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STATE OF NEW HAMPSHIRE
SUPREME COURT

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NO. 2019-0397

NH SUPREME COURT

APPEAL OF RYE SCHOOL DISTRICT

BRIEF OF THE APPELLEES

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

RULE 10 APPEAL FROM ADMINISTRATIVE AGENCY

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CONCISE COUNTERSTATEMENT OF THE CASE

Parents present this counterstatement of the case to provide a clear statement of the facts and the lengthy history of this matter. S was born in 2006 and has growth hormone insufficiency and short stature disorder for which she has been treated at Boston Children's Hospital's Endocrinology Program. (R. 229). For her whole life, she has experienced poor weight gain and been of exceptionally small stature (R. 510). S has also been diagnosed with anxiety and attention issues since 2013 (R. 486).

Rye Elementary School – Second Grade (2013-2014)

S became a student at Rye Elementary School in second grade in 2013. Prior to that, during 1st grade at Little Harbor School in Portsmouth, she was provided with a 504 Plan for ADHD and Executive Functioning Issues (R. 419). In Fall 2013, the 504 Plan was revised and parents and RES began to develop a Tier 1 Intervention Plan due to concerns with attention and ability to complete work. (R. 410-420, 424). The special education process was started with a referral meeting taking place in December 2013 (R.

441). In Spring 2014, RES determined that S was not eligible for SPED services. On May 12, 2014, mother e-mailed the school outlining her concerns about S's progress, noting her struggles to complete work and sustain attention, as well as social concerns, and requesting that the team meet again. (R. 442-443). Although the school received the e-mail, there is no record of any response. (R. 440).

Rye Elementary School – Third Grade (2014-2015)

In third grade, S continued to have difficulty remaining on task; for example, guidance counselor Sarah Maloney observed S off task 45% of the time and being on task 75% of the time only with significant cuing. (R. 582).

During third grade, issues involving another student in her class, H, began to cause S great difficulties. On January 8, 2015, parents wrote to Principal Lull because H had been “poking, pinching, slapping, scratching and stomping on [S's] foot.” (R. 586). S did not want to go to school that morning unless the problem was addressed. (R. 586). Parents advised Principal Lull that S told her parents that H

was “bullying” her and that she thought H did this because S is “small and stupid.” (R. 586). In response, Principal Lull asked if she could pass their e-mail onto Guidance Counselor Maloney, and indicated that she was aware of the on-going issue and had been working on it “quite a bit,” noting that the school had a “no touching” policy (R. 586). Principal Lull did not address the statement that S felt H was bullying her or mention the school’s bullying policy (R. 596). After school that day, S came home and told her parents that that H had squeezed and dug her fingernails into S’s arm (R. 586). Parents immediately notified Principal Lull and asked to meet with her ASAP (R. 586). In a follow-up e-mail on January 11, 2015, parents reiterated that S had been complaining about H since the first week of school, and that H had touched S’s private parts inappropriately at Girl Scouts and at school. (R. 736). Parents asked that H and S be separated, noting that the situation was too difficult for S to work through on her own and that S is worried that speaking up will make the situation worse. (R. 736).

Despite Principal Lull's statement that the school was trying to be proactive, and the Guidance Counselor checked in with parents about keeping S and H apart (R. 585), the issues with H continued. Parents advised the school on February 18, 2015, that S still struggled with how to handle H (R. 585). On April 10, 2015, the parents reported to the school that mother witnessed H push S out of the lunch line – telling her to “get out of here.” (R. 586). Mother took S to the office, where she was crying, telling Stacey (the school secretary) that “she doesn't understand why H picks on her so much,” and saying “I can't take it anymore;” S also asked her parents to report H's behavior as bullying. (R 586-587). Ms. Maloney's response included Principal Lull, noting Principal Lull needed to be involved because “there are very specific procedures that need to be followed [and to provide] all the information you need around our JICK policy.” (R. 586). Principal Lull did not respond in this e-mail chain.

The school “monitored” the situation and towards the end of third grade, the Guidance Counselor asked parents about loosening restrictions between S and H, and the girls were permitted to play

together again, but were instructed to let an adult know if one said or did something that would lead to hurt feelings. (R 327, 834). And then on June 4, 2015, parents advised Guidance Counselor Maloney that S reported that H had touched her inappropriately again (R 161). Guidance Counselor Maloney's response was to talk with S, with no mention of talking with H (R 161).

