

STATE OF NEW HAMPSHIRE
SUPREME COURT

Case No. 2019-0397

APPEAL OF RYE SCHOOL DISTRICT

REPLY BRIEF OF THE APPELLANT RYE SCHOOL DISTRICT

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

RULE 10 APPEAL FROM ADMINISTRATIVE AGENCY

Anthony M. Muir, Esq. (Bar #266715)
Barbara F. Loughman, Esq. (Bar #1512)
Soule, Leslie, Kidder, Sayward &
Loughman, PLLC
220 Main Street
Salem, NH 03079
(603) 898-9776

TABLE OF CONTENTS

	<u>PAGE</u>
CITATIONS	3
STATEMENT IN REPLY.....	4
CONCLUSION	15
CERTIFICATION	15
CERTIFICATE OF COMPLIANCE.....	16

CITATIONS

CASES

PAGE(S)

<i>Bean v. Red Oak Property Management, Inc.</i> , 118 N.H. 325 (1978)	8
<i>Christopher v. SmithKline Beecham Corp.</i> , 567 U.S. 142 (2012)	6
<i>Garand v. Town of Exeter</i> , 159 N.H. 136 (2009)	5
<i>In re Hoyt</i> , 143 N.H. 533 (1999)	4-5
<i>Perron v Aranosian</i> , 128 NH 92 (1986)	8
<i>Tasker v. New Hampshire Pers. Comm'n</i> , 115 N.H. 204 (1975)	7
<i>Thiem v. Thomas</i> , 119 N.H. 598 (1979)	8

STATUTES AND OTHER AUTHORITIES

(Statutes and Regulations not previously provided are provided in
Appendix to Reply Brief of the Appellant Rye School
District)

Ed 209.01	7, 9
Ed 209.06	8
Ed 210.01	8
Ed 213.01	4, 6
RSA 21-N:9	4, 6
RSA 21-N:11	4-6
RSA 193:3	5-6
RSA 328-E:9	4
RSA 541:2	4
RSA 541-A:3-14	6
RSA 541-A:35	7

STATEMENT IN REPLY

I. An RSA 541 appeal from a State Board finding of Manifest Educational Hardship is allowed pursuant to RSA 21-N:11 and Ed 213.01.

RSA 541:2 allows for an appeal to this Court of an administrative agency decision when the appeal is “so authorized by law.” This appeal is proper under RSA 541 because the appeal is authorized by both RSA 21-N:11 and Ed 213.01.

RSA 21-N:11, III provides the State Board with the authority to “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.” (emphasis added). Additionally, Ed 213.01(a), a rule promulgated by the State Board pursuant to RSA 21-N:11, V and RSA 21-N:9, states that “All appeals of final action by the state board shall be taken in accordance with RSA 541.”

The State Board argues in its brief that an appeal under RSA 541 is improper based on *In re Hoyt*, wherein this Court stated that “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.” *In re Hoyt*, 143 N.H. 533, 534 (1999). The statute at issue in *Hoyt* was RSA 328-E:9, *Naturopathic Healthcare Practice Qualification for Licensure*. In rendering its decision, the Supreme Court ruled that an appeal pursuant to

RSA 541 was improper because RSA 328-E, the overall chapter on Naturopathic Healthcare Practice did not contain any reference to RSA 541. The instant matter differs from *Hoyt*. Although RSA 193:3 does not reference RSA 541, RSA 21-N:11 contains a clear reference to RSA 541. Just as the Court in *Hoyt* looked to RSA 328-E, the chapter in its entirety establishing the Naturopathic Board of Directors in determining whether an appeal was proper under RSA 541, this Court must look to RSA 21-N, the chapter establish the State Board of Education in its entirety for a reference to RSA 541. Where RSA 21-N:11 contains a reference to RSA 541, this appeal is proper.

