor's treatment notes later obtained through discovery indicate that Student's anxiety and other problems continued while she attended school in New Castle. R. p. 483-501. The only time the mother reported a reduction in anxiety was during a school vacation. R. p. 498.

The administration addressed every complaint made by the parents about Student's 504 plan. After the parent complained there was no box in each classroom for Student to keep her things, Principal Lull investigated and found there was a box for Student in each classroom, but Student was not using it. App. 1, p. 5 & 11, F.19. Student's teachers reduced homework. App. 1, p. 6 & 11, F.20. Principal Lull encouraged Student to use speech-to-text to assist with written output and offered Student a private space to do it, but Student did not want to use speech-to-text. App. 1, p. 6 & 11, F.22. Student's 504 plan allowed her to eat snacks in class outside of snack time; at Rye Elementary School any child is allowed to eat a snack at any time during the school day, as was Student. App. 1, p. 6 & 12, F.23.

After the parent complained in an email to Principal Lull on October 21, 2016, that Student had missed recess, the 504 plan was amended, on October 24<sup>th</sup>, and a statement added to "refrain from keeping Student in for recess to encourage activity and socialization." App. 1, p. 6 & 12, F.24.

When the parent complained that Student was not writing down homework assignments correctly in her agenda, the 504 plan was modified to provide for a teacher to check the agenda; when the parent complained this was not working and suggested posting assignments online, the principal immediately arranged for all fifth-grade school assignments to be posted online on Google Calendar; when the parent complained that on one occasion, the complete assignment was not posted on Google Calendar, the principal checked and found that it was; the principal also established a checklist system for Student to assist Student in managing her assignments and completing her homework. App. 1, p. 6 & 12, F.25

Student's 504 plan did not provide for counseling services, nor is there any record of a parent request for those services. The parent did not request changes to Sydney's 504 plan to address anxiety. However, accommodations were provided to allow her to take breaks if she is appearing distracted, lost or overwhelmed in the October 27, 2016 revision to the plan. R. p. 431-2.

During the time Student attended Rye Elementary School, she earned good grades. See Report Cards, R. p.384-398, App. 1,p. 5 &10, F. 15. Student also performed well on statewide testing. App. 1, p. 5 &10-11, F. 16. Student's 2014-2015, Grade 3 Smarter Summative Mathematics and ELA/Literacy scores were both in the proficient range. R. p. 399-402. In fourth grade, the 2015-2016 school year, her math score was slightly below proficient while her ELA/Literacy score was at the top end of proficient. R. p. 403-404. Her Spring 2016, grade four NECAP in Science was proficient. R. p-. 405.

Student left Rye before the 2016-2017 school year statewide testing was given. App. 1, p. 5 & 11, F. 17. When Student was tested on September 6, and 7, 2017, shortly after beginning the 2017-18 school year at New Castle, her STAR reading score was 6.1 grade equivalent, and her

STAR math score was 5.8 grade equivalent. R. p. 406-409. These test results also indicate that Student made good progress academically during her fifth-grade year at Rye Elementary School. App. 1, p. 5 & 11, F.17.

On January 10, 2019 the state board met to review the hearing officer's recommendation. Ed 212.02 gives each party the right to a ten-minute oral argument on the record before the board. ED 212.02 (b). The board swore in the parent as a witness and conducted a two-hour hearing during which it allowed the parent to testify, making a number of claims that either were not in the record or were contradicted by the record and fact findings of the hearing officer. The school district was provided no opportunity to cross examine the parent. The state board did not record the hearing or keep minutes of the hearing which was in non-public session. According to the public session minutes for January 10, 2019, the board went into non-public session at 10:45 and returned from non-public session at 12:45. App. 3.

At the conclusion of the hearing, the board said it was accepting the hearing officer's report and denying his recommendations. The school district filed a request for rehearing on February 8. R. p. 00008AX.

On February 15, 2019, the board issued a decision letter saying it was accepting the hearing officer's findings that Rye offered accommodations to address the parents' concerns but disagreed that they were sufficient to meet the student's unique educational and social needs, and the three criteria in Rye's manifest educational hardship policy were met. App. 1, p. 18. On February 22, 2019, the board denied Rye's February 8 request for rehearing without prejudice to refile. App. 1, p. 20.

