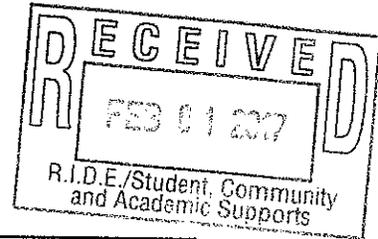


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HOBSON & COUTU, LIMITED
ATTORNEYS AT LAW

January 30, 2017

Lisa Colwell, Ed D.
Director of Pupil Personnel Services
Portsmouth School Department
29 Middle Road
Portsmouth, RI 02871

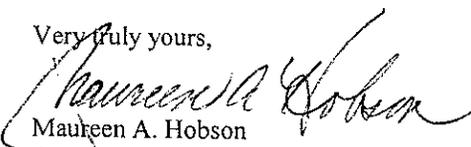
Re: [REDACTED] vs. Portsmouth School District LL 16-17

Dear Dr. Colwell:

I am enclosing herewith a copy of the Administrative Decision entered today in the above-entitled matter. Please be advised that the original transcripts and evidence are available for pick-up in my office on any weekday between the hours of 9:00 am. and 4:30 pm. Please let me know who will be picking up the file, and please advise that person to have proper identification.

My bill for services is also enclosed herewith.

Very truly yours,


Maureen A. Hobson

Cc: Christine H. Barring, Esq.
Gregory Mancini, Esq.
MaryAnn Carroll, Esq.
Kerri Sorrensen, RIDE

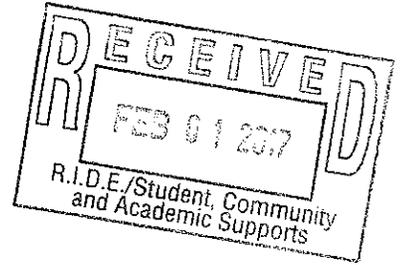
STATE OF RHODE ISLAND
PROVIDENCE, SC

DEPARTMENT OF EDUCATION

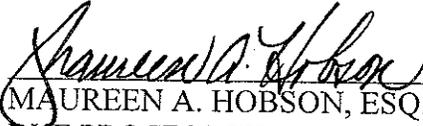
IN THE MATTER OF:

█ vs. THE PORTSMOUTH SCHOOL DISTRICT

LL 16-17



ADMINISTRATIVE DECISION


MAUREEN A. HOBSON, ESQ.
DUE PROCESS HEARING OFFICER

HELD: That the Student's IEP and placement at Portsmouth High School constitute a free appropriate public education (FAPE), and further, that the actions of staff on April 29, 2016 and July 28, 2016 did not endanger the student or amount to a denial of FAPE

LEXICON:

School District:
Student:
Parent:
Student's Attorney:

District's Attorney:
Hearing Officer:
Witnesses:

Portsmouth

[REDACTED]
Gregory Mancini, Esq.
Christine H. Barrington, Esq.
MaryAnn Carroll, Esq.
Maureen A. Hobson, Esq.
Lisa Colwell, Dir. of Pupil Personnel
Services for Portsmouth
Michelle Silva, 1-1 teaching assistant
Charity Shea, Portsmouth Special
Education Coordinator
[REDACTED], child neurologist
Marianne Packer, special education
teacher in Middletown
Sarah Kraeger, Director of Newport
County Regional Special
Education Program
Amanda Madore, Portsmouth school
psychologist
[REDACTED]
Cristen Sassi, Occupational Therapy
consultant
Abigail Velucci, Portsmouth speech/
language therapist
May Morris, Portsmouth
Occupational therapist

HISTORY AND TRAVEL

The student is a 16 year old girl who has been diagnosed with autism, and who is non verbal. The student also suffers from epilepsy and sensory integration disorder. The student has been serviced in the Portsmouth public schools with an IEP since at least elementary school. When it was time for the student to begin her high school education, Portsmouth did not have an appropriate classroom setting and/or program for her. Therefore, the student matriculated into the Middletown High School under the Newport County Regional Special Education Program. Following the student's freshman year at Middletown, Portsmouth initiated its own program and discontinued participation in the Newport County Regional program. At the start of the 10th grade, the student began attending a placement with a curriculum that was designed for her at Portsmouth High School. In the fall of 2015, the parents removed the student from her class at Portsmouth High School and filed a due progress complaint alleging that the student was being denied a free appropriate public education (hereinafter, FAPE). This Hearing Officer was appointed to adjudicate that complaint in 2015. However, at a pre-hearing conference, the parties agreed that the district would undertake to provide certain services that were being requested by the parents and that were designed to integrate the student into the Portsmouth High School program. The parties further agreed that the student would return to school in January 2016. Based on the agreement, the due process complaint was voluntarily dismissed. The student continued at Portsmouth High School from January 4, 2016 through July 28, 2016 when the mother again removed the student from the program. In September 2016, the mother filed another due process complaint that is the subject of this hearing. That complaint alleges that the district has failed to provide the student with FAPE, and that actions of the Portsmouth staff on two occasions in April and July of 2016 endangered the child and amounted to a further denial of FAPE.

The student has not returned to Portsmouth High School, nor has she been enrolled in any educational program since July 28, 2016. The parents are seeking a determination by

this Hearing Officer that the district denied their child FAPE and are further requesting that the district be required to perform additional evaluations of the child and to immediately place her in an approved alternate special education program at public expense. The parents have indicated a preference that the student be returned to the special education class at Middletown High School or to some other private special education facility. The parents have not identified any private educational facility or special education program that they allege would be appropriate for their child.

The hearings in this matter were conducted over 8 days commencing on October 25, 2016 and culminating on November 17, 2016. The parties then requested the opportunity to submit post hearing memoranda. The parties have waived the 45 day time period for the filing of a decision and have entered into a written stipulation providing for a decision to be rendered on or before February 10, 2017.*

TESTIMONY AND FACTS

The first person called to testify by the Petitioner was Lisa Colwell, the Director of Pupil Personnel Services for the Portsmouth School District. Dr. Colwell testified that for the 2015-2016 school year the student was enrolled in Portsmouth High School as a 10th grader in a self-contained classroom in the "life skills" program. Dr. Colwell described the life skills program as a classroom for students with significant disabilities, the main focus of which is the attainment of life skills within a modified academic

4.

The Hearing Officer would also take this opportunity to address a matter that came to her attention via an e mail from petitioner's counsel on January 16, 2017. The email concerns the filing of a request for an Interim Order made by the petitioners in December 2016 to the Commissioner of Education, pending a Decision in this matter. The petitioners were entirely within their rights to file their request to the Commissioner, and, the fact that they did so has not hampered or prejudiced this Decision in the least. However, in the email explaining the circumstances of the filing of the petition, counsel for the petitioners incorrectly states that the filing of the request before the Commissioner was warranted in that this Hearing Officer "declined to initiate or decide any immediate remedy." The petitioners' complaint was not processed as an "emergency hearing" and, the parties jointly agreed in writing to the lengthy hearing and briefing schedule by which this hearing was conducted to its conclusion. This footnote is being included to avoid confusion on the part of a future reviewing court as to why no "immediate remedy" was addressed in this Decision.

program. It is not a common core program, but it utilizes common core connectors. She also testified that many of the students within that curriculum are on "alternate assessment" as well.

The student started at Portsmouth High School in September 2015 in the life skills class with 3 other students. At some point in the fall of 2015, the student's parents removed her from school and filed for due process. The due process filing lead to a pre-hearing conference at which time the parties agreed that the student would return to her life skills classroom at Portsmouth High School effective January 4, 2016. When she did return to school, there were 4 students in the class, including her. The student and two others from class were eligible for alternate assessment. For the 2016-2017 school year, the student's class consists of 7 students, 4 of whom are being alternately assessed, including the student.*

Dr. Colwell testified that the student's performance on the Test of Non-Verbal Intelligence (TONI-4) placed her current cognitive ability within the very poor range, less than the 1st percentile. Dr. Colwell testified that she is aware of the student's diagnoses of autism, epilepsy and sensory integration disorder. Regarding the latter diagnosis, the student's auditory processing is the most prominent, as evidenced by the district's Occupational Therapy Report (P-20). According to the student's March 16, 2016 Psychological Assessment (R-4), at that time, the student did not have an ILP, which is a plan for her transition to independence once her education is completed. She did and does continue have a Behavioral Intervention Plan (hereinafter BIP) that was developed by Portsmouth in January 2016. The BIP identifies "triggers" to unwanted and/or aggressive behaviors. Identified triggers include new or unfamiliar tasks, people and places, as well as unexpected noises from within and without the class, i.e. from other students or from external sources like fire drills, etc. From January through June 2016,

* Though the student was scheduled to attend the 11th grade at Portsmouth High School in September 2016, her parents have held her out of school and filed their complaint for this due process hearing. The student has not attended school since July 28, 2016.

the mother had raised concerns about a boy in the life skills class who makes frequent and successive noises. The mother complained that his noise making has historically been on of the student's triggers.

