

**COMMONWEALTH OF MASSACHUSETTS  
DIVISION OF ADMINISTRATIVE LAW APPEALS  
BUREAU OF SPECIAL EDUCATION APPEALS**

In re: Adam<sup>1</sup>

BSEA #1708888

**DECISION**

This decision is issued pursuant to the Individuals with Disabilities Education Act (20 USC 1400 *et seq.*), Section 504 of the Rehabilitation Act of 1973 (29 USC 794), the state special education law (MGL c. 71B), the state Administrative Procedure Act (MGL c. 30A), and the regulations promulgated under these statutes.

An expedited hearing was held on May 4, 9, and 10, 2017 before Hearing Officer Amy Reichbach. Those present for all or part of the proceedings were:

Student	
Student's Mother	
Daniel Fagan	Out of District Coordinator, Taunton Public Schools
Paul Gregg	Community Facilitator, Taunton Public Schools
Eric Lefaivre	Associate Headmaster, Taunton High School
Virginia Martin	School Psychologist, Taunton Public Schools
Maureen McCarthy	Guidance Counselor, Taunton High School
Andrea Mota	Special Education Teacher, Taunton High School
Judith Mulrooney	Director of Special Education, Taunton Public Schools
Marguerite Mitchell, Esq.	Attorney for Taunton Public Schools

The official record of the hearing consists of documents submitted by the Parent and marked as Exhibits P-1 to P-19; documents submitted by the Taunton Public Schools and marked as Exhibits S-1 to S-25; approximately three days of recorded oral testimony and argument; and a three volume transcript produced by a court reporter. As agreed to by the parties the record was held open until noon on May 11, 2017 for submission of closing arguments. Closing arguments were received and the record closed on that date.

**INTRODUCTION**

Parent filed a Hearing Request against Taunton Public Schools ("Taunton" or "District") on April 19, 2017 raising several claims in connection with an incident involving her son Adam

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<sup>1</sup> "Adam" is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in documents available to the public.

that occurred on or about March 10, 2016.<sup>2</sup> Specifically, Parent alleged that Taunton failed to offer her son, a tenth grader on an Individualized Education Program (IEP) as of March 10, 2016, a timely manifestation determination meeting (“MDR” or “manifestation determination review”) in connection with discipline for the incident that occurred that day. In fact, no MDR was offered, she alleged, until March 31, 2017, at which time the Team refused to determine whether Adam’s conduct more than a year earlier was a manifestation of his disability. Furthermore, Parent contended that Taunton High School (THS) failed to offer, implement, or make available the accommodations necessary for Adam to make effective progress, per his IEP, and instead engaged in a practice of excluding him from school through suspensions.

As Parent’s appeal involved a manifestation determination, her hearing request received expedited status, and the hearing was scheduled for May 4, 2017.

On April 26, 2017, Taunton filed a Motion for Partial Dismissal with Prejudice and Response to the Remainder of Hearing Request. The basis of its Motion for Partial Dismissal was the District’s contention that because Adam was in the guardianship of his maternal grandmother and uncle at the time of the March 10, 2016 incident and remained in their custody until February 27, 2017, Parent did not have standing to assert any claim that accrued prior to that date.

On May 1, 2017, the undersigned Hearing Officer held a telephonic Motion Session to address the District’s Motion. Parent indicated at that time that her mother would join her as a co-claimant, and later that day Parent re-filed her Hearing Request with her mother’s signature as well as her own. As such, the parties agreed that the Hearing Officer need not address the District’s Motion. Also on that date, the Hearing Officer issued an Order clarifying that the expedited hearing would address only issues that required expedited status: specifically, the manifestation determination and school discipline that had occurred in connection with the March 2016 incident, leading Adam to receive out-of-school tutoring from March 2016 to the time of the hearing. A decision as to whether Adam was receiving a Free Appropriate Public Education (FAPE) up to and at the time of the March 2016 incident was expressly reserved for a later proceeding.

For the reasons below, I find that Taunton’s failure to convene a timely manifestation determination review was a significant procedural error that led to the deprivation of FAPE.

### **FINDINGS OF FACT**

1. Adam is a seventeen-year-old resident of Taunton, Massachusetts. He was in the guardianship of his grandmother and his uncle as of March 2016, though his mother regained custody of him in February 2017. (Mother, Mulrooney)
2. Adam is eligible for special education under the category of emotional impairment. Adam has been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD), Post Traumatic

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<sup>2</sup> In her Hearing Request, Parent referred to March 9, 2016, and testimony at hearing referred to both March 9 and March 10, 2016. Documents in evidence suggest that the incident occurred on Marchj 10, 2016.

Stress Disorder (PTSD), and reactive attachment disorder (RAD). (S-1, S-2, S-3)  
Psychological evaluations from 2006 and 2009 note that Adam witnessed severe domestic violence and that his PTSD is related to childhood trauma. (S-6) Although they are not included in his most recent IEP, the record reflects that Adam has a possible communication disability (S-3) and a diagnosis of Oppositional Defiant Disorder (ODD). (S-6)

3. Adam began attending THS in ninth grade, in the fall of 2014. By October 2014, Taunton was aware that he was experiencing difficulty with the transition; he had had “several write ups and suspensions,” and his Team noted that Adam “often needs redirection to stay on task and not engage in inappropriate behavior.” Adam’s IEP dated 10/27/2014 to 10/26/2015 noted that [w]hen given the chance to demonstrate his proficiency, he is often unable to or refuses;” that “even with proper notes, including clearly defined steps and examples of problems, [he] often has difficulty completing homework;” and that he still needs improvement in “owning up to his behavior, effort. . . difficulty transitioning from one activity to the next, and his frequent and deliberate instances of mild acting out, swearing, arguing with teacher and other offensive and disrespectful remarks.” (S-1)
4. Adam’s most recent IEP (hereinafter “last IEP”), fully accepted by his guardian on November 16, 2016, is dated October 29, 2015 to October 28, 2016. It calls for placement in a full inclusion program at Taunton High School, with fifteen (15) minutes per six-day cycle of counseling and eighty-four (84) minutes daily of mathematics support in the general education classroom. (S-2)
5. Adam’s last IEP includes the following information under the heading, “How does the disability(ies) affect progress in the indicated area(s) of other educational needs”:

“In the past, [Adam]’s difficulties with behavior and social/emotional issues negatively impact his ability to express his ideas, wants, and feelings in an appropriate manner. This impacts his ability to relate to others, to problem-solve, to engage in play with peers and to interact with children and adults in an appropriate manner. He also had difficulty focusing on the task at hand and requires reminders of what is expected. Significant amount of consistency is needed for [Adam] to make effective progress with his social emotional issues . . . Deficits in pragmatic/social communication can affect [Adam]’s ability to communicate effectively with peers and adults for academic problem solving and social acceptance.” (S-2)