While the State Board argues that the reference to RSA 541 in RSA 21-N:11 does not expressly provide for the right to appeal a State Board decision, this reading would lead to an absurd result, as there would be no other reason to reference RSA 541 in this statute. *See Garand v. Town of Exeter*, 159 N.H. 136 (2009) (Stating that this Court presumes that the legislature does not enact unnecessary or duplicative provisions). RSA 21-N:11 references RSA 541 for “**any** dispute between individuals and school systems or the department of education, except those governed by the provisions of RSA 21-N:4, III,” (emphasis added.) which includes manifest educational hardship matters under RSA 193:3. Although RSA 193:3 does not expressly reference RSA 541, it would be duplicative for the legislature to include reference to RSA 541 in every statute where an issue could arise within the subject matter jurisdiction of the State Board of Education. RSA 21-N:11’s reference to RSA 541 serves as a catch all

reference to authorize appeals to this Court for any final decision of the State Board.

Furthermore, Ed 213.01 makes it expressly clear that final actions taken by the State Board are to be taken by this Court in accordance with RSA 541. The State Board's argument with respect to Ed 213.01 is problematic for two reasons. First, Ed 213.01 was properly adopted pursuant to the State Board's rulemaking authorities under RSA 21-N:11 and RSA 21-N:9. RSA 541-A provides for an arduous and elaborate rulemaking process involving review of proposed rules for validity under state law when the rules are under consideration. *See* RSA 541-A:3 through RSA 541-A:14. Where Ed 213.01(a) was properly adopted pursuant to RSA 541-A and expressly provides the right to an appeal under RSA 541 for all final State Board decisions, and where a decision on a manifest educational hardship under RSA 193:3 is a final decision, an appeal under RSA 541 is proper.

Secondly, in arguing against the validity of its own rules, the State Board's position is inconsistent. On the one hand, the State Board adopted a rule providing for appeals of all final actions under RSA 541. On the other hand, the State Board now argues that Ed 213.01(a) is invalid because it did not have the authority to adopt the rule. The State Board cannot have it both ways and argue against its own rule only when it is now convenient to do so during the course of litigation. This Court should afford the State Board no deference to the interpretation of its own rule. *See Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012)

(holding that deference to an agency's interpretation of its own rules is unwarranted where there is reason to suspect the agency's interpretation does not reflect the agency's fair and considered judgment, when an agency's interpretation conflicts with prior interpretation, or where it appears that the interpretation is nothing more than a convenient litigating position.)

II. A Certiorari Review should lead this Court to the same conclusion as a review under RSA 541.

Even if this Court determines that an appeal is not permitted under RSA 541 and that treating the appeal as a petition for writ of certiorari is more appropriate, the Court should still reach the same decision under a certiorari review. A certiorari review requires this Court to review 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). As discussed in the Rye School District's Brief, the State Board failed to observe the law when it substituted its judgment for that of the hearing officer on the credibility of witnesses, failed to keep an accurate record as required under Ed 209.01, failed to apply the correct standard for manifest educational hardship, and failed to rule upon each request for findings of fact as required under RSA 541-A:35.

III. The State Board ignored the fact findings in the hearings officer's recommended decision and substituted its judgment for that of the hearing officer on credibility of witnesses.

The State Board ignored the fact findings in the hearings officer's recommended decision and substituted its judgment for that of the hearing officer on credibility of witnesses. The Department of Education rules require "trial type evidentiary proceedings," that "a) All evidence shall be adduced in the presence of the hearing officer," and "(b) All witnesses giving testimony shall first be administered an oath or affirmation by the hearing officer." Ed 209.06. The hearing officer is required to issue a proposed decision including "(9) Findings of fact;(10) Conclusions of law; (11) The decision of the hearing officer;" and "(12) An explanation of how the decision can be appealed to the board." Ed 210.01(a).