The IEPs drafted for the student in May of 2016 (finalized in June) (P-10) and October 2016 (R-26) should contain assessments and post high school goals directed to the student's education, employment and independent living. At age 16, the student's post secondary school goal is for independent living and employment. Dr. Colwell stated that there was a discussion about bringing a representative from the Office of Rehabilitation Services (hereinafter, ORS) into the district to meet with the team in October 2016. That person would have assisted the district and the student to transition from the school setting to life after completion of school. The representative from ORS did not appear at the meeting, and, since then, there have been no more meetings and the child is not in school, so no planning can take place. Dr, Colwell also stated that the Speech and Language Report prepared by the district (R-5) evidences the fact that the student is non-verbal and it identifies alternate forms of communication, e.g. her ipad and pictures. Even using these communication techniques, the student has not been able to functionally communicate what interest, if any, she has concerning her educational, employment and independent living goals following completion of high school.

Dr. Colwell said that under the district's present policy, the student will not be eligible to receive a high school diploma because she is being alternately assessed. She will complete high school, but she will not "graduate".

Dr. Colwell testified that the student uses her ipad to communicate in the classroom. During her time at Portsmouth High School, her use of the ipad has increased. The district added a "shopping app" and use of a debit card to the June 2016 IEP, but the student has not been able to attain those goals at this point.

On October 4, 2016, the district conducted a meeting to address resolution of the pending due process and changes to the IEP. At that meeting, the parent requested the addition of goals and objectives in the common core academic areas. The district acquiesced to the mother's request and subsequently made modifications to the IEP.

The student also has an Individual Health Care Plan (hereinafter, IHCP) that is

incorporated into her IEP. Dr. Colwell stated that the IHCP expressly provides that restraints are not to be used and states that the classroom teacher has been instructed in de-escalation. The IHCP is dated May 11, 2016.

The student's last day in school was July 28, 2016. The mother unilaterally removed her from school on that date. Then, on August 1, 2016, the mother requested an emergency IEP meeting. That meeting was conducted on September 1, 2016. The mother was in attendance at the meeting. At the September 1st meeting, the IEP team did not recommend any changes to the IEP that had been developed in May 2016. Dr. Colwell testified that prior to the July 28th incident, the mother, in an earlier meeting on July 13, 2016 had requested an out of district placement. (P-14) Other witness testimony (discussed further herein) indicates that the mother may have made this same request to IEP team members in May or June 2016. The mother's request for an out of district placement was rejected by the district because the IEP team thought that the Portsmouth High School classroom and curriculum were appropriate to meet the student's needs.

Counsel for the Petitioner challenged the efficacy of the Portsmouth High School program because the IEP that was developed in Middletown in June 2015 for the 2015-2016 school year provided that the student would be educated in a general education classroom setting for 80% of her school day, whereas the student's present IEP that was developed by Portsmouth dictates that less than 40% of her day would be in a general or regular education setting.*

7.

*In June of 2015, the Newport County Regional Special Education Program, in conjunction with Middletown High School developed an IEP for the 2015-2016 school year. That IEP, though drafted by Middletown, followed the student to Portsmouth High School. Subsequent testimony from other witnesses establishes that the June 30, 2015 IEP states 80% general education in error. The student has never been in a predominantly general education (regular education) curriculum. She has always been in a self-contained classroom with general education opportunities. The 80% listed was just a typographical mistake.

The student's current IEP (R-26) was drafted on or about October 19, 2016 after the October 4th IEP/resolution meeting. It provides for the student to attend the life skills program at Portsmouth High School with 6 other children. ORS is a component of the IEP. There is a community component. Extended school year services are provided. A 1-1 aide is included (the same one that the student had from January through July 2016). The IEP setting is in a classroom with a special education teacher and additional classroom aides, one of whom is the student's former 1-1 aide from Portsmouth Middle School, Lindy Lopes.

Following petitioner's direct examination of Dr. Colwell, counsel for the district also inquired. Dr. Colwell was queried as to her education and experience. She has numerous educational degrees, including a doctorate degree. She was qualified as an expert in the field of special education.

Dr. Colwell identified one of the parents' complaints as being the failure of the IEP team at Portsmouth to include a regular education teacher on the team in conformance with RIDE regulations. She stated that the student's IEP teams have variously included math, social studies, art, music and physical education teachers. Dr. Colwell testified that the RIDE regulations do not define a regular education teacher for purposes of completing an IEP team. Dr. Colwell interprets the regulations to permit the use of regular education teachers outside the core academic subjects.

The mother also complained about changes in the student's schedule. Dr. Colwell testified that schedule changes are unavoidable in high school programs. When they do occur, the staff always prepares the student in advance of the change. That protocol is contained in the student's BIP.

Dr. Colwell stated that she and other district staff met extensively with the student's educators in the Newport County Regional program at Middletown High School in order to learn about her. The teachers in Middletown told the Portsmouth staff that the student had periods of dysregulation during which she engaged in injurious behaviors toward herself and others. Dysregulation at Middletown included self injurious behaviors and kicking others.

At the October 4, 2016 IEP/resolution session, the parent requested an independent evaluation for academics, to which the district agreed; an independent FBA, which the district refused, but agreed that the district would undertake its own FBA; an independent assistive technology assessment to which the parties agreed upon a more comprehensive augmentation communication evaluation; core classroom teachers on the IEP team, to which the district refused since the student was not attending core classes; a comprehensive vocational assessment to which the district agreed, as it always takes place in the 11th grade in conjunction with ORS; and an approved out of district private educational placement that the district refused. The mother had previously agreed to the program content set forth in the June IEP, all of which could be provided within the district's public school. In addition, the district was agreeing to further modify the IEP.

Dr. Colwell testified that the Portsmouth High School IEP provides the student with FAPE. She stated that the mother has kept the student out of school based on her allegations that the district improperly restrained the student during an incident that occurred on July 28, 2016. Dr. Colwell investigated the incident and concluded that staff did not restrain the student but merely prevented her from causing injury to herself. She said there was no reasonable alternative to the staff's actions on that date. Dr. Colwell further stated that the student's self injurious behaviors did not increase at Portsmouth High School based upon her conversations with staff at Middletown High School and review of the student's records. There are peaks and valleys to her behavior.

Dr. Colwell said the mother expressed concern about an increase in her daughter's seizures, none of which occurred in school, but that were apparently happening at home. Dr. Colwell testified that the student's environment at Portsmouth High School is as safe as that of Middletown High School, which is the mother's preferred placement versus Portsmouth High School. Dr. Colwell said that dysregulation is expected, given the student's profile, but that the team has strategies to curtail it and would work on further strategies to keep her regulated should she return to Portsmouth High School.

Dr. Colwell also testified that the student is facing truancy proceedings since she has not attended school at all in the 2016-2017 school year. Those proceedings are being

held in abeyance pending the outcome of this hearing.

Michelle Silva has been the student's 1-1 aide in her class at Portsmouth High School from January 2016 to the present date. She is still assigned to the student, though the student has not returned to school since leaving in July 2016. Prior to commencing her duties as the student's 1-1 aide, Mrs. Silva received information about the student from the district, and she received training from the student's previous aide. She also received training from the Autism Project consultant who the district had brought into the school to help in transitioning the student into the school environment and to provide Silva with coping skills to be used with the student. Mrs. Silva has been a special education aide in Portsmouth for six years. Previous to that time, she was an aide in the Tiverton School system.

Mrs. Silva testified that she is familiar with the student's behavior plan as well as her health care plan. As the student's 1-1 aide, Mrs. Silva was with her throughout the school day. She stated that no aversive actions were ever undertaken, nor were restraints used with the student. Mrs. Silva said that the things that triggered the student's dysregulation changed from day to day. Some times things that happened in class on a particular day could trigger her, whereas the same thing occurring on another day brought no reaction at all. Mrs. Silva was asked whether any specific student or thing caused dysregulation. She stated that she could not pinpoint any one thing. She said that when the student becomes agitated for whatever reason, she can engage in injurious behavior toward herself or others. Mrs. Silva recounted that during the period from January 2016 through July 2016, there might have been ten instances of this behavior that lasted anywhere from 3 minutes to 1 hour. During those times, the student was off task and not attentive to her school work.