Rye Elementary School – Fourth Grade (2015-2016)

Fourth grade was a better year for S – although she continued to have issues with anxiety, work completion, and feeling picked on, her teacher Mrs. Jacquie DeFreze provided supports that were effective and Mrs. DeFreze provided excellent communication. (See, e.g., R. 596-597) (anxiety, but S reports feeling like the teacher “read [her] mind”) R. 599 (S feels picked on due to being small), R. 601 (work completion issues, anxious and distracted), R 609 (work refusal and attention issues), R 613 (teacher notes S “cranking in her school work”), R 624 (teacher notes that S “is showing growth,” but “does vary from day to day”); see generally R 596-626).

At the beginning of fourth grade, parents let the school know that they were considering having S return to counseling for her anxiety, and that Guidance Counselor Maloney thought S should see the counselor that came into school. (R 596). Guidance Counselor Maloney talked with S on September 21, 2015, reporting in an e-mail to parents that S identified “two worries one being aliens and one being that “mother” would leave her alone,” and suggesting that S seeing an outside counselor as well (R 603). S and her mother saw Colleen Ducluzeau, MS, of Seacoast Mental Health, to whom similar worries were reported. (R 540).

While the School District chastises parents for not immediately enrolling S in therapy, as explained above, fourth grade went well for S, and S did begin treatment for her anxiety with Deb Addario LCSW while she was in 5th grade at RES (R 483). As parents explained to Guidance Counselor Lori Arsenault, S saw a counselor at school in 4th grade and the school counselor available in 5th grade was a personal friend, so not likely to be a good fit. (R 307) Parents were looking

for another counselor, but were finding it hard to find a good fit (R 307).

Rye Elementary School – Fifth Grade – 2016-2017

For fifth grade, RES had a middle school structure, with the children rotating to different teachers for different core subjects. S was placed in the homeroom of Mrs. Phoebe Bischoff, the Language Arts teacher. Given S's attention and executive functioning issues, parents anticipated that the middle school structure would be difficult for her and requested a meeting to update the 504 Plan at the very start of the school year. (R. 279). The 504 Plan was finally updated on October 24, 2016 (R. 430). The 504 Plan included provisions S would not be forced to miss recess to complete work and that she be allowed small snacks outside of snack time. (R. 431).

From the beginning of 5th grade, S experienced difficulties completing work, maintaining her agenda, packing her backpack at the end of the day, and increasing anxiety, despite multiple requests for assistance from her homeroom teacher, and notifications to Guidance Counselor Lori Arsenault and Principal Lull requesting their

assistance because the homeroom teacher was not effectively communicating with the parents or assisting S (For example: R 313 (Sept. 21, 2016 e-mail to homeroom teacher indicating worries about S, including focus and homework organization, with no response from homeroom teacher); R 305-308 (Sept. 22, 2016 e-mail to Guidance Counselor outlining issues with S and homeroom teacher and parents' suggestions regarding organization, S's need for frequent bathroom breaks and need for a complete lunch and recess break); R. 295 (Oct. 24, 2016 e-mail to Guidance Counselor advising that S is asking to change homeroom or change school; Guidance Counselor spoke with S and S was feeling stressed, overwhelmed and sad); R. 293 (Jan 20, 2017 e-mail to Guidance Counselor reporting that S failed a history test because it was not in agenda as contemplated by 504 Plan, homeroom teacher did not reply to parents' requests for assistance, and that S felt bullied by two girls); 311-12 (Feb. 10, 2017 e-mail to Principal Lull advising that S was refusing to go to school).

On October 19, 2016, parents wrote to Guidance Counselor Arsenault and Principal Lull requesting a change in homeroom,

outlining S's challenges, need for an outside tutor, and difficulties carrying all of her books and supplies as required by her homeroom teacher (R 746). The request was not granted. The possibility of changing S's homeroom was raised again in February 2017. However, a homeroom change was impossible because there were only two other homeroom teachers and S could not be placed in either of those classes – at that point, H was in Mrs. Gianforte's class and Principal Lull stated that S could not be moved into Mr. Ross's room (R 755).

As 5th grade wore on, nothing improved and on many nights S would have meltdowns and it would take hours to complete homework, even with parental assistance. Parents continued to make the school aware of these issues (for example, R 639-640). Despite the School District's claim that S's grades were good, she was having particular difficulty in math. At one point she had 2 uncompleted math quizzes and a test to make up – mother described the hours it took S to work on them, without successfully completing them. (R 639). The math teacher suggested S avoid word problems (R 639),

which would mean that S's grades would not be based on the same basis as other students.

In early 2017, parents again requested SPED evaluations, and a meeting to review the results took place on April 18, 2017 (R 312-315). It was determined that S did not require specialized instruction, even though it was pointed out that the 504 Plan wasn't working, and that S was very slow at math work and needed a math chart because she did not know her math facts (R 311, 312, 313). Principal Lull and Assistant Superintendent Kelli Killen were to be advised about the issues regarding the 504 (R 313).