Adam’s IEP also notes that although he has been offered counseling he refuses to attend. (S-2)

Among other things the IEP lists as accommodations counseling; positive reinforcement; clear, consistent limitation, and consequences, [and] reminders of school rules.” (Mulrooney)

6. No IEP has been proposed for Adam since the expiration of his last IEP on October 28, 2016. Asked at hearing why no IEP has been proposed since then, despite the convening of an annual review meeting on December 21, 2016, Taunton Director of Special Education Judith Mulrooney responded that “the consensus of the Team was. . . we did not have the

information to develop an IEP for [Adam], because we did not have the evaluation information.” Ms. Mulrooney indicated that a new IEP would not be written until Adam had completed the comprehensive evaluation the District had proposed. (Mulrooney)

7. A psychological evaluation of Adam conducted by Regional Educational Assessment & Diagnostic Services (READS) in 2009 states, “Psychologically and behaviorally during the current examination, [Adam]’s presentation was quite variable. He clearly is able to respond positively to structuring, encouragement, and positive reinforcement. On the other hand, he has periods where his defiance is severe, including outright refusal and obnoxious comments toward adults including profanity.” The evaluator concluded that “[f]rom a behavioral perspective, the prominence of his oppositional and defiant tendencies was rather dramatic. While these could reflect the PTSD and complex psychosocial history, he also meets criteria for an Oppositional Defiant Disorder (ODD). With his sleep disturbance and mood irritability, consideration of an underlying mood disorder is also suggested through further consultation with his psychotherapist and psychiatrist.” (S-6)
8. Adam’s most recent evaluations were conducted in May 2013 by the Middleborough Public Schools. At the time he was in an out-of-district placement. Adam’s reevaluation consisted of a speech and language evaluation, an occupational therapy reevaluation, and a psychoeducational evaluation. (S-3, S-4, S-5)
9. The evaluator who completed Adam’s speech and language evaluation in May 2013 observed that his participation and cooperation were inconsistent throughout the evaluation and he demonstrated a low frustration tolerance. She noted that “[w]eaknesses . . . could impact [Adam]’s ability to gain information, initiate and maintain expected topics, show interest in others and effectively interact within group settings,” and that he “presents with overall below average problem solving skills and overall below average social development skills.” She concluded that the “results of this evaluation identify [Adam] with a communication disability, specifically in the area of social communication.” (S-3)
10. No further speech and language assessments appear in Adam’s record. His last IEP does not reflect a diagnosis of a communication disability. (S-2)
11. The evaluator who conducted Adam’s occupational therapy evaluation in May 2013 observed that he “fluctuated between being pleasant and conversational with the evaluators to making rude comments, rushing through testing items and being completely disengaged.” She concluded that “[t]he results of this evaluation are not thought to accurately reflect [Adam]’s true abilities.” (S-4)
12. The evaluator who completed Adam’s psychoeducational evaluation in May 2013 noted that his placement at North River Collaborative had been terminated the previous month after only four months because he “display (*sic*) numerous negative behaviors including non-compliance, leaving class without permission, disrespect and insubordinate behaviors. He instigated other students, and smoked on school property.” Her evaluation contained the following information: “School personnel indicate [Adam]’s difficulties with behavior and social/emotional issues negatively impact his ability to express himself in an appropriate

manner. This impacts his ability to relate to others, problem solve and interact with peers and adults in an appropriate manner. He also has difficulty focusing.” She observed that Adam was marginally cooperative during testing, and displayed limited attention and concentration as well as inconsistent motivation to achieve. On the Behavioral Assessment System for Children, Second Edition (BASC), Adam scored within the Clinically Significant range for Relations with Parents and he received an At-Risk score in Self-Reliance, though the evaluator questioned the validity of this score because Adam’s responses lacked consistency. Adam refused to complete several assessments that aimed to measure written language and social/emotional adjustment. The evaluator concluded, Adam “does present with significant concerns related to ability to maintain focus, regulate behavior, and maintain appropriate interpersonal relationships. [Adam] will require a restrictive environment to address his behavioral concerns.” (S-5)

13. Given that Adam’s last three-year reevaluation was completed in May 2013, a new three-year reevaluation should have been completed by May 2016. (Martin) As of the incident that occurred on March 10, 2016, Adam’s guardians had not been asked to consent to any evaluations or reevaluations of him. (Parent)
14. Adam’s disabilities impact his functioning in several ways. According to his mother, sometimes Adam has difficulty focusing; when he gets excited he tends to talk with his hands, sometimes too quickly or at too high a volume. Redirection, verbal prompts, and reminders assist him in getting back on track. (P-18) Moreover during transitions or when he is asked to multi-task, sometimes he gets overwhelmed. When Adam “gets anxious or nervous or excited or feeling like he’s being mistreated, sometimes he’ll get really stuck on things and tend to want to repeat them. . . And he’s never had a good idea about personal space. . . He need to be redirected a lot and reminded about boundaries. He has impulsiveness issues . . . But I do really feel with some patience and redirection and reminders, [Adam] can communicate very effectively.” (Mother)

THS special education teacher Andrea Mota, who co-taught Adam’s math class during the 2015-16 year, testified that from what she has seen, Adam’s social and emotional disability impacts him in the following way:

Adam “tends to struggle to deal with peer interactions . . . conversations with someone that would be an authority figure, like a teacher or a vice principal or something along those lines and doesn’t seem to know how to cope with these sometimes, even though when you talk to [Adam], he seems very bright, and he can really hold a conversation . . . when he’s upset, he’s not sure how to handle that.”

Ms. Mota did not attend any of the Team meetings regarding Adam during the 2015-2016 school year, nor was she invited to attend the manifestation determination review that took place in March 2017. (Mota)

15. In a progress report generated on January 14, 2016, Ms. Mota noted that Adam “does not process and strategized (*sic*) appropriate ways to deal with the issues that may occur. When frustrated [Adam] typically engages in inappropriate behaviors and interactions with peers

and staff.” According to the progress report, Adam was making no progress on his math goal, he rarely attended class, and when he did he usually got removed because of inappropriate behavior and language. Ms. Mota observed that Adam would be making more progress in math if his attendance were more consistent. (P-16) At hearing Ms. Mota testified that during the 2015-16 school year, she observed Adam storming out of math class, though not in a violent way, when he got frustrated. She stated that Adam would have some days when he appeared to be struggling, and on those days she would just let him be, but when he was in a calm mood he appeared capable of doing the work, and on those days she and her general education co-teacher would permit him to listen to music while he worked. (Mota)