Mrs. Silva testified as to the events that occurred on April 29, 2016. Mrs. Silva was in the break room having lunch when she heard that there was an incident in the classroom. She left lunch and went immediately to the classroom. When she got there, she learned that the student was acting out aggressively toward a teacher and another child in the

class. Mrs. Silva and other staff directed the student to exit the classroom. Mrs. Silva escorted the student from behind her to prevent her from turning and again striking out at the other child. Mrs. Silva took the student to a quiet area where she calmed down. Once calm, Mrs. Silva took the child with her to the lunch room. In the lunch room, the student approached and kicked her own sister. At that point, Mrs. Silva took the student back to the classroom where they had lunch together. Following lunch, the student was fine throughout the rest of the day. Mrs. Silva stated that she did not place her hand on the student at all that day, and no restraints were used. She said she was able to verbally direct the student to the "quiet" area. Per the school protocol, a maladaptive behavior report was filled out and sent to the mother. Mrs. Silva testified that there were other dates wherein dysregulation occurred. On each of those occasions, Mrs. Silva made a maladaptive behavior report describing the incident. The reports were submitted to the teacher, and as far as Mrs. Silva knows, copies were forwarded to the parents as well.

Mrs. Silva was asked about what occurred on July 28, 2016. She testified that the student came to school that morning in a very happy mood. She followed her school routine. They had art class, then music class with the teacher and one other student. Mrs. Silva stepped into the adjoining room to collect items that were needed for the next lesson. When she returned to the music room, she found that the student was self-stimulating. Mrs. Silva directed the student to place her hand on her chest and apply pressure. This was a procedure that had been taught to Mrs. Silva by the Autism Project consultant. Mrs. Silva tried to re-direct her several times, at which point, the student got agitated and started biting Mrs. Silva's hand. She also kicked her. Mrs. Silva then told the student that they needed to go to the "red room", a quiet secure area that is used for de-escalation. The student got up and began walking. Enroute to the red room, the student abruptly threw herself onto the floor. Mrs. Silva dropped down to secure the child from hitting her head on a desk that was in close proximity. Once on the floor, the student started kicking Mrs. Silva again. Mrs. Silva waited for her to calm down. Mrs. Silva then stood up and asked the student if she was "ready". At that point, the student got up off the floor and walked to the red room where she regained her composure after a minute or two.

She returned to class and was fine for the rest of the day. The student was directed to the red room on that date because she was self-stimming (masturbating), an activity that the mother wanted curtailed. In response to the mother's concern regarding this behavior, the school developed a protocol of verbally directing the student to use her hand to compress her chest. She was directed to the red room whenever she refused verbal instruction and experienced increased agitation culminating in self injury or aggression toward others as was the case on July 28, 2016. Mrs. Silva described the red room (red zone, red area) as a safe secure area where students cannot hurt themselves. It is a padded room.

Mrs. Silva testified that she has taken multiple courses and training sessions, some of which addressed autism. She was taught how to "read students" and how to achieve de-escalation without the use of restraints. In addition, Mrs. Silva's training with the student's former 1-1 aide helped her to understand and communicate more fully with the student. The student communicates with Mrs. Silva through her ipad, pointing at things, walking away from unwanted activities, etc. Silva said she stayed on as the 1-1 aide throughout the summer of 2016 in the extended school year program so the student would not regress. Mrs. Silva thought that the child made good progress from January through July 2016. She increased time spent on task with Mrs. Silva's assistance from 20 to approximately 40 minutes. She also began tolerating the time she had to spend with other staff members, e.g., the occupational therapist. This was something that she would not tolerate upon her arrival in January. She increased her sentence structure from 3 to 7 words, increased her math skills and developed the ability to follow a schedule. Mrs. Silva said she made emotional progress, too. Her instances, and lengths, of dysregulation and outbursts decreased over that period of time. Where they used to last 20 minutes or more, they were down to an average of 5 minutes per episode. Mrs. Silva believes that the incident occurring on July 28, 2016 represented a huge success in as much as it only lasted approximately 5 minutes. Mrs. Silva said that though the mother reported that the student was experiencing seizures at home, she never had a seizure at school.

The next witness called was Charity Shea, the Special Education Coordinator at Portsmouth High School. In her capacity as such, she said she was familiar with the student, though she does not provide any direct service to her. She is aware that there was a BIP that was developed by the school psychologist in January 2016. She is not aware of any functional behavioral assessment (hereinafter, FBA) having been undertaken. Mrs. Shea said that she has observed the student in class a handful of times. She is aware of the student's triggers, e.g. loud noises, lack of advance direction, changes in schedule, changes to curriculum or staff, etc. only through secondary sources. She has not observed them. She is not aware of any particular student who triggers the student's episodes, nor has she seen any reference to that from service providers. Mrs. Shea testified as to the make-up of the student's 10th grade and 11th grade classes. The 11th grade class consists of 7 students, a teacher, the student's 1-1 aide and 3 other aides, one of whom is the student's former aide from middle school, Lindy Lopes.

Mrs. Shea attended all of the student's IEP and parental meetings as the district representative. She recalled meetings wherein the mother complained about the high school schedule that includes switching periods and the order of classes, assemblies and other things common to a high school agenda. She also complained about staffing changes. To address these issues, the district instructed the 1-1 aide and other personnel to "advance prepare" the student for schedule changes and other things that were out of her routine. They also created a pool of consistent substitute staff so that the student would be familiar with the subs in the event that her aide or teacher was ill or otherwise out of work. All of the staff assigned to the student regularly or as subs were trained in dealing with students with autism. Mrs. Shea testified that there was a general education teacher at each of the student's IEP meetings* Input from the general education

*except at one meeting where she believes the mother waived the attendance of a general education teacher. There were approximately 11 meeting held between Sept. 2015 and July 2016, but they were not all IEP meetings. The requirement of a general education teacher applies only to IEP meetings. Of the 11 meetings conducted, only 2 were formal IEP meetings. The other IEP team meetings were held at the request of the mother.

professional depended on the level of involvement. The student was being alternately assessed, so the general education teachers may not have had significant input, but they were present at the meetings and contributed to drafting the IEPs.

The mother also complained about concerns she had for the student when she was getting on and off the bus with another child, a boy who the mother said was a trigger for her. To alleviate this concern, the district arranged for a 1-1 aide to walk with the student to and from the bus alone without proximity to the other child.

Mrs. Shea stated that at a meeting conducted on January 19, 2016, the mother requested that an outside evaluation be performed by Dr. Prizant. However, the district decided to perform its own evaluations. (P-3) The district agreed to complete a psychological evaluation, occupational therapy evaluation and a speech/language evaluation. Those were completed. The mother was also seeking an FBA, but it was agreed that the team would use classroom observations as part of a behavior plan. There were subsequent meetings in April and May 2016. (P-9, P-10, R-24) wherein there was discussion of post school goals of independent living, employment and education, i.e. daily living skills, understanding time, personal needs, handling money, etc.

Sometime in March 2016, the student's service providers approached Mrs. Shea questioning whether the classroom teacher, Mrs. Rollings was providing the student with instruction in conformance with her IEP. Mrs. Shea said that she addressed the issue with the teacher to make sure she was adhering to the goals and objectives set forth in the IEP. In addition, there was a binder for each student in the class from which lessons were "pulled". Mrs. Shea made sure that the teacher was utilizing it. The binder was put together by Mrs. Shea and the school psychologist. To the best of the witness' knowledge, the teacher followed the binder. The school psychologist was in the classroom often and monitored the instruction. Mrs. Rollings had also been the student's ESY teacher when the student was transitioning from Middletown to Portsmouth in the summer of 2015. She has since left the employ of the Portsmouth School District.

Mrs. Shea testified that on several occasions, and particularly at a meeting on June 1, 2016, the mother requested an out of district placement. She further said that her daughter was experiencing increased seizure activity at home that she attributed to the school environment. An out of district placement was rejected because the team felt that the services they were providing to the student at Portsmouth High School constituted FAPE, and that the student was making educational progress. There has been no evidence at all of any seizures occurring at school

The student's child neurologist, [REDACTED] MD was called as a witness. Based upon [REDACTED] education and experience, he was qualified as an expert in child neurology. [REDACTED] testified as to the student's diagnoses of autism and randomly occurring seizures (epilepsy) that appear to have no specific trigger or causation. With respect to her autism diagnosis, [REDACTED] stated that one of the student's social triggers is the high pitched voice of a boy in her class. This was as reported to him by the mother. [REDACTED] has never been to the class or observed the student in it. He said that the student's triggers cause her anxiety and high blood pressure that can manifest in self injurious behaviors or aggression toward others. [REDACTED] sees the patient twice per year. He last saw her in an office visit on May 3, 2016. He stated that she was comfortable during that visit despite the fact that he had moved to a new office, that she was on task, and that she communicated with him through her ipad.