In late February 2017, the family took a volunteer trip to Indonesia, getting S's assignments in advance, and upon return, there was still work to make up with the assistance of her teachers. (R. 663-664).

On March 20, 2017, parents wrote to Mrs. Bischoff and Principal Lull, noting that she was concerned that S was "not mentally or developmentally ready for 5th grade" and questioned promoting her to 6th grade at the end of the school year (R 665-666). The record

contains no written response regarding the possibility of repeating 5th grade.

In April 2017, frustrated with the lack of emotional or academic progress with no proactive plans offered by RES, and the impact of S's increasing anxiety regarding school on her physical health, the parents decided to look at other schools, touring Maude H. Trefethan Elementary School ("MHT") in New Castle (R 376).

During the April break, S had a decrease in symptoms and when the break ended, she was hysterical and begging her parents not to send her to school. (R 856). By e-mail dated April 28, 2017, parents advised Assistant Superintendent/504 Supervisor Killen that they were considering moving S to MHT, outlining the history of poor communication, difficulties with the 504 process, S's fluctuating STAR results, requests for additional math support, and bullying (R 372-377). Parents explained that they hoped that in a smaller setting, S would not fall through the cracks. (R 377). They noted that S could not even think about school without feeling physically ill and anxious, pointing at that while she was at SPCA camp that week, she was

engaged, learning and happy. (R 377). They asked to meet with Assistant Superintendent Killen to discuss their options (R 377).

On May 4, 2017, mother had lunch with S at school and witnessed C push a goldfish cracker up S's nose (S had a prior issue with C opening the bathroom stall door while S was in the stall (R. 768, 777, 854). Mother notified Principal Lull by e-mail, stating that some children indicated that C had stuffed goldfish crackers up S's nose in the past (R 768). She noted that S has a hard time sticking up for herself because S "worries about upsetting her peers or bullying worsening." (R 768). Mother also noted that S's anxiety was continuing to increase. (R 768). In response to C's behavior, Principal Lull merely wrote:

You use the word bullied but I don't think she is being bullied by [C] is she? Would you want to fill out a JICK report? I think [C] would be shocked to think you think she is bullying [S]. I think she meant it to be funny, which it is not. I do believe [S] can tell a friend to stop or ask a teacher for support in situations like this. (R 768).

Principal Lull went on to offer to meet with S and her 4th grade teacher “to clear some of this up and hopefully that will help.” (R 768). There was no indication that Principal Lull felt it important to determine what was going on between S and C, which would involve talking with C and other children. Parents note that S had complained to them about C’s treatment of her, a fact they discussed with Meg Louney (RES SPED coordinator) and Danielle Cullinane (contracted school psychologist) at the April SPED meeting. (R 777). By e-mail dated April 20, 2017, Ms. Cullinane noted that she was forwarding the bullying concerns to Principal Lull. (R771). In light of Principal Lull’s obvious predetermination that there was no bullying, why would parents bother to fill out a JICK form?

Maude H. Trefethan Elementary School – 5th and 6th grades
2016-2019

Believing MHT might provide a better environment for S, parents applied to tuition S into that school, noting that because the small school had a combined 5/6th grade classroom, S would have more time to mature before entering a middle school, and seeing MHT

as a “positive and encouraging place for [S] to learn.” (R 685-686). In her recommendation letter, S’s fourth grade teacher noted S’s strengths (creativity, humor and imagination), with attention issues and a tendency to get overwhelmed. (R 684). The teacher noted that “[S] needs to find the right fit.” (R 684)

S started at MHT on May 16, 2017 (R 683). The 504 Plan from RES was continued, although it still was not clear whether S was eating enough (R 691). The MHT school nurse quickly reached out to parents to meet with them about S’s health/nutritional requirements (R 692). In June 2017, the school nurse developed a Health Care Plan for S’s weight issues and made sure that Mr. Purcell (S’s classroom teacher) and Principal Latchaw understood the plan (R 544). S told the school nurse was happy about the plan as “she felt nervous to ask teacher to eat if hungry or needing to refuel.” (R 544). In her first few weeks at MHT, S’s therapist noted that S’s anxiety was decreased and that S reported that she “love[d] everything about the school” (R 491). MHT also updated the 504 Plan on September 15, 2017 (R 432).