16. The Taunton High School Discipline Code provides that “[s]tudents suspended for violent or assaultive behavior, for making threatening gestures or comments, for possessing or using a weapon, or for any reason or behavior determined by Administration and school support personnel to be a threat to the school setting will be referred for a risk assessment. Students referred for a risk assessment cannot return to school until the results have been reviewed and accepted by THS Administration and school support personnel and the student is deemed safe to return to school . . . Students must stay off school grounds while on out-of-school suspension or they are subject to arrest for trespassing.” (S-7; Mulrooney) Taunton provided this section of the High School Student Handbook as an exhibit in advance of hearing. (S-7)

The THS Discipline Code contains a separate section entitled “Suspension of Students with IEPs and 504 Plans,” which was submitted into evidence by Parent during the hearing. This section describes a suspension of longer than ten (10) consecutive days or a series of suspensions that are shorter than that but constitute a pattern as a change in placement of a student with disabilities, and requires that prior to a suspension that constitutes a change in placement, district personnel, the parent, and other relevant members of the Team convene to review all relevant information in the student’s file (including the IEP, teacher observations, and relevant information from the parents), “to determine whether the behavior was caused by or had a direct and substantial relationship to the disability or was the direct result of the district’s failure to implement the IEP.” In accordance with relevant law, the handbook provides that if the Team determines that the behavior is not a manifestation of the disability, the district may suspend or expel the student, except that it must still offer services, in another setting, to enable the student to continue to participate in the general education curriculum and progress toward IEP goals; and, as appropriate, the District will also offer a functional behavioral assessment (FBA) and behavioral intervention services. If the Team determines that the behavior is a manifestation of the disability, then the Team completes an FBA and behavioral intervention plan if it has not already done so. Except when the student has been placed in an interim alternative educational setting (IAES) in accordance with the relevant provision of the code, the student returns to the original placement unless the parents and district agree otherwise. The discipline code allows for placement of a student in an IAES, regardless of the manifestation determination, for up to forty-five (45) school days in the following limited circumstances: (1) on its own authority if the behavior involves weapons, illegal drugs, or other controlled substances, or the infliction of serious bodily injury on another person while at school or a school function “or, considered case by case, unique circumstances;” or (2) on the authority of a hearing officer if the officer orders the

alternative placement after the district provides evidence that the student is “substantially likely to injure himself/herself or others.” (P-19)

17. As of March 10, 2016, Adam had been suspended for at least twenty-seven (27) days during the 2015-16 school year for infractions such as use of vulgar language, inappropriate behavior, being disrespectful and insubordinate, being disruptive in the house office, major insubordination, and verbal altercation. (P-4, S-11)
18. As of March 10, 2016, Taunton had not conducted a manifestation determination review in connection with any of Adam’s suspensions during the 2015-16 school year. (Mother, Student, Lefaiivre) Although discipline of Adam was his responsibility, Associate Headmaster Eric Lefaiivre was not aware that Adam was on an IEP during the 2015-16 school year until after March 10, 2016. (Lefaiivre)
19. As of March 10, 2016, Taunton Public Schools had not conducted an FBA of Adam. (Mother, Lefaiivre, Martin)
20. On March 10, 2016, Adam was brought to Mr. Lefaiivre’s office by Security Guard Paul Gregg<sup>3</sup> after he was found in the lunch room when he should have been in class. He was told to wait for Mr. Lefaiivre; he did not know how long he would have to wait. (Student, Mother, Gregg) Adam expected to receive an out-of-school suspension. (Student) Although headphones are prohibited on school grounds, Adam put in earbuds while waiting on a bench in the office and refused to take them off when told to do so. (Student, Lefaiivre) He was then relocated to a small private conference room off of the house office, where he was allowed to wear his earbuds. (Student, Lefaiivre) While in the conference room, Adam called his mother on his cellular telephone and told her what was going on.<sup>4</sup> He was stressed, anxious and upset. His mother told him to calm down, wait for Mr. Lefaiivre, and do what he was told. (Mother, Student) At some point, Adam wheeled the chair he was sitting on out of the conference room, earbuds in, and put his feet up on a desk. (Lefaiivre) He then picked up a telephone off of an office desk and called his mother. He told her that he was going to be getting an out-of-school suspension and that he had to wait for Mr. Lefaiivre. He said, “I just want to go back to class. This is bullshit.” Adam then handed the telephone to the secretary, who spoke with his mother about what had happened then handed the phone back to him. Adam’s mother told him to wait for Mr. Lefaiivre. Some time later, Adam called his mother again and told her that he was walking out of the school. (Student, Mother) The office staff reported to Mr. Lefaiivre that Adam’s language during this incident was vulgar and his behavior aggravated, “particularly animated, particularly angry.” They reported that when he leaned over the desk, “trying to hand the phone to talk to whoever is on the other end . . . they were particularly distressed and feared for themselves in that moment.” (Lefaiivre) Adam testified that he left the building because he was told to do so. (Student) School

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<sup>3</sup> Although his current title is Community Facilitator, as of March 10, 2016, Mr. Gregg was a Security Guard at THS.

<sup>4</sup> Adam testified that during the phone call he made from his cellular telephone, he asked his mother to call the office and ask for him to be dismissed from school. His mother testified that he asked her to call the office and ask school personnel if he could stay in school rather than be suspended. (Mother, Student)

witnesses did not recall Adam being told to leave, and reported that he left without permission. (Martin)

21. On March 11, 2016, Adam received a three (3) day Out of School Suspension for “Disrespect to Staff, Disruption at School Assembly, Inappropriate School Behavior, Insubordination – Major, Phone – Electronics Violation, Threatening School Staff, Vulgar or Obscene Language.” (District Motion)
22. No manifestation determination review was held before the suspension went into effect. (Parent, Fagan, Lefaiivre, Mulrooney, Martin)
23. Taunton’s risk assessment procedure consists of two parts. During the first part, called a threat inquiry, the housemaster, the guidance counselor, the school psychologist, and any witnesses to the incident in question meet to determine the significance of the behavior displayed by the student. If the group determines that the behavior warrants further investigation, the District seeks parental consent to move the process forward through a formal threat assessment, or safety evaluation. The first day of the threat assessment is always considered a suspension. (Lefaiivre, Martin)

In this instance the group determined that the safety evaluation should proceed because, in addition to the specifics of the incident that occurred on March 10, 2016, Adam’s “behaviors had been getting sort of progressively worse, more belligerent.” (S-8; Lefaiivre, Martin) The safety evaluation was to be conducted by Taunton school psychologist Virginia Martin. Ms. Martin has a Master’s degree in education and a Certificate of Advanced Graduate Studies in school psychology. She is licensed as a school psychologist by the Massachusetts Department of Elementary and Secondary Education and the National Association of School Psychologists. (Martin)