[REDACTED] testified as to the student's regression within the year prior to May 2016, as exemplified by her increased seizure activity and instances of self injurious behavior or aggression toward others. These were things that the mother reported to him. On August 12, 2016, [REDACTED] drafted a letter (P-57) suggesting consideration of a change in educational placement to "a school that can support her significant needs".

On cross-examination [REDACTED] stated that preparation for his testimony at the hearing was limited to reviewing his office notes from the visit of May 3, 2016.

He did not, nor did he ever, speak with anyone from either the Portsmouth School District or the Newport County Regional Special Education Program. He could not recall whether any of the student's seizures had occurred at school. He stated that his only knowledge of her school program, seizure activity and increased aggression came to him via reports from the mother. His letter of August 12th details the type of school program that he feels the student requires, but he admitted that he has not observed the Portsmouth program, nor is he familiar with it. So, [REDACTED] was not able to say that the student's current program at Portsmouth High School is not providing the educational program he envisions in his letter. This Hearing Officer inquired of [REDACTED] why he was recommending placement other than Portsmouth High School and what he was hoping to gain that she was not getting at Portsmouth. Though he is not familiar with any of the services being provided in Portsmouth, [REDACTED] said he was concerned that her environment is contributing to the student's anxiety that then results in the increased seizure activity and aggressive behaviors reported by her mother. He said the issues relate to her sensory environment, among other things; her "auditory, sensory, tactile, digital stimuli" and how loud and/or busy her environment is, as those things make her much more anxious if they are not regulated. He stated that the student needs "a plan for transitioning as well as to help warn her of upcoming activities and to keep a constant schedule through the day". He stated that if she experiences anxiety at school, it could extend beyond the school day and trigger events occurring after the school day. [REDACTED] stated that he was not advocating a particular setting or specific school, just noting that the student needs help with transitioning, advance planning, communication and a plan to manage her seizures. He said a 1-1 aide would be important to the student for communication as well as having communication devices available to her. He further stated that any classroom environment for the student would need to be adjusted for lighting and volume of noise. The other kids in the room would need to be fairly "matched" to her. She needs a consistent day with transition warnings built in and the ability to seek out a calmer setting and/or ask the aide for that when she feels overwhelmed. The 1-1 aide should be able to read the student's cues for mounting anxiety. He said the aide can be particularly helpful in escorting the student to a quiet

area where she is able to re-gain herself when her anxiety escalates. He indicated that management by the aide can be difficult because of the self injurious behaviors and aggressive actions that may be directed at the aide. He said the aggression toward the aide is not focused on the aide, but is a result of the child's anxiety. In the event of self injurious behavior or aggression toward others, [REDACTED] testified that it may be necessary for the aide to "try to restrain the child, hold their arms to their side, try to get eye level and try to speak with them in a calm, reassuring voice" reassuring them that they are going to take a sensory break to distract the child from her frustration. It is the job of the aide to read the child's body language to determine when she is stressed and to help her come to a more relaxed state.

The next witness was Marianne Packer, the special education teacher for the 9th grade in Middletown. She was the student's 9th grade teacher when the student attended Middletown High School through the Newport County Regional Special Education Program during the 2014-2015 school year. Mrs. Packer said she participated in developing the student's IEP and that her instruction was aligned with the IEP. She could not remember how many kids were in the class, but she did remember that the student had her own 1-1 aide. She said that there were actually two 1-1 aides who serviced the student on a rotating basis. Mrs. Packer said that the student sometimes engaged in self injurious behaviors, like biting her hand. The Middletown staff response to these behaviors ranged from "planned ignoring" it to needing to remove her from the classroom for a break before re-joining the class when she had calmed herself. Mrs. Packer could not recall any specific incidences of aggression against others. Mrs. Packer said that she met with Dr. Colwell regarding the student's transition from Middletown High School to Portsmouth High School, but she could not recall the content of their discussion.

Sarah Kraeger, Director of the Newport County Regional Special Education Program testified that she has known the student since the student was 3 years old and transitioning from the Early Intervention program to the Newport County Regional

Special Education program* At that time, Portsmouth did not have its own special education program, so services were provided in Portsmouth but under the auspices of the Newport County Regional program. As the Director of Special Education for the Newport County Regional program, Mrs. Kraeger facilitated the student's IEP meetings. She said that the student's instruction in Middletown followed her IEP and that she made progress when she was in Middletown. Mrs. Kraeger testified that the Newport County Regional Special Education program would be amenable to accepting the student back into the program if there were a decision to that effect. Mrs. Kraeger testified that the student attended Portsmouth schools from K-8th grade, Middletown High School in 9th grade, after which time she was returned to Portsmouth commencing in 10th grade.

Mrs. Kraeger clarified that the Newport County Regional IEP that she helped develop (R-23) contains at least one error. The IEP misstates the student's classroom as being "inside regular class more than 80% of the time". She said that was computer error. The student's IEP actually should state that she was to be in a regular classroom less than 40% of the time.

Amanda Madore is the school psychologist at Portsmouth High School. She testified that she serviced the student from January-July 2016 in her position as consultant to the life skills program. Dr. Madore started her position at Portsmouth High School on or about October 28, 2015, the same day that the student was removed from school by her parents for the first time. Despite that, in anticipation of the student's return to school, and in collaboration with the IEP team, Dr. Madore began drafting a BIP for the student immediately upon commencing her employment. Dr. Madore said she was aware of the student's diagnoses of autism, epilepsy and auditory sensory processing integration disorder. Dr. Madore did not have an opportunity to meet with the student before drafting the BIP, but she did review records and speak with the classroom teacher (Mrs. Rollings), the special education coordinator (Charity Shea), the student's former 1-1 aide (Lindy Lopes) and the mother. The BIP that Dr. Madore and the team prepared

* Early Intervention (E.I.) is a program by which individuals with disabilities are identified at an early age and provided services until they are transitioned into the local public school system.

included information about self-injurious behaviors, aggression, general non-compliance (or "task refusal") and eloping. Those were concerns that were conveyed to her by the aforementioned people. The BIP identified triggers for those behaviors as being new and unfamiliar tasks and places and noises that occur within the class. There was discussion about conducting an FBA, but they agreed that an FBA would be done in the 2016-2017 school year after they had an opportunity to observe the student in school. Since the student has not returned to school this year, there has been no FBA. Mrs. Madore was aware of the letter from [REDACTED] wherein he referred to vocalizations of another child in class as being upsetting to the student. Portsmouth had already addressed that concern prior to receiving [REDACTED] letter. Dr. Madore said that there is a boy in the class who occasionally makes spontaneous vocalizations. The student's mother complained about the peer noises to Portsmouth staff. In response to the mother's complaints, staff attempted to minimize contact between the two students by staggering their schedules and separating them spatially within the classroom. Dr. Madore did recall one incident in the classroom when the student kicked the boy. There were no incidents that she could recall involving the two students and the bus. Dr. Madore did say that the student kicked staff members on rare occasions and once, a random student in the hall. In general, she stated, behavioral interventions are in place to separate the two students. Dr. Madore testified that the vocalizing student was just one trigger of many that could cause dysregulation. The BIP addresses them. Counsel for the parent quizzed Dr. Madore as to whether she was concerned that the peer vocalizations could cause the student to have an epileptic seizure and possibly die. The witness testified that the students are not in proximity to each other, and that the student has never experienced a seizure at school.* Dr. Madore said that all noise; any noise could be a trigger e.g., the district identified noise in the hallway and cafeteria. It is not confined to peer vocalizations,

Dr. Madore also described the "red break area" as did other witnesses. It is a quiet

*There is no evidence anywhere in the record that would support a finding that the student has experienced seizures during the school day.

room with padding on the floor and walls where students can go voluntarily or at staff suggestion in order to relax or calm down from a period of dysregulation. According to the maladaptive logs that the school keeps, the student had occasion to utilize the "red area" 10 times during the 4th quarter of the 2015-2016 school year. There is a door to the room, but it is always open and students are closely monitored while inside it. If dysregulation involved aggression or self injurious behavior, the school nurse is also called to evaluate the child for injury. The current BIP does not address use of the red area. The red area is a resource for attaining regulation when staff is not successful in addressing a student's dysregulation in the classroom. The red area is used in addition to the strategies identified in the BIP. The use of the red area is a judgment call on the part of the teacher or 1-1 aide who is present in the classroom.