Although S continued to have instances which required parental requests for help, her teacher and Principal Latchaw were responsive and S showed significantly less anxiety at school and did not have any instances of school refusal during her time at MHT. A simple comparison of the number of e-mails with RES and the e-mails with MHT demonstrates how much more smoothly the year was going. For example, parents' October 2, 2017 e-mail was a simple request for help in helping S learn math facts (R. 701). Their October 19, 2017 e-mail was a follow-up to a conversation with Principal Latchaw regarding the issue with a boy, C – parents related that they were aware of the issue because mother spoke with Mr. Purcell about why S was upset in gym and learned that Mr. Purcell had already taken care of it by talking with Mrs. Stern and C (R 702). Principal Latchaw's response was in marked contrast to that of Principal Lull – in his October 19, 2017 response to parents' e-mail, he wrote:

Thank you for bringing these items to my attention! In doing so, I will be able to work, in concert with other staff [S] sees, to nip such behaviors in the bud. (R 702).

Parents' March 23, 2018 e-mail details specific comments made by certain boys to S (709).

S did perform well on STAR tests at the start of her time at New Castle –she is an intelligent child and was happier at New Castle. (R 406). It should also be noted that this was the second time she took 5th grade STAR assessments.

Medical Records

Another important aspect of this case is S's medical conditions. She has been seen at Boston Children's Hospital since 2014, when she was at less than the fifth percentile in height and her growth velocity was decreasing (R 510-511). As her pediatrician's growth chart indicated, S's weight fluctuated from less than the first percentile to the fifth percentile from 2013 to 2018 (R 543). In February 2017, she was under the 1st percentile in weight and the 2d percentile in height (R 520). In Fall 2017, parents made the decision to begin growth hormone treatments for her height issues and medications to increase her appetite for her weight issues. (R 502). S was extremely anxious

about the hormone shots, but by January 2018, was able to have them regularly. (R 504, 505). Although S did gain four pounds in Spring 2017, that gain occurred during the school break (which was at the end of April 2017) (R 544). It is important to note that the timing of this weight gain was reported to the MHT nurse shortly after this weight gain occurred. (R 544).

S's pediatrician reviewed her records and noted that as of December 18, 2017, S was doing quite well mentally and physically and "strongly encourage[d] her to remain in her present school." (370). The School District criticizes S's pediatrician's report because S's pediatrician saw her in July 2017, after S left RES. The School District overlooks the fact that this visit was for S's **annual** physical. (R 524). It makes perfect sense that in a large pediatric practice, that the practitioner who usually performs the child's annual physical letter would review the records to write a letter to a school. Likewise, most pediatricians obtain significant information regarding symptoms and medical history from parents, rather than children.

Finally, with respect to medical issues, at the time of the hearing before the Hearing Officer, S was due to undergo a sleep study to address issues she had in the morning getting up for school (R 880-881).

Request for Manifest Educational Hardship

In Fall 2017, parents requested that the School District reimburse them for the tuition they had to pay to MHT, first requesting a special school transfer under the school's JCA policy (R 264, 268). In their October 19, 2017 e-mail to Superintendent Petralia, parents provided him with information about S's medical history and how that was connected with their decision to move her to MHT, noting that keeping S "back in 5th grade at Rye Elementary would have a profound negative impact and [was] not an option" (R. 321). Superintendent Petralia denied this request by letter dated October 26, 2017, stating his conclusion that S's education "would not be adversely effected if she attended [RES]" (R 325)). In his November 14, 2017, response to parents' request for information on the appeal process, he noted that with respect to the bullying they

reported to him, “[he] checked with the Principal and learned that there are no records of bullying complaints filed on [S’s] behalf.” (R 331).

In response to Superintendent Petralia’s statement that there were no records of bullying complaints, parents wrote to him on November 28, 2017, detailing some of the history of the complaints that they made to RES, including conversations with Principal Lull – in one of those conversations Principal Lull indicated that there was no point in filing a formal bullying complaint with respect to issues with H as she was in charge of investigating bullying complaints and that she did not believe that H was bullying S (R 335-338). Parents also sent Superintendent Petralia some of their e-mails to RES in which they pointed out the bullying that S was enduring. (R. 340-346).

After Superintendent Petralia’s denial of their request for a reassignment, parents requested a hearing in front of the Rye School Board under the Manifest Educational Hardship Policy (JEC) and the hearing took place on December 20, 2017 (R 333-334, 348, 369-369).

The hearing took place in non-public session, and the non-public minutes give no indication of just what transpired at the meeting. (R 360).

On December 21, 2017, parents wrote to the Rye School Board via Superintendent Petralia to ensure that the School Board understood their position. (R). The subject line is “Letter for Rye School Board” (R 370). The parents explained that they had gone “off script” at the December 20 hearing, but that they had “more information and since this has been a long journey let’s decide **if you have any more questions or need any more information that you are all welcome to ask us.**” (R 370). They specifically noted that they believed that the Rye School Board should consider their correspondence to Assistant Superintendent Killen, which they attached to the e-mail, as well with the SAU50 Special Education Director. (R 370-377). This correspondence never made it to the Rye School Board, although it has since become evident that the Rye School Board did have more questions.