24. During the first part of the risk assessment, the group discussed the fact that Adam was on an IEP and they realized that he had not been offered a manifestation determination review in connection with any of the suspensions he had received during the 2015-16 school year. (Martin, Mulrooney, Lefaiivre) Asked why he did not offer to hold a manifestation determination at this time, Mr. Lefaiivre testified that the “indication [from the special education department] was that we’re already taking care of it” and that “there was a recognition that [Adam] probably needed more services than he was getting and that the picture was much larger than this offense or this safety evaluation, and that special ed intended to address the issue at large in addition to, again, the safety eval and this particular incident.” (Lefaiivre)

Also at some point around this time, while she was reviewing Adam’s records, Ms. Martin expressed her concern to Ms. Mulrooney “about [Adam] not getting possibly the appropriate services that were in his IEP and also a concern that there had not been a manifestation determination meeting held.” Ms. Martin also told Ms. Mulrooney that she noticed that some of Adam’s evaluations had not been complete, and that she felt she was lacking the appropriate evaluation information she needed in order to make “a really informed decision about what was going on with” Adam. Ms. Mulrooney did not initiate a manifestation



determination review at this time. Asked why, she explained that she and Ms. Martin believed that the same way they lacked information to make the judgment in a safety evaluation, they lacked “the knowledge necessary to know if [Adam]’s behavior was part of his disability or just behavior.” They both believed that “an evaluation of [Adam] would be probably in his best interests in order for us to make the informed judgments that we needed to make to provide [Adam] with an IEP that would better service him.” (Mulrooney)

25. On or about March 23, 2016, Adam’s grandmother signed a release to permit Taunton Public Schools to initiate a Safety Evaluation of Adam. The release described the precipitating incident as follows: “[Adam] was escorted to Associate Headmaster, Eric Lefavre’s office, as a result of skipping lunch. Shortly after, [Adam] was asked to remove his headphones several times by multiple staff members. When he did not comply, [Adam] was asked to sit in the conference room. He quickly exited the conference room, sat in the main office area putting his headphones back in and his feet up on the desk. At this point, [Adam] escalated, becoming belligerent (*sic*) – using foul and aggressive language. He then grabbed the office phone w/o permission. He appeared further agitated, physically posturing toward three female staff members. These staff members reported feeling unsafe, indicating that they felt the need to back away from him. [Adam] then left the house office and it became necessary for security to intervene. Paul Greg[g], security officer attempted to deescalate [Adam], however he ultimately chose to walk out of the building w/o permission.” (S-8)

Attached to the release is a document entitled “Threat Assessment Team Initial Meeting Form,” dated March 11, 2016. The form contains a box checked “yes,” under “Special Education,” but the line “If yes, Disability category:” is left blank. Also attached is a document entitled “Threat Assessment Incident Report.” The form includes the narrative that appears on the release, above. Sections entitled “Factors involved in the actual threat and/or information about student who made threat;” “What do you think he/she meant when they made the threat;” “What is your level of concerns regarding this student’s potential for violence;” “Describe the relationship with the student;” and “Teacher/adult completing form” are left blank. (S-8)

26. Although nothing in the record reflects an agreement by Adam’s guardians to change his placement to tutoring, Adam appears to have begun working with a tutor on March 29, 2016. Documents in the record demonstrate that Adam received two (2) hours of tutoring the week of March 29, 2016, and that the tutor was contracted for four (4) hours per week to cover the subjects of wellness, history, and algebra. A second Home Tutoring Weekly Summary, submitted by Adam’s tutor on May 12, 2016, demonstrates that Adam received three (3) hours of tutoring on that date, and that the tutor was contracted for six (6) hours a week to cover the same three subjects. (S-15) When asked about Adam’s current placement, Ms. Mulrooney replied that it was tutoring; however, she also testified that tutoring is not a placement.<sup>5</sup> (Mulrooney)

27. On March 30, 2016, a meeting invitation was issued for a “safety evaluation” meeting to take place on April 1, 2016. (S-10) It appears that no meeting occurred on that day.

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<sup>5</sup> At the manifestation determination review that was ultimately held on March 31, 2017, the Team defined Adam’s current placement as tutoring. (S-25)

28. A meeting took place on April 6, 2016 (hereinafter “April 6<sup>th</sup> meeting). The Team Meeting Summary reflects no purpose for the meeting, but the attendance sheet states “Other-safety evaluation.” (S-11) The meeting was attended by Adam, his mother, his grandmother and uncle (legal guardians), school psychologist Virginia Martin, and chair Daniel Fagan, Out-of-District Coordinator for Taunton Public Schools.<sup>6</sup> None of Adam’s teachers attended the meeting. (S-12) At the time of this meeting Adam had accumulated thirty (30) days of suspension for the 2015-16 school year. (S-11, P-4, P-7)
29. Adam’s mother hoped that at this meeting, they would talk about Adam going back to school, since he had been out of school for almost a month already. (Mother) Rather than discuss Adam’s return to THS, District personnel made clear that this was not an option for Adam. (Mother) The District proposed a 40-day placement and evaluation in recognition of the difficulties Adam was having at THS because they believed “this placement and evaluation will provide the necessary information to develop an appropriate IEP addressing [Adam]’s needs.”<sup>7</sup> (S-12) Adam expressed his desire to continue to attend Taunton High School rather than an out-of-district placement or the district’s alternative high school. His mother expressed concern about Adam going backwards to a more restrictive placement such as READS (where he had been before) or South Coast Educational Collaborative (“South Coast”), and both she and Adam explained that they did not want him placed where he might be restrained or observe other children being restrained, as had occurred in his previous out-of-district settings. (S-11; Student, Mother, Fagan) At this time, Adam’s guardians rejected the District’s request that they consent to a 40-day placement and evaluation, as well as the District’s attempt to obtain a release to permit the South Coast program to contact them. Although Adam’s grandmother and uncle appeared open to the options, they wanted time to consider the District’s proposals and discuss things alone before making a decision. (S-12; Fagan) Adam’s guardians also asserted that Adam was not dangerous at home. (S-11) Adam’s mother testified that she began requesting a manifestation determination at this meeting, but neither district personnel nor the record substantiates this claim.
30. This meeting, which purported to include a review of Adam’s safety evaluation, appears to have served as the second component of the risk assessment itself. According to the District, the risk assessment process is conducted by the school psychologist and consists of an interview of the student, an interview of parent(s)/guardians, staff consultation, consultation with outside therapists, and a record review. (S-9) Despite the fact that “[t]ypically, in addition to meeting with the parents and the child, [she] would meet with the student individually and conduct formalized testing” including behavioral assessments and structured inventories of violence, Ms. Martin did not interview Adam, his mother, or his guardians individually on April 6, 2016 or at any other time. Ms. Martin never conducted any formalized testing of Adam. (Martin) Instead, she invited Mr. Fagan to attend the meeting in