Dr. Madore testified that she is aware that the mother made a request for an alternative out of district placement on at least one occasion on July 13, 2016. The team rejected the request due to the progress that the student had made at Portsmouth High School with her IEP goals and her increased ability to maintain time on task. The witness explained that although the student's time on task with peers was 5-10 minutes, her time on task with her teacher and 1-1 aide had increased to between 20-40 minutes. Dr. Madore testified that in assessing the student's progress at Portsmouth High School, the team relied on material that they had gathered from January through April in anticipation of drafting a Portsmouth IEP in May 2016. The IEP that was in place for the 2015-2016 school year was drafted in Middletown. The IEP was due for renewal by the Portsmouth School District in May of 2016.*

Dr. Madore testified that the life skills classroom teacher did reach out to her for help and support. Dr. Madore said it was the first time that the teacher was working with a severe and profound population in the life skills program, and they worked together

* At the end of the 2015-2016 school year, Middletown drafted the IEP for the 2015- 2016 school year as, at that time, Portsmouth had not yet formally withdrawn from the Newport County Regional Special Education Program. The Middletown IEP was implemented in Portsmouth High School for the 2015-2016, and it continued through May 2016.

to create an environment for the life skills classroom that was in its first year at Portsmouth High School. She stated that it was a collaborative effort. Dr. Madore said she was in the student's classroom daily. She had no concerns about the teacher, Mrs. Rollings. She said that Mrs. Rollings was looking for tools to appropriately teach the student, and staff assisted her in that endeavor. They developed "teaching binders" for each student in the class that could be used by the teacher, the aides and/or any substitute personnel. She said that there was a specific pool of substitute personnel for the class who were trained in and cognizant of the needs of the students in the class, and who were known to the students, and , therefore, familiar to the students.

The witness testified extensively as to the topics, goals and strategies that were utilized in drafting the student's IEP in May 2016 and in re-vamping it in October 2016. They included, among other things, the addition of transition goals in response to the mother's request and as part of the resolution of the due process claim. From the commencement of her employment through the end of the school year, Dr. Madore met with the mother and the team approximately 12 times. She received 50-60 e mails from the mother and spoke with her 1-2 times per week. The current IEP has not been implemented because the student has not returned to school since July 28, 2016. If she were to return to school, she would be with 6 students in the life skills classroom. There is a new classroom teacher. Mrs. Silva would continue as the student's 1-1 aide. The boy about whom the mother complained continues to be in the class, and the "red area" would continue to be used as it has in the past. Dr. Madore stated that the student made progress at Portsmouth High School in reading and math. In addition, she was making progress in recognizing her own dysregulation and was seeking her own ways to allay it. She was also making strides in her communication skills.

The next witness was the student's mother. She stated that she is a founding member and current president of the National Autism Association. She stated that she talks to parents across the country every day about the challenges facing parents of autistic children with respect to their education.

The mother testified that her daughter has autism, sensory integration disorder and epilepsy. She has had an IEP since she was 4 years of age. The mother said the student

attended elementary and middle school in Portsmouth under the direction of the Newport County Regional Special Education Program. She said that problems first began in the latter portion of middle school when the student started eloping from class and engaging in aggressive behavior toward a boy in the class. The student was fitted with a "tracking bracelet" to detect her whereabouts when she eloped, and school personnel separated her from the boy who was the object of her hitting and kicking episodes. The aforementioned actions eliminated those problems in middle school.

The transition from 8th grade in Portsmouth to 9th grade at Middletown High School went very well according to the mother. At Middletown, the student had two 1-1 aides, and they alternated days with the student. The mother said that her daughter progressed well at Middletown. She was placed in a special education classroom and went with her 1-1 aide to regular education classes for some core subjects. She increased communication skills with her ipad. The mother met monthly with Middletown staff. She said there was only one Middletown IEP meeting that occurred at the end of the school year. The student commenced school in Middletown with an IEP that had been developed in Portsmouth at the end of 8th grade. That IEP remained in place when the student transferred from Portsmouth to Middletown. The mother testified that there were no instances of aggression at school or at home while the child was attending school in the Middletown.

When Portsmouth separated itself from the Newport County Regional Special Education Program, the student returned to Portsmouth where she entered high school in the 10th grade. When the student returned to Portsmouth, the district temporarily arranged for her previous middle school aide, Lindy Lopes to train the new 1-1 aide (s). However, there was a turnover in aides, and according to the mother, by October 2015, the student was with her fourth 1-1 aide. Meanwhile, two or three weeks into the school year, the prior 1-1 aide returned to her regular assignment and was no longer available to the student. According to the mother, the student's unfamiliarity with the new aides caused her to become frustrated and agitated to the point of crying. In October, the mother removed the child from school and filed a due process complaint with RIDE. That complaint was resolved in January 2016 when the district hired a permanent 1-1

aide and brought Ms. Lope back to train the new aide for approximately a two week period. The student was out of school that time from October 29, 2015 until January 4, 2016. The mother said that the training of Mrs. Silva by Ms. Lopes went well, but that when Ms. Lopes left again, the student began to exhibit renewed anxiety and aggression. However, the mother said that by February, 2016, the student was doing fairly well in school.

The mother said she had more or less monthly meetings with Portsmouth wherein she requested further evaluations, an FBA and a transition evaluation, among other things. The mother was also concerned about the student's communication skills. The mother felt that the student was using her ipad with greater frequency in Middletown than she was in Portsmouth. She said that the student's 3rd quarter report failed to include any measurable data regarding the student's progress toward her goals. In March 2016, the IEP team began discussing the student's future IEP to be drafted in May for the 2016-2017 school year. The mother said she continued to advocate for more evaluations before completing an IEP. She said that her daughter experienced a downward spiral from March 2016 until June 2016. The IEP team met in June to finalize the student's new IEP. The mother testified that at that meeting, she requested an out of district placement for her daughter. The IEP team refused her request, and, according to her testimony, the team members said that they required more observation and additional data before determining whether an out of district placement would be appropriate. The mother did accept and sign the IEP proffered by the district in June. However, she said that she was concerned about the inconsistency of staff.*

The mother said that the student's 4th quarter progress notes indicate that her aggressive behaviors at school increased beginning in March of 2016. The school

*The testimony and evidence demonstrate that once the student returned to school in January 2016 and Mrs. Silva was hired, she was the exclusive 1-1 aide for the student from January 2016 through the present, notwithstanding that the child has not returned to school in the 2016-2017 school year. During the period from January-July 2016, according to a chart that the mother made (P-35), the aide was out 6 days and left early twice. The classroom teacher was out 8 times during that same period. Reasons for the absences were not addressed in the hearing. Presumably, the specially trained substitutes who were familiar with the students were in attendance those days.

psychologist gave her a detailed report of behaviors (P-13), but the mother said it was not sufficient. Staff said that aggression was infrequent, but the mother wanted to know why it was happening at all. She said the student was frustrated and crying a lot at home, kicking walls, staying alone in her room and sometimes, refusing to attend school. The mother testified that the student had experienced twelve seizures since returning to Portsmouth, whereas there were only two during her year at Middletown High School.

The mother said that the student's 4th quarter report shows a regression in the student's "time on task" from 40 minutes in March to 10-20 minutes in June.*

The mother related information about an incident involving the student that occurred on April 29, 2016. The mother was not present to witness the incident, but she got a report of it from the staff (P-30). According to the report, on that date, the student grabbed a teacher's wrist twice then kicked her as Mrs. Silva was attempting to bring her to the red area. The report indicates that Mrs. Silva took her by the arm to lead her to the red room. After a short interlude, she calmed down and was returned to the classroom.

The student's last day of school in the district was July 28, 2016. On that date, the student kicked her 1-1 aide, Mrs. Silva. The mother was given a maladaptive behavior report from the school staff. Counsel for the parent introduced 4 photographs depicting the student with various bruises. (P-73). One picture shows a bruise on the under side of the student's right arm. It is not clear where the student sustained that bruise, at home, at school or elsewhere. The other 3 pictures show bruises to her hand, forehead, foot, leg and knee. All of these bruises were sustained at home when the student banged her head and kicked the home entertainment center. She also sustained bruises to her hand from biting it. The aforementioned injuries were all self-inflicted while the student was at home.

* Other witnesses testified that 40 minutes was a reference to time on task with the assistance of the 1-1 aide or teacher, whereas 10-20 minutes referenced her time on task with peers.

Following that incident, on August 1, 2016, the mother requested that the district convene an emergency IEP meeting. A meeting was held on September 1, 2016.* The mother alleged that the child's BIP was not being followed, that she was "restrained" in contradiction to her BIP, and that her physical and emotional health were in jeopardy. The IEP was not changed as a result of the September 1st meeting. Thereafter, the mother said she hired an attorney and filed for due process.** At an October 4, 2016 IEP/resolution meeting, the district did present a revised IEP that included suggestions that had been made by an independent educational consultant in September. According to the mother, the district did not offer any evaluations on October 4th.