The record also contains the December 21, 2017 Principal Latchaw wrote to Superintendent Petralia in response to his supervisor's request for the principal's observations regarding S. (R. 350). Superintendent Petralia forwarded Principal Latchaw's e-mail to Rye School Board Chair Scott Marion, but not to parents. (R. 350).

While it is not entirely clear in the record why this request was made of Principal Latchaw, it became clear that after the December 20 hearing, the Rye School Board also requested to make a comparison of report cards and assessment data from the two schools. (R. 931, 936). It's difficult to assess the Rye School Board's comparison of those records because the Record contains few records that are in fact comparable. The Record contains S's report cards from third through the second trimester of fifth grade at RES (R 384-398), as well as her first quarter report card of her first full year of fifth grade at MHT (R 399). Her fourth quarter report card from the end of her first year of fifth grade at MHT is not included. Her last report card from RES contained mostly Bs, and a C plus. (R. 397). Her first quarter report card at MHT contains all As and Bs. (R. 398). The Record also

contains S's State Assessments from third and fourth grade (R. 399-405) and her Star assessment only from grade 3 (R. 403-402). There are no other Star results from RES, but there are Star results from MHT. (R. 406-409).

By letter dated January 4, 2018, Superintendent Petralia advised parents that the Rye School Board denied their Manifest Educational Hardship request (R 366). In the letter, he indicated the following with respect to the standard:

Rye School Board Policy JEC establishes criteria, **all of which must be met**, in order for a change of placement on the basis of manifest educational hardship under Policy JRC. The criteria are:

1. There are unusual and extraordinary circumstances.
2. The current assignment is detrimental to the pupil.
3. The current assignment has a negative effect on the pupil.

Superintendent Petralia continued that "[t]he Board found that the above criteria were not met." (R. 366). He stated that had S returned to RES, she would have been assigned to a different 5th grade class

and that her academic performance at RES was similar to that at MHT. (R 367). Notably, other than this statement, there is nothing in the record that indicates that RES would have allowed S to be held back in 5th grade.

Upon receipt of the decision via e-mail, parents asked Superintendent Petralia if he had forwarded their December 21, 2017 e-mail to the School Board (R 370). He responded that he had failed to forward their communication to the Board, and asked them to “be assured” that the matters in that communication had been “thoroughly reviewed and discussed.” (R 378). At this point, parents were not aware that the Rye School Board had questions for Mr. Latchaw or wanted to compare S’s academic records at the two schools.

By e-mail dated January 7, 2018, parents questioned Superintendent Petralia on the standard he recited as this is not the standard set forth in the JEC policy (R 379). Rather, that policy states:

The parent[s] or guardian[s] of the student may use whatever information they deem is appropriate to support their request. At a minimum however, the parent[s] or guardian(s) must

submit information demonstrating to the school board that the **current assignment is detrimental or has a negative effect on the pupil.** (R 368).

Parents asked where the criteria he set forth were documented and what was the difference between criteria 2 (detrimental) and criteria 3 (negative effect). (R 379). Parents noted that the decision letter had the grades of S's attendance at Rye wrong and that in other correspondence, SAU50 had inaccurate numbers regarding tuition payments parents made to MHT (R 379). They asked what evidence supported the conclusion that S's academic performance at the two schools was similar. (380). Parents stated that while the School Board's decision was disappointing, "the format and content of follow-up were most concerning. Just the errors in facts alone continue to reinforce our lack of trust." (R 379). In his response, Superintendent Petralia refused to answer their questions regarding the standard under the Manifest Education Hardship policy or S's performance, stating his reasoning that the parents had a right to appeal to the State Board. (R. 321).

The parents engaged an attorney and began the process to appeal to the State Board of Education (R 53). However, parents withdrew their appeal due to the costs involved. Mother took the opportunity to address the State Board pro se when the matter appeared on the Board's calendar on May 10, 2018 (R 953). The School District appeared as well, with Attorney Barbara Loughman and Superintendent Petralia attending. Mother explained that despite the withdrawal of the appeal, she had been advised that she still had ten minutes to speak (R 974). She wanted to let the Board know how difficult the process was for parents, in terms of emotions, time and finances (R 976, 978, 980, 983, 986) It was determined that as the appeal was withdrawn, the mother could not address the Board, and so after discussion with the Board, mother reinstated the appeal (R 38, 987).