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<sup>6</sup> Although both THS Guidance Counselor Maureen McCarthy and Out-of-District Coordinator Daniel Fagan testified that Ms. McCarthy attended the safety assessment meeting on April 6, 2016, her name does not appear on the attendance sheet submitted into evidence by the District. (S-12; McCarthy, Fagan)

<sup>7</sup> Ms. Mulrooney testified that the District proposed a 40-day evaluation placement because School Psychologist Virginia Martin had indicated to her “that she had real concerns about the student and that we did not have the appropriate evaluative information that we needed to make the appropriate decisions for his education.” (Mulrooney)

order to present the family with information about an out-of-district 40-day evaluation and placement. (S-9; Martin)

Ms. Martin's Threat Assessment report includes the following information: Adam failed all four of his courses in the fall of the 2015-2016 school year and was failing all of them during the spring semester as well. He had accumulated 54 absences, 27 tardies, and 3 dismissals; Ms. Martin noted that "[m]ore than half of [Adam]'s absences have resulted from suspension." Ms. Martin described Adam's "significant and extensive trauma history which is well documented within his mental health records . . . [which] indicate exposure to severe domestic violence, parental substance abuse, neglect and abandonment," and presentation with "suicidal ideation, self-injury, sexualized behaviors, and aggression toward peers and staff." She also noted that his prior diagnoses include PTSD, ADHD, ODD, and RAD. Ms. Martin reported that during the meeting, Adam was "able to take responsibility for some minor infractions that have taken place this school year, [but unable] to grasp the significance of the precipitous incident to this evaluation." Ms. Martin stated that she did not complete any formal assessments of Adam, as he "presented as extremely guarded, often appearing to give responses that reflect an image of how he wishes other see him, as opposed to how things actually are." (S-9; P-6) As explained above this comment about Adam's apparent concerns regarding how he is seen by others did not lead her to take him aside to interview him privately (Martin) Ms. Martin noted that Adam's family "presented with somewhat varying stances regarding [Adam]'s accountability for the present circumstance." His therapist "expressed significant concerns regarding [Adam]'s current educational placement [and] advocated for an alternative placement which would better address his social and emotional functioning." (S-9)

Ms. Martin concluded that "[r]esults from the current evaluation suggest that in order to best promote both [Adam]'s safety and educational programs, the IEP team should immediately reconvene to determine the most appropriate educational placement. It is highly recommended that the IEP team consider a 40-day placement and evaluation in order to collect necessary information to develop an appropriate IEP to address [Adam]'s needs." (S-9) The lack of recent evaluations informed Ms. Martin's recommendations, as "psychological disorders and the symptomology changes over time," and she did not believe she had sufficient information to deem Adam safe and appropriate to attend Taunton High School. Instead, further evaluation "would have given [the Team] enough information to make that conclusion and place him appropriately in an academic setting." Ms. Martin's recommendation for a 40-day assessment, which she made prior to meeting him or his family, "wasn't just about safety. It was also about placement. Because he has spent three-quarters of the school year being grossly unsuccessful from an academic standpoint." (Martin)

31. Mr. Fagan was aware, at the time of the April 6th meeting, that no MDR had been held with respect to Adam. Asked why he didn't offer a manifestation determination on that date, given that he testified that he always has manifestation determination documents in his briefcase, Mr. Fagan responded both that it was not his role in this case, and that, "At that point, I felt that the best thing to do, based on what I had heard in the safety eval and the concerns, was that it was more important to get [Adam] into school and get moving with his education." He

testified that the 40-day evaluation was offered because the District needed to “gain more information about his needs and where and how they could best be met,” in addition to needing “to determine where he was at in his level of appropriateness and safety in terms of what he needed for an educational environment, whether or not that was Taunton High School or a collaborative.” Mr. Fagan did not view the 40-day evaluation as disciplinary in nature; he stated that “we had made the decision that we didn’t have enough information to say he could come back to Taunton High at that point safely, and we didn’t have enough to say that he couldn’t[, s]o the offer was merely to keep providing him FAPE while obtaining the information we needed to make an appropriate decision.” (Fagan)

32. A Notice of School District Proposed Action (N-1) form reflecting the April 6<sup>th</sup> meeting was generated on April 8, 2016. Although the April 6<sup>th</sup> meeting appears to have served as the parent/guardian and student interview for the safety evaluation (Martin), the N-1 form refers to the April 6<sup>th</sup> meeting as follows: “The team met to review a safety-risk assessment on April 6, 2016. The team also held a discussion about placement. The district proposes a 40-day placement and evaluation at South Coast Educational Collaborative.” Although the District refers to this as a Team meeting, none of Adam’s special education or general education teachers was in attendance. Nothing in the record suggests that any Team members were formally excused from the meeting. (S-12)

The N-1 states that the safety/risk assessment as well as Adam’s performance this current year were used as the basis for this proposal, and that the district would “continue to provide tutoring until a team is reconvened to provide a final determination about whether or not [Adam] is safe to return to Taunton High and to develop appropriate next steps to meet his needs.” (S-12)

33. A Team meeting was held on April 26, 2016. According to the Team Meeting Summary generated at the meeting, Adam’s grandmother expressed that she was concerned about his placement, and it was determined that “[r]eturning to THS is not an option at this pt.” (S-14)
34. Pursuant to the N-1 form generated the same day, “the recommendation of the team is that [Adam] will continue with tutoring services, until an educational evaluation has been completed,” a recommendation based on his “current behavior during the school day.” The N-1 form also reflects the District’s determination that Adam would not be permitted to return to THS for the remainder of the school year, as “[h]is therapist as well as the school do not feel that it would be academically beneficial.” Instead, he would receive tutoring services, increasing from two hours a week to four hours a week.<sup>8</sup> The Team recommended that Adam undergo an evaluation<sup>9</sup> to permit it to write an appropriate IEP to meet his social

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<sup>8</sup> Testimony at the hearing suggests that the increase in tutoring was actually from four hours per week to six hours per week, though no records were entered into evidence suggesting that Adam ever received more than three hours per week. (S-15; Mulrooney)