The mother further complained that the student was not enrolled in any general education courses at Portsmouth High School with the exception of chorus. She also stated that she was unaware, until August 2016, that her daughter would not receive a diploma upon completion of high school. The student does not qualify for a diploma because she is being "alternately assessed". The mother did admit that the child has been alternately assessed since at least the third grade. She also said that she felt that the Portsmouth High School self-contained classroom provided the least restrictive environment for her daughter. However, she stated that the student should be with typically developing peers for part of the day.***.

On cross-examination, the mother testified that she agreed with, approved and signed all of the student's IEPs through grade 9, irrespective of whether there was a general

* After her August 1st request, and prior to the September 1st meeting, the mother filed a complaint with RIDE relative to the lack of timeliness of the response from the district to her request for an emergency meeting. The complaint was dismissed upon a RIDE finding that though she was not contacted directly, her attorney had been timely contacted.

** The testimony and evidence reflect that the mother sent copies of her August 1st request to Attorneys Barrington and Mancini, thereby inferring to the district and its counsel that she had retained attorneys. The district's attorney was ethically required to contact the attorneys and not the client directly.

***There is testimony on the record that typically developing peers were brought into the self-contained classroom program.

education core subjects teacher present at the IEP meetings. The IEP meeting notes indicate that there were various general education teachers in attendance at the IEP meetings, including, but not necessarily limited to, chorus/music, art, physical education and social studies. The mother stated that her attorney told her in August 2016 that those teachers, with the exception of the social studies teacher did not meet the regulatory requirements for the presence of a general educator at IEP meetings. The mother does not know if that is true, only that she was told so by her attorney.*

The mother testified that she did agree with the content, goals and needs contained in the IEP that Portsmouth School District developed when the student was entering the 9th grade in Middletown. She also agreed to the alternate assessment. She stated on direct examination that she wanted the district to send her child back to Middletown High School as her out of district placement. She was in a self-contained classroom in Middletown, as she was in all her previous school years in Portsmouth. She said she was satisfied with the 9th grade IEP and thought that it provided the student with FAPE. The mother was shown an Autism Project report (R-57) from January 27, 2007 and a September 20, 2010 e mail from the Portsmouth school psychologist (R-58) that document student behaviors of kicking, screaming and hurting others as conduct exhibited by the student dating back many years prior to her arrival at Portsmouth High School. Another Portsmouth school psychologist had prepared an FBA in November 2010 wherein she noted targeted behaviors as eloping, striking and kicking, and dropping to the floor. (R-55) Likewise, the special education assessment dated in March of 2012 (R-54), identifies crying, striking others and hand biting as some of the student's exhibited behaviors. The mother acknowledged those behaviors having existed over the years, but she attributes all of them to the aforementioned boy in class who makes noises and from whom her daughter is separated at Portsmouth High School. She further admits that there is no documentation that the boy is a "trigger" for her daughter.

The mother stated that she is aware that Mrs. Silva is continuing as the 1-1 aide assigned to the student this year, and, further, that the student's former aide, Lindy Lopes, has now joined the student's self-contained class as a classroom aide.

*Another reference to the fact that the mother had hired attorneys as of August 2016.

Following the October 4, 2016 IEP/resolution meeting, the district agreed to perform a number of evaluations requested by the mother and made some changes to the student's IEP. However, the student never returned to school, and the district did not receive a reply to the proffered IEP, so the evaluations could not be completed, nor the IEP implemented.

The mother said she is seeking to have her daughter returned to Middletown High School where she said she was "thriving", was safe, and was not engaging in any maladaptive behaviors.

Cristen Sassi, an occupational therapist working with the Autism Project testified that she met the student during the summer of 2015 at the extended school year program. Portsmouth hired her as an independent consultant. Originally, Ms. Sassi was hired for 8 hours per week, then in the fall of 2015, it was reduced to 6 hours, and now it is 4 hours per week. She said that she spent considerable time with the student, 4 hours per week from January-June 2016. She stated that she observed that the student has developed a strong connection with her 1-1 aide, Mrs. Silva. She stated that all students with an autism diagnosis dysregulate at times. She has witnessed the student being dysregulated, both excited (hand clapping) and anxious (hand biting). Ms. Sassi recommends use of the red room as a quiet place without stimuli where dysregulated students can re-gain composure. Ms. Sassi testified that she was part of the transition process when the student returned to the classroom in January 2016 after having being out of school since October 2015. She stated that Mrs. Silva has been great for the student. She has won the student's trust, increased the student's communication skills and has been able to obtain more focus and attention to school work. Ms. Sassi believes that the student would benefit even further if she were returned to the 11th grade in her Portsmouth High School class because there are more students this year who are higher functioning, and because the staff is "excellent".

Abigail Vellucci, the Portsmouth High School speech/language teacher testified regarding her experience with the student at Portsmouth High School. Ms. Vellucci provided direct service to the student via 1-1 and small group interactions. She also provided indirect services through staff and parent contact. She attended 6 or 7 meetings with the mother and had frequent e mail contact with her.

Ms. Vellucci said the student's communication methods include pointing at things, leading people to what she wants, and through use of her ipad that she can tap, and it speaks. Her predominant use of the ipad is to make requests. However, the speech and language staff was moving in the direction of teaching the student to use it to make conversation, e.g. to express comments and preferences. Ms. Vellucci said the student can communicate with short sentences using the ipad. She testified that the score earned on the student's speech/language evaluation on March 15, 2016 was low because the student was measured against typically developing peers. In reality, Ms. Vellucci said she was able to concentrate on the task and did quite well.

Ms Vellucci testified that the aforementioned boy in the class is not necessarily a trigger for the student. The student has many triggers, e.g. fire drills, music/chorus noise, and occasionally, unexpected noise from the boy, as well as from other sources. She said that sometimes these things bother the student, other times they pass unnoticed. Staff has been trying to develop ways for the student to communicate her emotions and feelings other than by dysregulation. Ms. Vellucci did say that coming back to school, after having been out so long, will require transition, as it did in January 2016. She suggested perhaps that they may employ a "shortened" day when she first re-enters school. But, Ms. Vellucci feels that with her 1-1 aide with her, her former aide in the class, and the array of services available, the student will adapt.

On cross-examination, Ms. Vellucci stated that the student's communication skills had increased during her time at Portsmouth High School, e.g. her length of communication and the number of people with whom she communicated progressed throughout the year.

Ms. Vellucci said she had frequent contact with the mother, as did other staff members. Ms. Vellucci thought that some of the mother's demands on the staff were unreasonable. She said the mother complained often about the kinds of things that happen every day in school, such as changes in schedule or people. Furthermore, she felt that the mother was particularly focused on the boy in her daughter's class, whereas the student had many and varied triggers. Ms. Vellucci said that she only witnessed one instance of dysregulation. She observed the student kick her aide once because she was upset that Ms. Vellucci took her ipad from her in order to work on it.

May Morris is the district's occupational therapist. She also has a master's degree in the mental health field. She has serviced the student since 2007, with the exception of the year that the student was in Middletown. When the witness first met the student, she was in the 2nd grade. Ms. Morris said the main thrust of her therapy was in the area of communication, as it appeared that the student's dysregulation was tied to her inability to communicate her needs. As the staff worked with the student and learned from her, the student's periods of dysregulation diminished. Ms. Morris stated that the student's transition from elementary to middle school was challenging inasmuch as the student is not comfortable with change. Ms. Morris testified that the student has kicked her and other staff members at times over the years, but Ms. Morris explained that it was not a serious attempt to hurt anybody, just her way of communicating. She said the student has had a history of dropping to the floor, biting her hand, flapping her hands and self-stimming (masturbating) over the years, but that these activities decreased from elementary to middle school years. She said that sounds made by other students do agitate the student. Other sources of dysregulation include changes of any type, attempting to have the student engage in an activity that she does not want to participate in and/or attempting to terminate an activity that she does not want to leave.

Ms. Morris said she has seen considerable progress with the student over the period from January 2016 through July 2016. The student is keyboarding at a faster rate, using spacing, caps and punctuation. She has also acquired some life skills, such as, manipulating zippers, tying her shoes, folding laundry, handling money, following cooking recipes and buttoning and unbuttoning clothing. Ms. Morris stated that the student will not have forgotten the skills that she acquired in school, but upon her return to school, there will be a period of social adjustment and re-integration into the class. Ms. Morris believes that the Portsmouth High School self-contained classroom is a safe place for the student with a teacher and three "great" aides, a room with a separate area for "quiet", and an adjoining room with sensory equipment for "breaks". She testified that the classroom has been re-organized in the 2016-2017 school year to provide better space. She said the classroom space is less distracting and more structured than previously. The student population is also larger and more diverse. There are more

student role models in the class. Ms. Morris said the changes in the classroom this year were already in place at the start of the school year and were not in response to any due process complaint.