A hearing was held before Hearing Officer John LeBrun on October 15, 2018 (R 823). The witnesses at the hearing were S's mother, Christine Blonda, Eric Blonda, Educational Advocate Christine Sununu, Principal Lull and Superintendent Petralia.

Principal Latchaw was supposed to testify, but ultimately did not (R. 796, 866). Parents appeared pro se and the School District was represented by its counsel.

The transcript of the October 2018 hearing has some gaps and is missing some of the testimony of Principal Lull and Superintendent Petralia. However, certain aspects of their testimony were clear. Principal Lull testified that she always gives parents copies of the school's bullying policy if they raise a claim of bullying, but that she did not believe that S was being bullied. (916, 918). Superintendent Petralia testified that he recommended to the Rye School Board that it deny parents' request for Manifest Educational Hardship because they did not file any formal bullying complaints or appeal from the denials of special education services (R. 930). He also testified that after the parents formally presented their request to the Rye School Board on December 20, 2017, that board requested S's academic records from him so they could make a side-by-side comparison.¹ (930-931). He

¹ Similar to not being aware of Principal Latchaw's December 21, 2017 letter that was sent to the Rye School Board Chair via Superintendent Petralia (R 350), parents were not aware that the Rye School Board was looking at and comparing S's academic records.

stated that there was a “strong basis” for the denial, noting that he reviewed 55 pages of e-mails and the fact that his grandchildren attend RES (944).

The School District filed ten pages of proposed findings of fact and rulings of law on October 25, 2018. (R. 20). Pro se parents did not file proposed findings and given the ten day limit, had no chance to respond to the School District’s proposals.

The Hearing Officer ruled in favor of the Rye School District on November 21, 2018 (R. 15). Parents filed Exceptions to the Hearing Officer’s Determination (R 12), and the matter was heard by the State BOE on January 10, 2019. The proceeding lasted much longer than expected, with the BoE listening carefully to mother, Attorney Loughman and Superintendent Petralia. At no point did Attorney Loughman object to the length of the proceeding or request to directly question mother. Nor did she ask to have the proceeding recorded when the meeting switched to non-public. Both sides had several opportunities to address the Board and answer the Board’s

questions. The Board accepted the Hearing Officer's report but denied his recommendation.

The School District then began a campaign of four requests for a rehearing. On February 8, 2019, the School District requested a rehearing, primarily arguing a denial of due process, failure to review the hearing transcript, and that the Board did not give enough deference to the Hearing Officer's findings. (R. 8ax). Parents submitted their opposition to the motion, pointing out that both parties had an equal opportunity to be heard (R. 8 am). They also explained:

The Board stated that they thoroughly read through the entire record and reviewed the over 1000 pages of documentation that were provided to the Board from both parties.

Helen Honorow referred to the large stack of tabbed documents multiple times and stated she had read every page of the documents that were provided.

She even referred to and read from parts of those documents during argument.

(R. 8 an). Board Member Honorow also stated that she did not hear anything that was outside of the record (R. 8 s). Parents further explained that the Board did not second guess the Hearing Officer - it

simply reached a different conclusion than the hearing officer. (R. 8an). The Board denied the School District's motion as premature. (R 20).

The Board issued its decision on February 15, 2019, stating:

The State Board accepted the Hearing Officer's finding that the Rye School District offered accommodations to address the parent's concern, but disagreed that those accommodations were sufficient to meet the student's unique educational and social needs. The record showed 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. (R. 10)

On March 6, 2019, the School District again moved for a rehearing, raising essentially the same arguments as in its February 8 motion (8v). Parents opposed this motion on March 12, 2019 (8 r – 8 t). On April 11, 2019, the Board heard the matter again and decided to order a transcript of the October hearing (R. 974). Before the Board met again, the Rye School District filed a "Motion to Set Aside Incomplete Transcript" on April 1, 2019 (R 951). Before the parents had a chance to respond, the Board ordered an updated transcript to

fill in gaps, and the Rye School District filed its fourth motion with the Board on May 8, 2019 (R 966). In these motions, the School District argued that a new hearing was required because the transcript omitted “much” of Principal Lull’s testimony entirely, as well as portions of Superintendent Petralia’s testimony, maintaining that the School District was denied due process. The School District submitted an affidavit by Superintendent Petralia, but not one from Principal Lull. (R 957). As parents pointed out in their May 10, 2019, opposition to the third and fourth motions, the School District did not indicate just what was missing from the transcript and just how it contradicted the voluminous documentation submitted to the Hearing Officer and reviewed by the Board (R 968). Parents also emphasized that even with the alleged additional testimony, the facts would not alter the conclusions when considering the record as a whole (R 969).