On March 8, Rye filed another request for rehearing based on the board's failure to follow its own rules by: conducting the two hour hearing on January 10, 2019 without giving the district the opportunity to cross examine the parent; failing to record the January 10th hearing; rejecting the

hearing officer's findings of fact without reviewing either a recording or a transcript of the hearing; rejecting the hearing officer's fact findings without grounds or an adequate explanation for rejecting those fact findings; second guessing the hearing officer's conclusions on the credibility of witnesses; and failing to apply the correct standard for manifest educational hardship. One additional ground was that the evidence submitted by the parents in support of their claim of manifest educational hardship was limited to problems the parent alleged student had while attending Rye Elementary School although Student's placement for the 2017-2018 school year would have been a different school, Rye Junior High School. R00008AC.

On March 20, 2019, the state board granted Rye's motion for rehearing for the limited purpose of rehearing oral arguments. App. 1, p. 22. At its April 11, 2019 hearing, the state board requested a verbatim transcript of the hearing and postponed a final decision until it could review the transcript.

The department of education is responsible for providing a record of its hearings. Ed 209.01(k). The recording from which the transcript was prepared garbled or omitted entirely most of the testimony of the school district's two witnesses, Rye's principal and the superintendent of schools. See Affidavit of Superintendent Sal Petralia, R. p. 00008g.<sup>1</sup>

Rye filed two motions on May 1 and May 8 objecting to the state board's use of a transcript that omits most of the testimony of Rye's witnesses and asking the state board either to base its decision on the fact findings of the hearing officer or remand the case to the hearing officer to recreate the missing testimony. R. p. 00008E, R. p. 00008G. Instead, the state board ordered a second transcript which, like the first, omitted most of the testimony of Rye's two witnesses. R. p. 00008R

<sup>1</sup> The Motion and cover letter are 7 pages. The 4 page affidavit is at the end of the Motion.



At its June 13, 2019 meeting, the state board denied the school district's motion for rehearing.<sup>2</sup> The state board issued a decision letter dated July 11, 2019. 00008A.

### SUMMARY OF ARGUMENT

The state board violated Rye's right to due process by substituting its judgment for that of the hearing officer on credibility of witnesses, ignoring the hearing officer's findings of fact, failing to rule on each of his findings before rejecting his recommendation and relying on a hearing transcript that omitted most of the testimony of Rye's two witnesses. The state board violated its own rules by swearing in the parent and conducting a two-hour hearing without giving Rye the opportunity to cross examine and by failing to record that hearing. The state board failed to apply the correct standard for determining manifest educational hardship. The evidence in the record does not support its conclusion.

### ARGUMENT

**1. The state board erred when it substituted its judgment for that of the hearing officer on credibility of witnesses.**

When the responsibility for hearing evidence and making factual determinations, including credibility assessments, is delegated to a hearing officer, the administrative body's role is limited to reviewing the record. Appeal of Dell, 140 NH 484, 496 (1995). The state board violated due process when it substituted its judgment for that of the hearing officer on the credibility of witnesses.

<sup>2</sup> When it voted, the board said it was affirming its previous decision relying, in part, on the transcript. The record of the board discussion is not available because the board sealed the minutes.



In Dell, the petitioner appealed a decision from the New Hampshire Board of Registration in Medicine denying his application for medical relicensure. Id. at 486. The board appointed a hearing officer who was charged with preparing an initial decision including recommendations for disposition of the case. Id. at 493. The board ultimately declined to follow the decision of the hearing officer. Id. at 487. On appeal, the petitioner argued that the board violated his due process rights in failing to reject the advisory decision of the hearing officer. Id. In its decision, the Supreme Court stressed that although a hearing officer's decision is advisory rather than binding on the board, "it is a relevant and important part of the administrative record." Id.

The Court further explained that even when a board may act on a written record of testimony by witnesses whom its members have not personally seen or heard, "this 'procedure is not proper where the board elects to make factual determinations as a hearing panel and...disposition turns on the credibility of the witnesses' testimony.'" Appeal of Dell, 140 NH 484, 495 citing Petition of Smith, 139 NH 299, 304 (1994). The Court held that "All members of the hearing panel acting as fact finders must be present for testimony...that concerns the disputed factual basis of a complaint where determination of those disputed facts, rests in some material part, on the fact finders' assessment of their credibility, as shown by their demeanor or conduct at the hearing." Appeal of Dell, 140 NH 484, 496 (1995).