<sup>9</sup> Ms. Mulrooney and Ms. Martin testified that the Team offered Adam and his guardians the option of a one-day evaluation at READS during this Team meeting, though nothing in the record suggests that anything other than a 40-day evaluation was offered at this time. (Mulrooney, Martin) Mr. Fagan testified that a READS evaluation is a one-day evaluation (Fagan), but at the manifestation determination review that occurred in March 2017, Ms. Martin referred to READS as a 40-day placement. (S-25) Guidance Counselor Maureen McCarthy also testified that a one-day READS evaluation was offered on April 6 and/or April 26, 2016 but was unable to find support in the record to

and emotional needs; that he attend summer school at the alternative high school, and that he meet with the Taunton Area School to Career coordinator to discuss summer work options. The attendance sheet for the Team meeting reflects that its purpose was eligibility determination and IEP development, and that the meeting was attended by the District's special education coordinator and school psychologist, Adam's liaison, his guidance counselor, his adjustment counselor, and his uncle. The space allotted for his teacher was unsigned, suggesting that none of Adam's teacher attended the meeting. Nothing in the record reflects that the absence of any Team members was excused. (S-13)

35. On June 20, 2016, Ms. Mulrooney sent a letter to Adam's grandmother to "review the options for [Adam]'s education for the 2016/2017 school year." According to the letter, Adam was not permitted to return to THS until he had a comprehensive educational and psychological evaluation. Ms. Mulrooney explained that consent had not been signed for either South Coast or READS and stated twice that Taunton High School "is not an option" for Adam for September. The letter made clear that "[o]nce the consent is complete, options for [Adam]'s educational placement will be discussed." (P-8)
36. Adam's mother interpreted this communication as pressure to consent to evaluation, as she understood it to mean the District would neither discuss nor consider Adam's return to THS, or any other public placement, unless and until his guardians acceded to the District's request. (Mother)
37. There is no indication in the record that the Team contacted Adam and his family between June 20 and September 1, 2016. The District's position during this period was that Adam was not allowed to return to THS until he completed the 40-day evaluation and placement.<sup>10</sup> (P-3)
38. On September 1, 2016, an N-1 form was generated to reflect a telephone conference purportedly held by the Team that day. The record does not reflect attendance at the meeting, although Mr. Fagan testified that it was a telephone conversation between Adam's uncle, Ms. McCarthy, and himself. (Fagan) According to the N-1, Taunton proposed a 40-day evaluation placement in a therapeutic day setting to include cognitive, psychological, and academic assessments. The N-1 reflected that Taunton had initially proposed this evaluation in April 2016, "when a Safety Evaluation yielded results indicating that [Adam] was not safe to turn to Taunton High School;" that Adam's guardian had rejected this proposal and he was provided tutoring services for the remainder of the school year; and that "[t]he option of [Adam] returning directly to Taunton High was rejected as the Safety Evaluation reviewed in April of 2016 indicated that [Adam] needed to be evaluated to determine if he was safe to return to Taunton High." Pursuant to the N-1, referrals for the 40-day evaluation were to be sent to READS Collaborative and South Coast; Adam would begin his "placement period" once he had been accepted to a program and the district received signed consent from his guardian; and a team meeting would be held at the conclusion of the 40-day evaluation period. (S-15)

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substantiate her memory. (McCarthy) The Team Meeting Summary generated at this meeting states "40 day evaluation proposed/he needs at least some type of reevaluation (Reeds)." (S-14)

<sup>10</sup> The District may have been willing to accept a one-day evaluation, see note 9, *supra*, though Parent did not understand this to be the case at this time and Adam's guardians did not testify at the hearing.

39. The District received an Evaluation Consent Form signed by Adam's uncle on September 7, 2016. The boxes next to Educational Assessment, Observation of the Student, and Psychological Assessment were checked off, and in the box marked "Assessment in All Areas Related to the Suspected Disability(ies)," the list of recommended assessments was, "cognitive, academic, 40-day evaluation placement." (S-16) Adam's uncle also signed a Release of Information form to release records to South Coast, dated September 7, 2016. On the reverse side of the form appeared a letter signed by Mr. Fagan requesting that Adam be considered for a 40-day evaluation placement. (S-17) Mr. Fagan delivered Adam's referral packet to South Coast the day after he received the signed documents. (Fagan)
40. Although Adam's uncle visited South Coast on or about September 14, 2016, Adam did not accompany him to the visit, nor did he begin an evaluation there. (S-18; Fagan)
41. In September 2016, Mr. Fagan contacted Adam's Department of Children and Families (DCF) social worker to request that DCF consider filing a care and protection petition on behalf of Adam if he continued to refuse to attend a 40-day evaluation placement. (S-18) Adam's social worker, assigned to him through a Child Requiring Assistance petition, responded that that because Adam was over the age of sixteen (16), DCF would not file a care and protection based solely on his refusal to attend school programming. (P-3)
42. Adam's mother believes that her brother, Adam's then-guardian, signed the release to permit packets about Adam to be sent to Southcoast Collaborative in September, after refusing to sign it for six months, because he was feeling harassed and bullied. (Mother)
43. On December 20, 2016, Adam's tutor, William McGovern, wrote a letter describing Adam's progress and performance. According to Mr. McGovern, Adam was respectful, and he was working both in tutoring sessions and at home. (P-9; Mulrooney)
44. On December 21, 2016, an annual review meeting was held. It was attended by Ms. Mulrooney, Special Education Coordinator Amy Moynihan, Adam, Adam's Special Education Liaison Donna Fitta, Guidance Counselor Maureen McCarthy, and Adam's mother. At the time, Adam's mother had court permission to participate in educational meetings, but had no decision-making rights; Adam remained in the guardianship of his grandmother and uncle, neither of whom attended the meeting. None of Adam's special education or general education teachers attended, and the record contains no evidence that they were excused from the meeting. (S-19, P-10)

At this meeting, Adam's mother requested that the Team hold a manifestation determination review in connection with the March 10th incident.<sup>11</sup> (Mulrooney) No MDR was offered at this time. The Team recommended that Adam continue with tutoring services until an educational evaluation has been completed, and offered increased math support in the form of virtual school given the difficulties Adam was having in math. (Mulrooney) The Team based its recommendation on the following information: Adam "is overdue for his three year

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<sup>11</sup> Because she did not have educational decision-making rights at this time, Parent did not have standing to make the request.

evaluation and the results of a safety evaluation.” The Team rejected the option that Adam return to THS, noting that tutoring would continue as well as virtual schooling for math. Adam and his mother rejected the options, offered by the District, that Adam attend the Alternative High School or an out-of-district placement. Despite the guardians’ September 2016 consent to a 40-day evaluation, the Team had no indication that Adam would actually attend. Yet the Team decided that Adam would continue tutoring and virtual schooling until his evaluation had been completed, and that it would reconvene to discuss his evaluation and write an appropriate IEP to address his social, emotional, and academic needs only after the evaluation was completed. (S-19, P-10; Mulrooney)