The Board heard the School District’s third and fourth motions on June 13, 2019. The Board members indicated that they read the transcripts and when viewing the record as a whole, there was nothing

to change their conclusion, voting unanimously to adhere to its original decision.

SUMMARY OF ARGUMENT

The State Board properly rejected the Hearing Officer's determination. The Board's conclusion is supported by a thorough review of the record. The School District had multiple opportunities to be heard and has not been denied due process. The State Board followed the same standard applied by the Rye School District.

ARGUMENT

- 1. The State Board did not substitute its judgment for that of the Hearing Officer on the credibility of witnesses or violate the School District's right to due process.**

As The School District states, the Hearing Officer's decision is advisory. Appeal of Dell, 140 NH 484 (1995). Dell makes it clear that the Board must carefully review the record. In Dell, the doctor had a protected property right in his license and therefore was entitled

to procedural due process. It's not clear what right the School District is relying upon.

The School District claims that instead of limiting the parties to ten minutes, the Board improperly swore in mother and conducted a two hour hearing, heard statements that were not in the record and/or contradicted the Hearing Officer's findings, did not give the School District an opportunity cross-examine the parent, and failed to record the hearing.

The responses to these arguments are simple. The Board swore in mother because she is not an attorney. As parents pointed out in their oppositions to the School District's first two motions for a rehearing, the School District overlooks that the Board also swore in Superintendent Petralia and allowed him to provide his observations to the Board. (). The School District did not object to the length of the hearing or request to cross-examine the parent. At the very end of the hearing, the School District's attorney argued that mother had made statements that were outside of the record. Board Member Honorow indicated that she had read all of the documents and did not

hear anything that was outside of the record. (R 8 s). The School District did not identify what specific statements were allegedly outside of the record. In addition, the School District did not raise the issues of the failure to record the Board's non-public session or the absence of a transcript of the October hearing. It's hard to understand how the School District could have been deprived of due process when they were represented by counsel and the two proceeding actually gave them more of an opportunity to be heard.

2. The Board properly denied the School Districts requests for a rehearing due to some omissions in the hearing transcript and the School District was not denied due process in this regard.

The School District complains that most of the testimony of its two witnesses was either omitted entirely or too garbled to be understood. In support of their motions for a rehearing based on the transcript, they submitted an affidavit by Superintendent Petralia, but

not Principal Lull (R 957). They do not indicate in their brief what is missing. As parents stated in their opposition to these motions:

the alleged “missing” portions aligned with the testimony in the transcript and the documents submitted to this Board.

We do not dispute that this testimony was given by the witnesses. But even with these statements, their testimony is not enough to support the Hearing Officer’s conclusions when the Board looks at the record as a whole. . . .

The school was represented by counsel at the hearing and the Superintendent and counsel were prepared and took notes. Presumably, these notes were the basis of the affidavits submitted by the school. Given the presence of counsel at the hearing and three appearances before this Board, and the availability of all the documents submitted to this Board, the school’s claim that it has somehow been denied due process makes no sense. (968-969).

The School District cites State v. Brown, 143 N.H. 197 (1998). That case involved a criminal case and the lower courts denied the defendant’s request for a transcript. Here, a transcript was supplied, the School District only requested the transcript after they lost at the hearing, and do not identify any specific facts missing from the transcript.

3. The State Board correctly applied the School District's own standard for Manifest Educational Hardship

The State Board applied the same standard quoted in Superintendent Petralia's January 24, 2018 letter to parents. In hindsight, parents see that the reference to unusual or extraordinary circumstances appears in one of the introductory paragraphs of the Manifest Education Hardship policy – which states “The school board recognizes that in unusual and extraordinary circumstances parent(s) or guardian(s) may wish to request a change of assignment to another public school.” (R 327). The policy's procedure requires only that parents demonstrate that “the current assignment is detrimental or has a negative effect on the pupil.” (R 327). The record has ample evidence to support the Board's conclusions that S had unique social and educational needs, that the school's attempts to accommodate her were not sufficient, and that the issues were only satisfactorily addressed only when she began attending MHT (R 10). Simply put, RES had a detrimental effect on S.

In addition to anxiety and ADHD, S is so small that during much of her time at RES, she was barely on the growth curve and this impacted the way other children treated her. She was not merely “unusually small,” she has a growth hormone deficiency. Despite Superintendent Petralia’s testimony that the school “knows how to work with [students with ADHD and anxiety],” and accommodations made in the 504 Plan, S struggled for most of her time at RES, as detailed in our counterstatement of facts above.