In Dell, the Court upheld the decision of the board that made a determination regarding a credibility issue because the credibility issue was limited to a difference of opinion among medical experts. Id. The board members in Dell were also medical experts. Id. The Court concluded that the board could resolve evidentiary conflicts by using its own expertise and technical judgment in evaluating the expert opinion evidence contained in

the record. Id. See also Appeal of Grimm, 138 NH 42, 54 (1993) (holding that the Board of Examiners of Psychologists did not violate the licensee's due process rights in relying on its own expertise and technical judgment in evaluating the opinion evidence contained in the record).

Unlike in Dell and Grimm, the credibility issue in the instant matter is not a dispute between experts required to evaluate medical testimony from other experts, but a dispute as to the facts of the case. Furthermore, in both Dell and Grimm, the board members who did not attend every day of the hearing itself had the benefit of the written record of testimony by the witnesses. When the state board in this case made its January 10, 2019 decision, it did not have a transcript, and the transcript it obtained later omitted most of the testimony of Rye's two witnesses.

Ed 212.02(b) gives each party the right to a ten-minute oral argument on the record before the state board. Ed 212.02(b). Instead of following its rules, the state board swore in one of Student's parents as a witness and conducted a two-hour hearing, during which it allowed the parent to testify, making a number of statements and claims that were not in the record or were contradicted by the record and findings of fact of the hearing officer. The District did not have an opportunity to cross-examine the parent at this hearing and the state board failed to record the hearing.

Because the state board had delegated the responsibility of making factual determinations and determinations of witness credibility to the Hearing Officer, it violated the District's right to due process in ignoring those findings and its own rules by improperly taking testimony at the January 10, 2019 hearing. Ed. 210.01.

**2. The state board erred when it denied the school district's request for rehearing after reviewing a partial transcript that omitted most of the testimony of the School District's witnesses.**

Ed 209.01 requires the Department of Education to cause a complete and accurate record to be made of all evidentiary hearings. Ed. 209.01.

Apparently realizing that the board should at least review the hearing transcript if it was going to second guess the hearing officer's fact findings, the state board, ordered a transcript of the October 15, 2018 hearing conducted by the hearing officer before denying the District's Motion for Reconsideration.

Most of the testimony of the District's two witnesses, superintendent of schools, Sal Petralia and building principal, Suzanne Lull was either omitted entirely from the transcript or so garbled as to be meaningless. Due to the apparent failure of the recording equipment, the state board, and subsequently, this Court, do not have an accurate record of the October 15, 2018, evidentiary hearing. The state board deprived Rye of due process by relying on the incomplete and inaccurate record in making its final decision on June 13, 2019.

In its two Motions filed on May 1 and May 8, 2019, Rye explained that the transcript omitted most of the testimony of its two witnesses and asked the state board either to accept the fact findings and recommended decision of the hearing officer or remand the case to the hearing officer to conduct another hearing in order that a proper record of the testimony of the parties and their witnesses could be made and transcribed. The state board violated Rye's due process rights when it took no action on the District's two motions.

Ed 212.02 also requires the state board to record all oral arguments before the state board. Ed 212.02. The state board failed to record the January 10, 2019 hearing for oral arguments depriving Rye of any meaningful opportunity to compare the statements made by the parent during that hearing to the record in this case.

The state board failed to keep an accurate record and provide a transcript for both the October 15, 2018, and January 9, 2019, hearings, the two most crucial proceedings in this matter. This Court has recognized a due process right to an accurate transcript when there are credibility issues or allegations of inconsistencies in testimony. State v. Brown, 143 N.H. 197 (1998) (Failure to provide a party with a transcript of a prior proceeding in a criminal case can be a violation of a party's due process rights under the New Hampshire Constitution.) The state board was responsible for ensuring that an accurate record was created pursuant to its own regulations and failed to take any action to remedy its failure to create an accurate record, thereby violating Rye's right to due process.