FINDINGS AND CONCLUSIONS

The parents have commenced this due process proceeding challenging the appropriateness of their daughter's individualized education plan at Portsmouth High School. In addition, the parents allege that the actions of the Portsmouth school staff are contrary to their child's BIP and that those actions included the use of "restraints" in violation of her BIP and thereby negated a safe school setting and FAPE. The parents have requested a finding that the Portsmouth School District did not provide their daughter with FAPE, and they allege that they are entitled to an Order from this Hearing Officer placing their child at Middletown High School. It is the legal and evidentiary burden of the parents in this case to prove that the district did not provide FAPE for their child from January 2016 through the present date. Schaffer v. Weast, 126 ScD 528 (2005). Where the parents are seeking relief, it is their burden to establish the district's responsibility to bear the cost of an out of district placement. Coventry Pub. Sch. v. Rachel J., 893 F. Supp 2d 322 (D.R.I. 2012) Further, should they be successful in meeting that burden, they must also prove that their choice, Middletown High School, can reasonably be predicted to provide FAPE where Portsmouth has failed to do so. Florence County Sch. Dist. Four v. Carter, 510 US 7, 114 S.Ct 361, 121 L.Ed 2d 284 (1993). Regarding placement somewhere other than Middletown High School, the parents herein have not identified any out of district private school placement that they allege is appropriate for their child. Having failed to identify any private alternative program, the parents cannot sustain the burden of proof that they are entitled to an out of district private school placement. Florence , Id.

The student has been enrolled in a special education program since she was 4 years old. The special education services she received were provided by the Town of Portsmouth in Portsmouth schools under the aegis of The Newport County Regional Special Education Program, of which Portsmouth was a part until the end of the child's 9th grade school year. At the time of her entry into 9th grade, the Portsmouth School District did not have a special education program for student's with the petitioner's requirements. The student was, therefore, placed at Middletown High School in a self-contained special education classroom under the Newport County Regional umbrella. At the conclusion of the child's 9th grade program, the Portsmouth School District put their own special education curriculum in place and withdrew from participation in the Newport County Regional program. The student attended summer school or "ESY" in Portsmouth in 2015. In September 2015, the student was enrolled in the 10th grade in a self-contained classroom at Portsmouth High School. In the first two months following the start of the school year, there was a period of adjustment at the school whereby it appears that the student was attended to by up to four different 1-1 aides. In October 2015, the parents withdrew the student from school and filed a due process complaint. That complaint was resolved and the case voluntarily dismissed in January 2016 when the school district was able to secure a permanent 1-1 aide for the student, and she returned to school.

The 1-1 aide was trained for a period of time by the student's former 1-1 aide, the latter of which had been with the student throughout her middle school years. In addition, the new aide undertook a training program with personnel from the Autism Project, consultants to the Portsmouth School District. It is clear from the testimony, that the mother had "great faith" in the former aide and would have preferred that she continue as the student's permanent 1-1 aide in high school. However, that was not within the control of the Portsmouth School District due to existing employment policies and/or contracts. And, in fact, that aide was not with the student at Middletown High School where it was established through testimony that the child was attended to by two different 1-1 aides who alternated daily. The 1-1 aide who was assigned to the student in January 2016 has been with her continuously since that time. The testimony of all those persons knowledgeable about the Portsmouth program is in agreement that the 1-1 aide, Mrs. Silva, was a very good match for the student. Mrs. Silva is familiar with the student's health plan and BIP. In addition, Mrs. Silva embraced the instruction and suggestions that she received from

the Autism Project consultant and the student's other service providers. Mrs. Silva was the student's constant companion at school and was pro-active in the student's education. She acquired the ability to hone in on the student's cues as to when she was becoming excited or agitated in order to diffuse potentially volatile outbursts. The mother would have this Hearing Officer believe that prior to her attendance at Portsmouth High School, the student did not engage in dysregulation to the extent seen in Portsmouth High School. However, the testimony and demonstrative evidence dictate otherwise. It is clear from the record that the student has had a long history of humming, kicking, biting and other aggressive behaviors as well as self injurious behaviors, including self-stimulation, biting her hand and throwing her body to the floor. Were that not the case, there would have been no need for the Autism Project consultant and the BIP that specifically address those issues. All of the testimony, including that of the mother, point to these issues having existed throughout the student's school years. There are records from middle school that support the existence of these behaviors since at least that time.

The mother claims to have removed her child from the Portsmouth High School curriculum in July 2016 due to safety issues. She alleges that Portsmouth High School is not a safe environment for the student, that she was removed from the class in contravention of her BIP and that she was improperly restrained by the 1-1 aide and/or others at the school. There is quite simply no evidence on the record to support those claims. The 1-1 aide and the school psychologist both testified that they followed the protocol outlined in the BIP before removing the child to the red area, a quiet padded room where the student could relax and compose herself with the assistance of the aide. Testimony indicates that the time required in the red area was not frequent and was always of short duration. There is nothing about the events that occurred on April 29, 2016 and July 28, 2016 that would cause this Hearing Officer to believe that the student had been improperly restrained. The mother did testify that on July 28, 2016 the student came home with a bruise on her arm. It is not clear how the bruise was sustained. What is clear is that the student dysregulated that day and that she bit and/or struck a teacher. The teacher and, subsequently the 1-1 aide, attempted to regulate her with the methods identified in her BIP, i.e. re-directing the student verbally and demonstrating a technique whereby the student should use her hand to compress her chest. When these methods failed, the 1-1 aide asked the student to accompany her to the red area. While walking there, the student suddenly

dropped to the floor and was "thrashing" about, for lack of a better word. The aide got down on the floor at the student's level and reached out to her in an effort to mitigate any harm to the student as she was in close proximity to a desk on which she could injure herself. The only testimony indicates that the aide then asked the student if she was ready to get up and go to the red area. The student did then get up and go to the red area under the supervision of the aide. The aide testified that after only a minute or two, the student was completely calm and returned without further event to her classroom and school work. The mother was notified via a maladaptive behavior report, similar to those that she received each time the student dysregulated. Later that same day, the student dysregulated at home. She banged her head against a wall, kicked an entertainment center and bit her hand, causing additional bruises to herself as were depicted in the photos taken by the mother that were placed into evidence. The mother attributed the events occurring that day, and on other days at home, directly to the Portsmouth High School environment. Of particular note is the mother's focus on the boy in her daughter's class who makes occasional unexpected noises. The mother alleges that this boy is a prime cause of the student's dysregulation. However, all of the witnesses with direct knowledge of the situation agree that the student herein has many and varied "triggers" for her dysregulation at school, including changes in her schedule, new lessons, new people, fire drills, etc. And, further, that what bothers her on one day, she may completely ignore on another day. Nevertheless, as a direct result of the mother's concern, the district went about separating the student from the boy throughout the school day. He is in another room with a wall and a door, and school staff has staggered their schedules so they don't interact even when coming from and going to the bus. The situation with this particular boy has existed since at least middle school, and accommodations have been made since that time.

The mother also testified as to increased seizure activity since the student has attended Portsmouth High School. There is no evidence of a seizure ever occurring at school, nor does the mother claim any. However, the mother testified that during the time she was enrolled at Portsmouth High School, the student experienced twelve seizures at home, whereas the previous year, there were only two. The mother seemed to indicate that her

concern about the increased seizure activity prompted her to contact the student's private physician, a child neurologist, [REDACTED]. However, from [REDACTED] direct testimony, it seems evident that the student's May 2016 visit to his office was for a regularly scheduled appointment. He said that he ordinarily sees the student twice annually. At that appointment, the mother told [REDACTED] about the student's increased seizures and increased dysregulation at home and at school. The doctor could not pinpoint the source of the seizures, other than to say that they may be brought on by physical illness, sleep deprivation or anxiety. He said the mother told him that the child had not been ill, nor was she sleep deprived. In speaking about anxiety as a possible source of the seizures, [REDACTED] said that the anxiety need not be occurring at the same time as the seizures. He said that the student may experience anxiety at some time earlier that resulted in seizure activity some time later. He also indicated that seizures in general, if severe, can be life threatening. It should be noted that there is a seizure protocol contained in the student's IHP at Portsmouth, and that district personnel were familiar with it in the event of a seizure occurring at school. At the mother's request, [REDACTED] wrote a letter advocating a change of educational placement for the student. In his testimony at hearing, [REDACTED] said that he was not promoting any particular placement, only that the placement contain the elements identified in his letter and reiterated in his testimony. [REDACTED] admitted that he had never spoken with anyone in the Portsmouth School District and that he had no idea what type of classroom and program were being provided there. [REDACTED] did not attempt to contact anyone in the school system, and district personnel were not given the necessary consent from the family to contact him. It seems to this Hearing Officer that the doctor's recommendations for a low sensory classroom and program match up fairly well with what the Portsmouth School District is providing to the student. Further, the doctor described the methods by which adults could attempt to bring about regulation when the student has dysregulated. The methodologies identified by [REDACTED] are the same methodologies that Portsmouth personnel learned from the Autism Project and that are contained in the student's BIP. Further, [REDACTED] stated that physical interaction with