There is no point in requiring trial type evidentiary proceedings if the board can simply ignore the results of the hearing as it did here. In the absence of a complete transcript, the State Board cannot ignore the Hearing Officer's findings of fact any more than a court can. *See Bean v. Red Oak Property Management, Inc.*, 151 NH 248 (2004) (absent a transcript court must assume evidence sufficient to sustain findings of trial court); *Perron v. Aranosian*, 128 NH 92 (1986); *Thiem v. Thomas*, 119 N.H. 598 (1979) (In the absence of a transcript, the appellate court is bound by the trial court's findings of fact).

The Hearing Officer's findings were not based solely on the exhibits but also on the testimony of Rye's witnesses which were not recorded or

transcribed through no fault of the School District.¹ Attempting to decide this case based solely on the exhibits while ignoring the Hearing Officer's findings of fact and without a record of the District's testimony is a violation of the District's substantive and procedural due process rights and manifestly unfair to the District.

The witnesses' testimony was not essentially a summary of the exhibits. Without an adequate transcript of that testimony, neither the State Board, nor its counsel has a record of the testimony of the District's witnesses. That being the case, they cannot jump to the conclusion that the testimony was just a summary of the exhibits. The testimony is part of the record in this case. An administrative agency and a court cannot simply ignore all the testimony presented by one of the parties to a hearing and decide the case based solely on the exhibits. The Hearing Officer's findings make it clear that he assessed the credibility of witnesses and based much of his decision on their credibility.

The exhibits in this case are voluminous, because, as the Hearing Officer found, the parents' complaints "were numerous and continuous" and because the exhibits include multiple copies of most of the parent emails. R. 19. The emails, for the most part, present the parents' one-sided version of events, things they claim happened at school, where they were not present. The principal investigated every complaint, many of which turned out to be unfounded, and took corrective action. She described all

¹ The hearing officer is responsible for recording the hearing. Ed. 209.01(k).

this in detail during her testimony at the hearing. R. 8G, Affidavit of Salvatore Petralia, paragraphs 6, 7. Although some of this information is included in the exhibits, a great deal is not.

The parent complaints were bullying, Student's anxiety and problems with her 504 plan. The Hearing Officer found these claims were unsubstantiated and granted 45 of the District's 50 requests for findings. R.15. The Hearing Officer's recommended decision contradicts the claims made by the parents. He said,

“[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.” R. 19, Recommendation To State Board, p. 6-7.

These conclusions were based on the testimony of the witnesses. The parents' claims of bullying were based on three incidents they reported in third grade involving student H, one of which took place at an off campus girl scout meeting, none in fourth grade and two in fifth grade involving student, C. R. 00020-21, F. 2,4, 6,9, R. 855-856, Tr. 33-34. The Hearing Officer found there were more complaints of bullying in New Castle than there had been in Rye. R. 00022, F 12, 13, 14. When this was pointed out

in the District's request for rehearing, the parents tried to explain it away saying there were "some" incidents of bullying at New Castle ,and "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." R. 00008Z, Parents' March 12 letter in opposition to request for rehearing, p. 2.

The Hearing Officer granted Rye's requests for findings numbers 2 through 11 regarding bullying. His conclusion that Rye "appropriately responded to [the parent complaints] throughout the Student's time in District" was based on the testimony of the principal and the superintendent, which would be in the record, but for the incomplete transcript. R.19. Building principal Suzanne Lull testified that she investigated every incident, took corrective action after each and the action she took was effective. R. 00008G, Affidavit of Salvatore Petralia, paragraph 6. She also said that whether or not she considers an incident bullying, she investigates and takes corrective action to prevent it happening again. R. 00008G, Affidavit of Salvatore Petralia, paragraph 6. The superintendent testified that based on his review the parent claims were not substantiated and did not meet the criteria in the District's manifest educational hardship policy. R. 00008G, Affidavit of Salvatore Petralia, paragraph 8.

During the hearing before the Hearing Officer and in their numerous complaints to the District while Student attended Rye Elementary School, the parents claimed the 504 plan was not implemented. In their March

12, 2019 Objection to the District's motion for rehearing, the parents claimed student's 504 accommodations were insufficient and ineffective. The Hearing Officer, in granting requests 19-28 regarding the 504 plan, said "the evidence supports the school's successful efforts to implement the 504 plan despite the parent complaints." R. 00015, Recommendation To State Board p. 4.