**3. The state board failed to apply the correct standard for determining manifest educational hardship in the absence of evidence that student's placement at Rye Elementary School had a detrimental or negative effect on her or that unusual or extraordinary circumstances existed with regard to the particular student or that the student suffered from any difficulty not attributable to general conditions or circumstances which would affect numerous children attending Rye Elementary School.**

The state board did not apply the correct standard for Manifest Educational Hardship and improperly ruled that Manifest Educational Hardship existed. This Court has ruled that the focus of hardship is not general conditions or circumstances which affect or could affect the many students in a given school, but on those affecting the educational needs of a particular child. Lisbon Regional School District v. Landaff School District, 114 N.H. 674 (1974); Landaff School District v. State Board of

Education, 111 N.H. 317 (1971). Also, the hardship must involve an obvious deprivation due to a student's physical or mental condition. Id.

At the time of the District's school board hearing, there was no state board policy on manifest educational hardship because the old one had expired and not been replaced. Therefore, the only applicable policy for the school board hearing was the District's local board policy JEC. (See App. 2, p. 8, R, p. 327. The District's policy is the standard policy recommended by the New Hampshire School Boards Association and is consistent with the old and current ED 320 and RSA 193:3 as well as this Court's interpretation of the statute in the caselaw discussed above. The District's policy requires the parent to prove the existence of unusual and extraordinary circumstances and the detrimental or negative effect of the current placement on the student.

In his decision, the hearing officer said there were no unusual or extraordinary circumstances that would justify placing the student in another district. The hearing officer also granted Rye's request for finding number 49 which states:

*49. In Sydney's case there were no unusual or extraordinary circumstances. Superintendent Petralia testified that many elementary school students suffer from ADHD and anxiety and the school knows how to work with them. Common sense tells us that students come in all sizes, including unusually small, as is the case with Sydney.<sup>3</sup>*

There was also no evidence that the student's placement at Rye Elementary School had a detrimental or negative effect on her. The parent based her claim for manifest educational hardship on alleged incidents of

<sup>3</sup> Rye's numbered requests for findings of fact and rulings of law are printed in Appendix 1, pages 8-17. Those that were granted have a checkmark next to the number. Those that were denied, the letter d.

bullying, allegations that Student's 504 plan was not implemented, Student's anxiety, and medical concerns about lack of weight gain. None of these claims were substantiated either when the parent made them to the superintendent, or to the Rye school board, or to the hearing officer. The hearing officer agreed in his conclusion to his report, saying,

*Parents failed to demonstrate that attendance at the Rye School had a detrimental or negative effect on the student. She had friends and made academic progress at Rye. Her 504 plan was implemented. The issues that the parent alleged to have occurred at Rye School continued at the new school. In short, the parent's complaints were numerous and continuous, yet the school appropriately responded to them throughout the student's time in the district. There was no basis for reassignment due to manifest educational hardship. App. 1, p. 6-7, R. p. 19*

The hearing officer's conclusions are supported by his detailed findings of fact on all of the parents' claims. The hearing officer found that although the parents were aware of the bullying policy, the parents did not file any bullying complaints. They also did not follow the District's internal appeal process by appealing from the principal's handling of the matter to the superintendent or the school board, as discussed in findings 10-11, below.

*10. Principal Lull testified that Sydney's mother was well aware of the school district's bullying policy, Policy JICK, that whenever parents complained to her of bullying, she explained there is a difference between students being mean to each other and bullying, explained the JICK process and that parents could fill out a formal*



*JICK form if they wished to do so, and gave the mother a copy of the district's bullying policy.*

*11. During the entire time that Sydney attended Rye Elementary School, Sydney's parents never filed a formal bullying complaint, and did not complain to Superintendent Petralia that Sydney was being bullied at Rye Elementary School, or about the response of the Rye Elementary school principal and staff to their complaints, until they met with Superintendent Petralia in May 2017, by which time they had decided to withdraw Sydney from Rye Elementary School. Testimony of Salvatore Petralia.*

Even if it is assumed that, although the parents did not file formal bullying complaints, they were complaining that their daughter was being bullied, the hearing officer found that the incidents reported by the parents were investigated and dealt with appropriately. The hearing officer found that although the parents made several complaints during the 2014-15 school year when Student was in third grade, there were no complaints during the 2015-16 school year when Student was in fourth grade. The hearing officer also found that there was a single complaint regarding an incident that occurred in the girls' bathroom during the 2016-17 school year, which was dealt with and not repeated, as discussed in requests for findings 1-9 below which were also granted by the hearing officer.