45. On February 19, 2017, Ms. Mulrooney sent a letter to Adam’s guardian, letting her know that Adam and his mother were requesting a manifestation determination meeting in connection with the March 10, 2016 incident. Ms. Mulrooney explained that one of Adam’s guardians would have to attend the meeting on his behalf. (S-20, P-11; Mulrooney)
46. A manifestation determination review was scheduled for March 9, 2017. On that date, Parent hand-delivered to Taunton an Order and Decree advising the District that she had regained legal custody of Adam. (Mother) Also on that date, Adam was handed a Trespass Notice informing him that he was not permitted to be on the grounds of Taunton High School or Parker Middle School. (P-12; Mother) When Parent requested permission to tape record the meeting, it was rescheduled to March 29, 2017 so that the District could create its own recording as well. (Mulrooney)
47. On March 29, 2017, Parent was asked, and agreed, to reschedule the manifestation determination meeting to March 31, 2017, so that the school psychologist could attend. (Mulrooney)
48. The manifestation determination review on March 31, 2017 was attended by Ms. Mulrooney, Ms. Moynihan, Ms. Fitta, Mr. Lefavre, Ms. Martin, Adam, and his mother. None of Adam’s classroom teachers – general education or special education – attended the meeting. (S-21)
49. At the manifestation determination review, Adam’s mother asserted that his disabilities impacted his behavior on March 10, 2016. She explained that due to his ADHD, when he is overexcited or anxious, or during transitions, he tends to speak loudly and quickly, sometimes with his hands, and this could be perceived as aggressive. She believed that having to wait for an undetermined amount of time while expecting a punishment may have triggered his ADHD. She expressed her belief that some of Adam’s accommodations, including prompting, redirection, and the opportunity to take breaks, were not being implemented at the time of the incident in March 2016, and that had they been implemented Adam might have made different decisions on that day. (Mother) Ms. Mulrooney and Ms. Martin cautioned Adam’s mother that her assertion that Adam’s behavior was a manifestation of his disabilities was tantamount to admitting that he does not know right from wrong, and that he can neither use sound judgment nor control his behavior. (S-25; Mother, Martin, Mulrooney) As such, they suggested, if she insisted that the March 10<sup>th</sup> incident was a manifestation of Adam’s disability, this meant she was saying that as part of his disability, he threatens others and could become threatening to staff members. Such a

decision would have implications for him in the future, such as impacting his placement in a school or “in school buildings in general.”(Martin, Mother, Mulrooney) At the MDR, Ms Mulrooney stated that given that Adam and his mother believe this was a manifestation of his disability, the Team would be looking at a different placement. (S-25)

50. According to the N-1 form generated in connection with the manifestation determination meeting, at the end of the meeting the Team was unable to reach a decision.<sup>12</sup> Instead of determining whether Adam’s behavior on March 10, 2016 was a manifestation of his disability, the Team once again presented Parent with a consent form for a full evaluation of Adam in a setting outside of THS. The District explained that it was proposing an academic and psychological evaluation to determine the appropriate placement for Adam, because he “was not having academic success at THS with his current educational plan.” At this meeting, the District documented specifically that it had also offered a single day evaluation of Adam at READS. (S-21, P-14) For the first time, the District offered Parent a consent for an evaluation to be completed in-district (Mulrooney) Adam’s mother indicated that she would take the forms home and consider signing. Once again, the District indicated that when it received signed consent, the evaluations would be completed within regulatory timelines, and then the Team would reconvene “to review evaluations, redetermine eligibility, and make a manifestation determination.”(S-21, P-14) The Manifestation Determination Form completed during the meeting reflects that Adam has been suspended for thirty (30) days to date and that his current placement is tutoring. The Team wrote “uncertain” next to the questions, “Was the conduct caused by or does it have a direct and substantial relationship to the disability,” and “No” next to “Was the conduct the direct result of the district’s failure to implement the IEP.” Nothing was written next to questions and comments about a Functional Behavioral Assessment. (S-22, P-13)

51. Parent filed her Hearing Request on April 19, 2017.

52. At the time of the hearing, Ms. Mulrooney believed that the District still lacked the information needed to determine whether Adam’s behavior on March 10, 2016 was a manifestation of his disability. She testified, “Going back and looking at all of the documents in [Adam]’s folder, I don’t think anybody ever really truly captured how his disability impacts his behavior.” In fact, she endorsed the 40-day evaluation placement for Adam because “the people in those programs are trained. . . to know behavior [and] students’ disabilities[,] [a]nd they’re trained to know what is a manifestation of a student’s disability.” (Mulrooney)

53. At the time of the hearing, Taunton’s position was that Adam could not return to THS because he had not completed the evaluation the District sought. (Mulrooney, McCarthy) Taunton personnel asserted uniformly that their failure to hold a timely manifestation

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<sup>12</sup> Parent and Ms. Fitta appeared to believe that Adam’s behavior on March 10, 2016 was a manifestation of his disability, while the remaining Team members felt they did not have sufficient information to make a determination. No one at the MDR expressed a belief that Adam’s behavior was not a manifestation of his disability. (S-25)



determination review had no impact on Adam's current situation.<sup>13</sup> (Mulrooney, Fagan, Martin)

54. At the hearing, Mr. Fagan described a manifestation determination decision as not only punitive; he stated that it is an opportunity for a school district to obtain more information about a particular student. At times, according to Mr. Fagan, the District may decide during a manifestation determination meeting that it needs more information about a student, at which point it asks parents to consent to an evaluation. While that evaluation is pending, it is possible that a student will be kept out of school, depending on the "School's feeling on whether or not . . . they felt they were able to safely have the student attend. However, we would always provide educational services if they were to remain out." In the event that the student is not permitted to return to school pending the results of the evaluation, the District fills out an N-1 form that proposes tutoring, though Mr. Fagan does not consider this a change in placement. As to Adam's case specifically, according to Mr. Fagan, "whether or not the behaviors that led to [Ms. Martin's] involvement and to her initial safety assessment were a manifestation of his disability or they weren't, we still needed other information. And hence, the proposal from the District would not have changed." Moreover Mr. Fagan testified that the "manifestation would have taken place after [Adam] already had the threatening behavior at Taunton High, which led to his suspension . . . The alleged activity had already taken place. So therefore, Virginia Martin had already conducted her evaluation and come to the determination that we needed more information. So none of that would have changed if we held the manifestation determination meeting on that day, because he had already exhibited the behavior." Pressed by the Parent on cross-examination as to whether the District would have had to allow Adam to return to school had the Team determined that his behavior on March 10, 2016 was a manifestation of his disability, Mr. Fagan responded that the District's proposal would not have been different as it still would have sought more information. Mr. Fagan gave conflicting responses as to whether Adam could have been required to undergo an evaluation before being allowed to return to school, stating both, "[w]e can still say that we want more information before he returns, is my understanding of it," and "My understanding is that we can return to placement, but we can still, as a District, say that we want to get more information." (Fagan)