the child may be necessary when required to keep her safe, and that removing the child to a quiet area may be helpful. He did not recommend the student's return to Middletown High School, nor did he make any reference to the school program there. Nor did he testify as to any contemplated private school placement. [REDACTED] testimony is not necessarily contradictory to that of the district's witnesses. His letter in which he concludes that a change of placement is warranted is not based upon any knowledge of the student's current placement; whereas the numerous witnesses from within the school setting have intimate knowledge of the school program. To the extent that [REDACTED] testimony is being utilized by the parents in their attempt to establish entitlement to an out of district placement, this Hearing Officer finds the testimony of the Portsmouth educators to be more persuasive. See, Sebastian M. v. King Philip Reg'l Sch. Dist., 685 F3d 79 (1st Cir. 2012).

The witnesses from the Newport County Regional Special Education Program and Middletown High School testified that the student was placed in a self-contained classroom in Middletown with some interaction with general education students and that the subject student seemed to get along well there. One of the witnesses, Sarah Kraeger testified that the Newport County Regional program would accept the student back into the program if this Hearing Officer so ordered it, or the parties agreed to it. Neither of those witnesses provided any great detail as to the special education curriculum in Middletown or as to how it differed from Portsmouth High School so as to provide FAPE where the Portsmouth was allegedly not providing it. There is no evidence to suggest that Middletown had a program that was adequate for the student where Portsmouth failed the student. Florence, Id.

Although the main thrust of the parents' case is directed toward the district's failure to keep the student safe, thereby negating FAPE, the parents also claim defects in the IEP. The district bears the burden in a due process hearing to show that its proposed IEP is adequate. L.T. T.B. ex rel N.B. v. Warwick Sch. Comm., 361 F. 3d. 80 (1st Cir. 2004) The IEP that the child came into Portsmouth with was drafted by Newport County

Regional and/or Middletown personnel. Portsmouth set to work with the child using that IEP for the 2015-2016 school year. The parents withdrew the child from school in October 2015 and did not reinstate her until January 2016. During the period of time that the student was out of school, the Portsmouth school psychologist, without benefit of having met the student, drafted a BIP based on the records and reports that she had available to her. By the mother's own testimony, things seemed to be going well until sometime in March 2016, when, according to the mother, the child began to deteriorate emotionally. The mother sought the assistance of the Portsmouth staff, and, by all accounts, she met with them 11 or 12 times throughout the year. While all of these meetings were generally referred to as "IEP" meetings, they were, in fact, not formal IEP meetings. They were informational meetings at which the mother could interact with staff so they could jointly address issues for inclusion in the 2016-2017 IEP that was scheduled to be written in May or June of 2016 and, thereafter revised as necessary. The mother did meet with the IEP team in May of 2016, and an IEP for the upcoming year was drafted. The mother did request an out of district placement for the first time in a meeting that took place in either May or June. The IEP team refused the request, and the consensus at that meeting was, that without further observation and data, Portsmouth High School was providing FAPE for the student in the least restrictive environment (LRE). The mother specifically agreed to the IEP and signed it. However, after obtaining the services of the educational consultant/attorney, Christine H. Barrington in approximately late July or early August, the mother, for the first time, challenged the IEP on procedural grounds. The mother challenged the failure of the IEP team to include a "core subject" regular education teacher. The evidence demonstrates that the IEP team only met formally twice with respect to the student, but at all of the numerous meeting concerning the student, save one where the mother waived it, there was present a general education teacher, be it a music/chorus, physical education, social studies or other teacher. This Hearing Officer could not find any definitive legal requirement that the IEP team include a general education teacher from one of the "core subjects". In any event, if failure to include a core subject teacher constitutes a procedural violation, it does not necessarily follow that there was a failure to provide FAPE. To reach the conclusion that a procedural violation deprived the student of FAPE,

the violation must impede the child's right to a FAPE or cause a deprivation of educational benefits. 20 USC s 1415 (f)(3)(ii). An IEP is substantially adequate under IDEA if it is likely to produce progress not regression, and if it affords the student with an opportunity greater than mere trivial advancement, C.W.L. and E.L. v. Pelham Union Free Sch. Dist., 149 F. Supp. 3d. 451 (S.D.N.Y. 2015). The issue is whether the IEP was reasonably calculated to provide an appropriate education that enables the child to receive educational benefits. Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley, 458 US 176 (1982). The student herein was enrolled in a life skills program that is designed to provide her with the tools necessary to hopefully learn to live independently. There is abundant evidence on the record that the Portsmouth High School life skills program was designed precisely with its focus on money, hygiene, the ability to read and understand instructions and communication. These skills were all being taught, and the student was progressing toward achieving them. There is evidence of improved reading and math achievement and substantial progress in her non-verbal communication with her ipad, including more use of it, with longer sentences, and containing newly developed skills of punctuation and capitalization.

The mother also only recently complained that the student was being "alternately assessed", and that she would only be eligible to complete high school but not obtain a diploma. Facts presented at the hearing clearly establish that alternate assessment for this student has continued from the beginning of her education to the present, including the year that she spent at Middletown High School. Common core standards have not been applied to her curriculum.

At the October 2016 IEP/resolution meeting, the mother and the student's legal advocates requested further "independent" evaluations and post secondary school transition assistance. In an attempt to settle the matter, the school district agreed to a number of "in house" evaluations and to provide transition planning. The district was not required to perform independent evaluations simply because the mother requested them, especially in light of the fact that the parents have not allowed their daughter to attend school, thereby preventing school based evaluations. The failure of the student to return to school has rendered evaluations and transition planning impossible.

The petitioners' claim that their daughter is being denied FAPE at Portsmouth High School is without merit. The record is clear from the testimony of every professional

who actually worked with the student that she was making educational progress at Portsmouth High School. The parents' removal of the child from school, though well intended, was ill advised. By all accounts, the passage of time and absence from school will manifest itself in social regression when the child returns to school, yet again necessitating a period of transition and resulting in lost educational progress that cannot be attributed to the school district. There is no evidence to support a claim that the student's return to Portsmouth High School will lead to incidences of greater harm to the student or to others.

The IEPs developed for Middletown and Portsmouth are virtually identical. In order to prevail in their quest for an out of district placement, the petitioners must first prove that the district has defaulted in the provision of FAPE, and, further, that the private school placement (or out of district public school placement as sought herein) is appropriate and reasonably calculated to enable the child to obtain educational benefits that the district has failed to provide. Florence, Id.

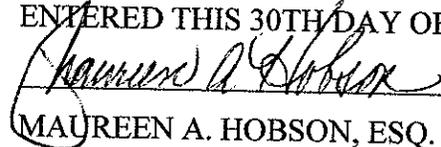
The parents have failed to demonstrate that the Portsmouth School District is unsafe or that it has failed to provide FAPE for the student.

As an alternative to finding in their favor, the petitioners have also put forth their request that any Order entered by this Hearing Officer include a requirement that the district adhere to providing all of the services that it offered following the October 4, 2016 IEP/resolution session. There is no reason for this Hearing Officer to surmise that the district will renege on the services proffered prior to hearing. However, this Hearing Officer declines to so order the district to provide them due to the passage of time and the changes in the circumstances of the parties that may have occurred since inception of this action.

ORDER

The Petitioners' claim that the Portsmouth School District has failed to provide a free appropriate public education for the child is hereby DENIED. The Petitioners' claim of entitlement to an out of district placement at public expense is hereby DENIED.

ENTERED THIS 30TH DAY OF JANUARY 2017.


MAUREEN A. HOBSON, ESQ.

CERTIFICATION

I certify that a copy of the within was forwarded to Christine H. Barrington, Esq., Gregory Mancini, Esq., MaryAnn Carroll, Esq. the Portsmouth School District, Office of Pupil Personnel Services, and the Rhode Island Department of Education on the 30th day of January 2017.