*1. The building principal described Sydney as having a bubbly, outgoing personality and being well-liked by other students.*

*2. In January 2015 Sydney's father complained to Principal Lull that student H had pinched Sydney's arm, leaving a mark, as a result*

*of which Sydney's father kept her home from school that day until he and Sydney could meet with the building principal.* <sup>4</sup>

*3. At the request of the parents, the principal and school staff did their best to keep Sydney and Student H apart and monitored the situation. Keeping Student H and Sydney away from each other was difficult, because they were good friends and wanted to be together. Testimony of Suzanne Lull.*

*4. On April 10, 2015, after Sydney's mother complained that Student H held Sydney's arm tightly and squeezed it, Guidance Counselor Sarah Maloney sent her an email confirming the effort to keep the two children apart, describing their relationship as an on again, off again friendship, and reminding the parent that "if you feel that Sydney is being bullied I am also including Suzanne [Lull], as there are very specific procedures that need to be followed. So I am going to make sure that you have all the information you need around our JICK Policy."*

*5. On May 19, 2015, Sydney's mother sent an email to Guidance Counselor, Sarah Maloney, with a copy to other staff members and Principal Lull, saying, "I just told them [Sydney and Student H] that they can play together..." and "Sydney asked if [Student H] could stay for the last few minutes of lunch since no one at her table talks to her."*

<sup>4</sup> Many of the requests for findings included references to Rye's exhibits submitted at the hearing. When the certified record was prepared, the numbering of the exhibits was changed. To avoid confusion, counsel has deleted the exhibit references in the argument section of the brief.



6. *On June 4, 2015, after Sydney's mother sent Guidance Counselor Sarah Maloney an email complaining that Student H had placed her hand under Sydney at a girl scout meeting and Sydney said this had also happened at school, Ms. Maloney sent the mother an email explaining that she spoke with Sydney to remind her of the importance of sharing anything with staff that makes her feel uncomfortable and Sydney said she would, that she would continue to monitor outside every day at recess, and that later that same day she asked Sydney four times to stop touching other people at recess.*

7. *Principal Lull assigned an additional person to recess while Sydney was at recess, in order to monitor interactions between Sydney and other students. Testimony of Suzanne Lull.*

8. *In fourth grade, Sydney and Student H were placed in separate classrooms; the parents did not make any claims that Sydney was bullied during fourth grade.*

9. *During fifth grade, after Sydney's mother complained that Sydney's friend, Student C peeked at Sydney through the gap in the bathroom stall and/or opened the door to the bathroom stall while Sydney was using it, Principal Lull spoke with Student C, and there are no reports that this happened again. Testimony of Suzanne Lull.*

The hearing officer also found that the parents continued to complain that Student was bullied while she was at school in New Castle. Based on the evidence and the hearing officer's findings, there were more bullying complaints from the parent during the year Student attended school in New Castle than there had been during her entire fifth grade year

at Rye Elementary School. Furthermore, as noted by the principal in New Castle, most of the complaints could not be substantiated and the parent did not file any formal bullying complaints, as discussed in findings 12 through 14 below which were adopted by the hearing officer. R. p. 350.

*12. After Sydney began attending elementary school in New Castle, Sydney's mother continued to complain that Sydney was being bullied by other students, specifically, on September 21, 2017, the mother sent an email to Sydney's teacher in New Castle saying that Sydney has been talking about having issues with Student D in gym class; on October 19, 2017, Sydney's mother sent an email to the New Castle Building Principal, David Latchaw, complaining that according to Sydney, "Student C waves his butt in her face 1-2 times per week." [and] "kept taking her food yesterday after repeatedly asking him to stop (and this occurs with a lot of other students as well)."*

*13. By December 21, 2017, Sydney's mother had contacted the New Castle principal several times with complaints about bullying that either were so vague as to be impossible to investigate or, in those circumstances when sufficient detail was provided for the principal to investigate, were found to be unsubstantiated.*

*14. Based on the mother's email correspondence with the building principal and Sydney's teacher in New Castle, Sydney was often upset and in tears about school issues and bullying while attending school in New Castle.*

The hearing officer also found that the staff at Rye Elementary School implemented Sydneys's 504 plan and updated it in response to requests from the parents, as discussed in requests 19 through 28 below.