The evidence referred to is principal Suzanne Lull's testimony contradicting the claims in the parent emails. She testified that school staff implemented the 504 plan and described in detail how the plan was implemented and revised in response to parent requests and that the plan was successful, all of which contradicted the claims made by the parents in their numerous emails on this subject. R. 8G, Affidavit of Salvatore Petralia, paragraph 7. The Hearing Officer obviously relied on this testimony in reaching his conclusions about the 504 plan and granting Rye's requests for findings 19 through 28. R. 00018. See also R. 00023-24. This testimony is not included in the recording or transcript of the hearing.

In their March 12, 2019 letter, the parents claimed they never said Rye Elementary School caused student's anxiety. They said Rye "did not effectively help and support [Student] and their inaction exacerbated her anxiety." R. 00008Z, p. 2. The hearing officer found "[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.” R.00018-19. He also granted the District’s request for finding number 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.” R. 00028-29, F. 50.

This finding, along with findings 33, 34 and 49 granted by the Hearing Officer, was again based in part on testimony by the superintendent and the building principal which is not included in the transcript. Principal Lull testified that when Student was in school she showed no signs of anxiety or not wanting to be there. She testified student had a bubbly outgoing personality and was well liked by other students. R. 00020, F.1. She said that when the mother told her Student needed a lot of bathroom breaks to deal with her anxiety and had gone into the bathroom to cry, the staff member who had checked found that Student and student C were in the bathroom fooling around. R.00021, F. 9.

The parents complained that Student could not keep up with homework which was causing her anxiety and problems at home as parents

spent hours trying to help her with it and student was unmotivated. Principal Lull told the parents the purpose of homework is to enable the teacher to figure out what the student has learned, that it counts for only 1% of the student's grade and that Student and her parents should either do a little bit or not do it at all, if it is causing difficulty; the parents ignored that advice. R. 00023, F.21.

Superintendent Petralia testified that many students suffer from anxiety and school staff know how to deal with it. R. 00008G, Affidavit par. 8. This testimony is missing from the transcript. Student received counseling for anxiety along with other problems and her therapy notes are included in the exhibits. However, the therapy did not begin until after Student left Rye and began attending school in New Castle. Although the counseling notes indicate student had meltdowns at home while attending school in New Castle, there was no evidence of meltdowns in school in Rye.

The hearing officer found the parents failed to demonstrate that attendance at Rye School had a detrimental or negative effect on the Student. The records include student's grades and test scores showing good academic progress. R. 00022-23, F. 15, 16, 17. The significance of the records and how student's performance compared to that of her peers was explained by principal Lull's testimony which was not transcribed. Principal Lull testified that student was above average academically, that she left Rye before the 2016-17 school year statewide testing was given, but that her scores at the beginning of the 2017-18 school year in New

Castle meant she had made good academic progress at Rye. R. 00008G, Affidavit par. 7.

CONCLUSION

WHEREFORE, this Court should reverse the decision of the State Board of Education and affirm the decision of the Rye School Board that the Student's placement at Rye did not cause a manifest educational hardship.

CERTIFICATION

Pursuant to Supreme Court Rule 16(10), I hereby certify that on this day a copy of this brief has been served via the Court's Electronic Filing System on all parties and emailed to the Christine & Eric Blonda.

May 26, 2020

/s/ Anthony M. Muir

Anthony M. Muir, Esq.

NH Bar #26671

CERTIFICATE OF COMPLIANCE

Pursuant to Supreme Court Rule 16(11), I hereby certify that this reply brief does not exceed 3,000 words, exclusive of pages containing the table of contents, tables of citations, and any addendum containing pertinent texts of constitutions, statutes, rules, regulations, and other such matters.

/s/ Anthony M. Muir

Anthony M. Muir, Esq.
NH Bar #266715