The middle school structure was particularly difficult for S, as demonstrated in parents’ multiple reports of her difficulties organizing and completing her work. The school made attempts to make accommodations, but only after multiple requests and they were often a matter of too little, too late.

The School District makes much of the fact that parents did not file JICK forms with respect to the bullying. Parents agree that Principal Lull testified that it was her practice that she always explained the JICK process whenever a parent raised a concern about bullying, and would tell parents that there is a difference between

students being mean to each other and bullying. The School District overlooks the multiple times that parents advised the school by e-mail of significant, on-going issues with H over the course of third grade and that S and H had to be in separate classrooms in fourth and fifth grade (161, 585, 586, 735, 755). When parents advised Principal Lull of another student shoving goldfish crackers up S's nose on more than one occasion, Principal Lull's response was that she did not think this was bullying and made no indication that she would address the situation (768). Given this response, it is reasonable to conclude that a JICK form was likely to be a fruitless exercise.

At MHT, S was in a much smaller classroom and, as also set forth in the counterstatement of facts, the MHT teachers and Principal Latchaw addressed any issues regarding anxiety, attention or bullying much more quickly and effectively.

With respect to S's anxiety, the School District tries to paint a picture that parents did not do enough to provide S with counseling. The School District overlooks that parents were continually in touch with the RES guidance counselor (161, 293, 295, 305-308, 582,

585-587, 603), there was in-school counseling (307, 596), S had a good fourth grade year, and was in counseling from before she left RES and throughout her time at MHT (483). Regardless of S's progress in therapy, the fact remains that she had no school refusal at MHT. Although she might have had difficulties in the morning, as of the time of the October hearing, she was scheduled for a sleep study, the results of which could shed light on S's morning issues. (R 880-881).

The School District argues that S gained weight during between February 2017 and May 2017, her last months at RES. However, as mother explained to the MHT school nurse in June 2017, that weight gain happened during the most recent school vacation (R 544).

The School District also argues that the School Board should have considered that S's placement for the 2017-2018 school year would have been Rye Junior High. The School District does not seem to be aware that parents wanted S to repeat 5th grade due to her emotional and developmental issues, as they notified Principal Lull, Superintendent Petralia and Assistant Superintendent Killen (321,

376, 666). The ability to repeat fifth grade in a much smaller environment without a middle school structure a significant part of the parents' decision to move S to MHT.

4. The State Board properly reversed the Rye School Board's decision because the record as a whole demonstrates that the placement at RES was detrimental to the student.

The State Board again argues that they were deprived of due process because the Board purportedly did not provide an adequate basis for its decision and did not have a recording of the October 15, 2018 hearing. They focus on the testimony that S was “bubbly” and well-liked by other students and that she had decent grades and good STAR test scores. But the Record does not contain her STAR tests scores from fifth grade at RES, so a comparison is not possible. A comparison of her final report card from RES with her first quarter at MHT shows significant improvement – she went from mostly Bs to As and Bs. (R. 396-397). The School District also overlooks the fact that parents moved S to MHT to avoid the middle school structure,

which significantly impacted her attention and executive functioning issues. As they expected, without the stress of the middle school structure, for which she was not developmentally prepared, she performed well.

Finally, as one of the Board members noted at the April 11, 2019 hearing:

The principal saying she's smiling when she's walking down the hall. Excuse me. You can smile through a lot of pain and that, to me, was not an adequate fact of representation of she's doing fine because she is smiling in the hall (R 1011-1012).

5. The State Board did not violate RSA 541-A35.

The School District submitted proposed findings of fact and the Hearing Officer acted in accordance with RSA 541-A:35 in ruling on every one of them in reaching his conclusion that the assignment to RES had a detrimental or negative effect on Sydney. In Petition of Sprague, 132 N.H. 250 (1989), there were absolutely no rulings on the petitioner's proposed findings. The School District is elevating form over substance and given the Hearing Officer's findings, and would

place an unnecessary burden on the State Board, which has already had this matter on its calendar at least four times.

CONCLUSION

WHEREFORE, parents respectfully request that this Court affirm the decision of the State Board.

REQUEST FOR ORAL ARGUMENT

Parents respectfully request oral argument by Christine Blonda, pro se.

Respectfully submitted,
Christine and Eric Blonda
155 Fern Avenue
Rye, New Hampshire 03870

Date: 4/6/20

Chr Blonda
ERB
CERTIFICATION

I, Christine Blonda, hereby certify that on this 7th day of April, 2020 an original copy of Appellees' Brief has been filed by mail with the New Hampshire Supreme Court. A paper copy has been sent electronically to the attorney for Rye School District and the Attorney General's office.

Date: 4/6/20

Chr Blonda
ERB