19. One element of Sydney's fifth grade 504 plan was that she be provided a place in each classroom within which to put her things. After the parent complained that this accommodation was not provided, Principal Lull investigated and found that there was a box for Sydney in each classroom, but Sydney was not using it.  
*Testimony of Suzanne Lull.*

20. Another feature of Sydney's 504 plan was to reduce homework; Sydney's teachers reduced her homework. *Testimony of Suzanne Lull.*

21. Principal Lull testified that she and teachers explain to parents that homework counts for less than 1% of the student's grade; is normally not even graded; should be completed by the student without parental assistance, so the teacher can gauge student progress; and if the student is unable to complete the homework, not to worry about it. Based on the emails and the exhibits, Sydney's parents did not follow this advice about homework

22. Principal Lull testified that consistent with the 504 plan, she encouraged Sydney to use speech-to-text to assist with written output and offered Sydney a private space to do it, however, Sydney did not want to use speech-to-text.

23. *Principal Lull testified that while Sydney's 504 plan provided that she would be allowed to eat snacks in class outside of snack time, at Rye Elementary School any child is allowed to eat a snack at any time during the school day, as was Sydney.*

24. *After the parent complained in an email to Suzanne Lull on October 21, 2016, that Sydney had missed recess, the 504 plan was amended, on October 24<sup>th</sup>, and a statement was added to "refrain from keeping Sydney in for recess to encourage activity and socialization."*

25. *When the parent complained that Sydney was not writing down homework assignments correctly in her agenda, Sydney's 504 plan was modified to provide for a teacher to check the agenda; when the parent complained this was not working and suggested posting assignments online, the building principal immediately arranged for all fifth-grade school assignments to be posted online on Google Calendar; when the parent complained that on one occasion, the complete assignment was not posted on Google Calendar, the principal checked and found out that it was; the principal also established a checklist system for Sydney to assist Sydney in managing her assignments and completing her homework. Testimony of Suzanne Lull.*

26. *During the second trimester of Sydney's fifth grade year, Sydney missed six or seven days of school because her parents took her on a family trip. Testimony of Suzanne Lull. See also attendance record in 2016-17 Rye report card, School District Exhibits Page 143, and March 16, 2017 email from one of Sydney's teachers stating that the trimester ends on March 24.*

27. *At the parents' request and contrary to normal school practice, when a student takes a trip while school is in session, Sydney's teachers provided her parents with work for Sydney to do while away, in order that Sydney would not get too far behind. Sydney did not do the work. Testimony of Suzanne Lull.*

28. *When Sydney returned to school after the family trip and the mother reported difficulty completing the missed school work because of a family emergency and jet lag, Sydney's teachers made a concerted effort to help her get caught up, including reducing the amount of work required and extending the deadline for submission of schoolwork. Testimony of Suzanne Lull.*

The hearing officer found that during the 2013-14 school year Student received outside counseling for anxiety, did not receive counseling during the 2014-15 or 2015-16 school year or during the 2016-17 school year until after the parents had made the decision to place Student in the school in New Castle. From May 2017 through June 18, 2018, Student continued to receive counseling for anxiety. Furthermore, as of June 18, 2018, the prognosis was reported as guarded with progress reported as minimal. This information does not suggest that Student's attendance at New Castle alleviated her anxiety, as discussed in requests for findings 33, 34, 36 through 38 below.

33. *During the 2013-14 school year, Sydney received outside counseling for general anxiety, stress, lability/mood swings, family tensions/conflict, empathic difficulties, parent-child conflict, sibling conflict, self-doubt, and impulsivity/hyper-activity, poor self-regulation, defiance, cognitive inflexibility, executive Fx impaired, inattention/distractibility, sensory/developmental, work/school problems.*

34. *Although Sydney had made only modest progress as of May 15, 2014 with a prognosis of “fair”, Sydney did not receive outside counseling during the 2014-15 school year because Sydney did not like going to counseling.*

36. *Although the therapist recommended individual and family therapy, those services apparently were not provided, because there is no record that the services were provided during the 2015-2016 school year and the mother testified that she did not know about any counseling services provided to Sydney during that year.*

37. *Sydney did not receive any counseling during the 2016-2017 school year until Sydney’s May 2, 2017 intake interview with Seacoast Mental Health Counseling.*

38. *Sydney’s parents had made the decision, before Sydney’s intake interview with Seacoast Mental Health Counseling on May 2, 2017, to withdraw Sydney from Rye Elementary School and place her elsewhere.*

The medical letters submitted to the local school board did not say Student should attend a different school. Furthermore, the effort to blame her lack of weight gain on her attendance at Rye Elementary School turned out to be untrue. A hormone deficiency caused her lack of weight gain, and her medical records indicate she gained weight while still at Rye between February and May 2017, as discussed in requests 30, 31, 32 and 42 below.

42. *Before acting on the parent request for reassignment, Superintendent Petralia requested Sydney’s medical records;*

*instead, he received notes from three medical providers, not Sydney's medical records. None of those providers recommended that Sydney be reassigned to a different elementary school. Sydney's counselor, Ms. Addario, did not mention the anxiety and difficulties at home reflected in her treatment notes, and her statement that many of Sydney's challenges have been reduced since moving to a new school, is based on a statement that the mother made to her.*

*30. The parents submitted a December 18, 2017 letter from a nurse practitioner at Pediatric Associates of Hampton and Portsmouth to the school board at the December 20, 2017 hearing. At that time, Nurse Practitioner Morin had seen Sydney only once, on July 13, 2017, and the informant is listed as the mother, not Sydney.*

*31. Sydney suffers from a growth hormone deficiency first diagnosed in June of 2017 and began growth hormone therapy in early November 2017. See November 15, 2017 report, by Dr. Putnam, Boston Children's Hospital "[Sydney] was diagnosed with growth hormone deficiency in 6/2017," and began growth hormone in November 2017.*

*32. According to Dr. Putnam, Sydney gained weight between February and May 2017; the statement in Dr. Putnam's report that the weight gain was partially the result of school change cannot be correct, because Sydney did not change schools until May 17, 2017, the date of her appointment with Dr. Putnam.*



The state board ignored the fact that Student's placement for the 2017-18 school year would have been at Rye Junior High, not Rye Elementary School, and the lack of any evidence that placement at Rye Junior High would cause a manifest educational hardship.

Based on all of the evidence and testimony presented by the District and the findings made by the hearing officer, the state board did not follow the correct standard for determining whether a manifest educational hardship exists for Student, and a manifest educational hardship does not exist under RSA 193:3 and the standard established by this Court.

**4. The state board erred in reversing the decision of the Rye School Board and rejecting the findings of the hearing officer because the state board's conclusions are not supported by competent evidence in the record.**

The state board violated Rye's due process rights by rejecting the hearing officer's fact findings without grounds or an adequate explanation for rejecting those fact findings. In Dell, the Court stated, "[w]here an administrative agency rejects an advisory decision, it must adequately explain the grounds for such different decision, and fully and particularly set out the agency's decision based upon an independent examination of the record." 140 NH at 493.

In the instant matter, the state board failed to comply with this Court's ruling in Dell in two ways. First, the state board did not have the opportunity to review the full record of the proceedings due to its failure to keep a complete record of the October 15, 2018, hearing. Second, the state board decision did not adequately explain the grounds for its rejection of the hearing officer's recommendation. Although the state board in its final order listed the criteria in the District's Manifest Educational Hardship Policy and said the



record reflects that all three of those criteria were met, the state board failed to identify the student's unique educational needs, nor did the state board say what the unusual and extraordinary circumstances were, in what respect the current assignment was detrimental to the student, and in what respect the current assignment has a negative effect on the pupil. Instead, the state board said:

*The state board accepted the hearing officer's finding that the Rye School District offered accommodations to address the parents' concerns but disagreed that those accommodations were sufficient to meet the student's unique educational and social needs. The record showed 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. As reflected in the record, the student's issues were satisfactorily addressed only when the student was placed in another school. App. 1, p. 19.*

This statement directly contradicts the hearing officer's findings of fact, numbers 1, 15, 16, 17 and 50. Request number 1 granted by the hearing officer states, "[t]he building principal described Sydney as having a bubbly, outgoing personality and being well-liked by other students." The hearing officer also granted request number 50.

*50. Sydney's parents have failed to prove that attendance at Rye Elementary School would have a detrimental or negative effect on Sydney. Sydney was a sociable child who had friends; Sydney's report cards show good academic progress as did her performance on standardized testing; parents failed to prove that Sydney's anxiety was caused by her attendance at Rye Elementary School, the symptoms of anxiety having continued, after Sydney began attending*

*school in New Castle; and all parent complaints were dealt with promptly by Principal and Rye school staff.*

The hearing officer granted requests for findings 15, 16 and 17 below:

*15. During the time Sydney attended Rye Elementary School, she earned good grades.*

*16. Sydney also performed well on statewide testing as follows: Sydney's 2014-2015, Grade 3 Smarter Summative Mathematics and ELA/Literacy scores were both in the proficient range; ... in fourth grade, the 2015-2016 school year, her math score was slightly below proficient while her ELA/Literacy score was at the top end of proficient, ...and her Spring 2016, grade four NECAP in Science was proficient.*

*17. Principal Suzanne Lull testified that Sydney left Rye Elementary School before the 2016-2017 school year statewide testing was given. However, when Sydney was tested on September 6, and 7, 2017, shortly after beginning the 2017-18 school year at New Castle, her STAR reading score was 6.1 grade equivalent, and her STAR math score was 5.8 grade equivalent....These test results also indicate that Sydney made good progress academically during her fifth-grade year at Rye Elementary School.*

When a child is sociable and has friends, receives good grades and has good test scores, it does not logically follow that the child's placement is not meeting her needs. It is also not logical for the state board to conclude that the accommodations provided by Rye were not sufficient to meet Sydney's unique educational and social needs, or that Rye's ongoing

attempts to fit Student into the school program did not alleviate the many problems faced by her based on the record before it. Because the state board did not provide any rationale or explanation of the grounds for the difference between the hearing officer's findings and its decision, it violated Rye's due process rights.

**5. The state board violated RSA 541-A:35 by failing to rule upon each of the School District's proposed Findings of Fact.**

Ed 209.06 (j) and (k) specifically permit parties to submit proposed findings of fact at trial-type evidentiary hearings. RSA 541-A:35 states that "if, in accordance with agency rules, a party submitted proposed findings of fact, the decision shall include a ruling upon each proposed finding." This Court interprets the language of this statute strictly, and the state board should have ruled on each of the proposed findings submitted by the hearing officer. Petition of Sprague, 132 N.H. 250, 264 (1989). (State Board of Registration in Medicine must rule on each finding of fact). The word "shall" in RSA 541-A:35 is mandatory and does not permit discretion on the part of the board. Id.

The hearing officer granted 45 of the District's 50 requests for Findings of Fact and Rulings of Law. The state board violated RSA 541-A:35 in failing to rule on each of Rye's proposed findings granted by the hearing officer.

CONCLUSION

WHEREFORE, The Rye School District respectfully prays that this Court reverse the decision of the State Board of Education and affirm the decision of the Rye School Board that Student's placement at Rye did not cause a Manifest Educational Hardship.

REQUEST FOR ORAL ARGUMENT

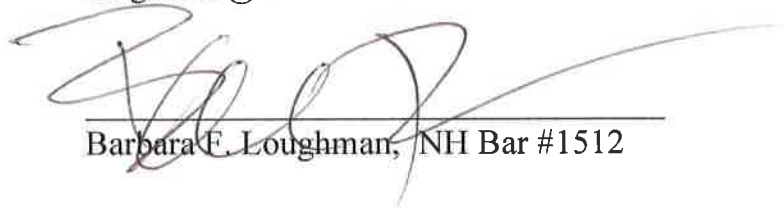
The Rye School District respectfully requests an oral argument by Barbara F. Loughman.

Respectfully submitted,  
Rye School District

By its Attorneys,  
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Date:

2/18/20

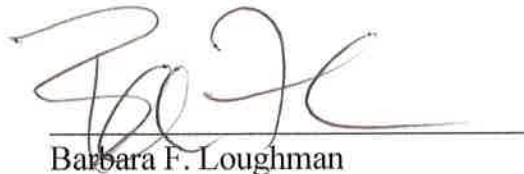
  
Barbara F. Loughman, NH Bar #1512

CERTIFICATION

I, Barbara F. Loughman, Esquire, hereby certify that on this 18<sup>th</sup> day of February, 2020 an original of Appellant's Brief has been filed electronically with the New Hampshire Supreme Court. A paper copy has been served by mail on parents, Eric and Christine Blonda, pro se.

Date:

2/18/20

  
Barbara F. Loughman