55. At the hearing, Ms. Mulrooney stated that the purpose of a manifestation determination review is to determine whether a student's disability is impacting his behavior. If a behavior is found to be a manifestation of a student's disability, she continued, "it means that the student . . . may have difficulty managing that behavior in specific settings, and that in my experience with manifestation determinations, when we make a determination of 'Yes,' typically then we're looking at placement, because the behavior may not be appropriate to the setting the student is in." In addition to a conversation about placement, a positive

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<sup>13</sup> Ms. Mulrooney testified that a manifestation determination review in 2016 would have resulted in a determination of "unsure" or "no," since "they were looking at it more as behavior than social-emotional." Had the answer been "unsure," the parent would be asked to sign a consent to get more information about the student, and "we could come to some agreement as to whether the student was returning to school or the student remained in tutoring. Once we got the evaluation information, we would reconvene the team and make a decision as to what was appropriate." She also testified that if a parent refused to consent to an evaluation, in these circumstances, the District would have offered an interim placement, and that that in Adam's situation, even if a manifestation determination review had been held in 2016, the safety evaluation still would have been conducted. (Mulrooney).

manifestation determination would lead to a functional behavioral assessment, potentially a behavioral intervention plan, and possibly a request for additional evaluations. Ms. Mulrooney also expressed her belief, pursuant to the THS Code of Discipline, that a student is not allowed to attend school while he is undergoing a safety evaluation.<sup>14</sup> (Mulrooney)

56. At the hearing, Ms. Martin testified, that even if the behavior that leads to a threat assessment is found to be a manifestation of a student's disability, the student may be required to stay out of school until she finds him safe to return to school; he is given tutorial services to stay on track with academics, and any absences are excused. (Martin) She also expressed this belief at the manifestation determination review on March 31, 2017, when she told Parent that a timely MDR would not have changed things for Adam because the District has the right, when it puts a student out of school, to consider an alternative educational placement. (S-25)
57. Adam has been out of school since March 10, 2016. He has received between two and six hours of tutoring per week since March 29, 2016. It is not clear from the record whether Adam earned any credits for the 2015-16 school year. He appears to have earned at least some credits during the fall of the 2016-17 school year and to be on his way to earning credit in three courses for the second semester of the 2016-17 school year. He has not received any counseling services. (Mulrooney)

## DISCUSSION

### A. The Parties' Positions

Parent asserts that Adam was entitled to a manifestation determination review within ten (10) days of his suspension for the March 10, 2016 incident, as he had previously been suspended for over ten (10) days during the 2015-16 school year. She contends that Taunton's failure to convene that meeting resulted in Adam being excluded from school for more than a year and that when Taunton finally did convene the MDR twelve months after the incident, it failed to consider information in its possession regarding his disabilities when it concluded the meeting with no decision. Parent also argues that at the time of his suspension on March 10, 2016, Adam's IEP was not being implemented as, for example, he was not being provided with clear, consistent limits, expectations and consequences with respect to headphone use at school, and the individual responsible for disciplining him was unaware that he even had an IEP. Parent further contends that Taunton discriminated against Adam on the basis of his disability; and that he and his family were bullied as Taunton attempted to obtain their agreement to an out-of-district evaluation of Adam. Parent requested that Taunton's manifestation determination decision be overturned and that Adam be allowed to return to his last agreed upon placement in a full inclusion program at Taunton High School.<sup>15</sup>

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<sup>14</sup> As Ms. Mulrooney testified, the THS Code of Discipline provides, "Students referred for a risk assessment cannot return to school until the results have been reviewed and accepted by THS administration and support personnel, and the student is deemed safe to return to school." (S-7; Mulrooney)

<sup>15</sup> At hearing, Parent, who appeared *pro se*, introduced evidence of the credits and services Adam was denied as a result of the District's actions and inactions.

The District contends that although it failed to hold a timely manifestation review in connection with Adam’s suspension for the events that occurred on March 10, 2016, this failure did not change the outcome for Adam. Because the District believed it had insufficient information about Adam at the time of his suspension, it asserts, a timely MDR would have been inconclusive. As such, the safety evaluation would have occurred, leading to the conclusion that Adam could not return to THS absent his participation in a comprehensive evaluation. It is Adam and his guardians’ refusal to consent to an evaluation until September 2016 and, after that date, Adam’s refusal to participate in the 40-day evaluation at South Coast that caused him to be out of school for so long. According to the District, “there is no evidence that Taunton failed to provide [Adam] with an opportunity to be appropriately educated and to receive continued educational benefits since March of 2016. And there is no evidence that Taunton[’s] failure to hold the manifestation meeting in a timely manner caused educational harm to” Adam. In other words, the District asserts, “No harm; no foul.”

## B. Relevant Legal Principles

In order to determine whether Parent is entitled to a decision in her favor, I must consider legal standards governing special education, school discipline, changes in placement, and procedural violations. As the moving party in this matter, Parent bears the burden of proof.<sup>16</sup> To prevail, she must prove – by a preponderance of the evidence – that the District changed Adam’s placement in March 2016 without convening a timely manifestation determination review and/or obtaining parental consent, that such failure was not cured by the September 2016 consent to a 40-day evaluation or the March 2017 MDR, and that these procedural inadequacies constituted a deprivation of FAPE.<sup>17</sup>

### 1. *School Discipline of Students with Disabilities Entails Additional Procedural Protections*

Pursuant to the Individuals with Disabilities Education Act (IDEA) and its implementing regulations, school districts may not change the placement of a student with a disability for disciplinary purposes (i.e. via suspension or expulsion) if the conduct triggering the discipline is a manifestation of the student’s disability.<sup>18</sup> In other words, if the student’s conduct was caused by or has a direct and substantial relationship to his disability or disabilities, the school district may not change his placement because of that conduct.

Federal law defines a change in placement for purposes of removal of a child with a disability from the child’s educational placement as occurring if (1) the removal is for more than ten (10) consecutive school days; or (2) the child has been subjected to a series of removals that constitutes a pattern because: (i) the series of removals total more than ten (10) school days in a

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<sup>16</sup> See *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2008).

<sup>17</sup> See *Schaffer*, 546 U.S. at 62; see also *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 994 (1st Cir. 1990) (Districts are liable for procedural violations if parents prove both that a violation occurred and that the procedural inadequacies compromised the pupil’s right to an appropriate education, seriously hampered the parents’ opportunity to participate in the formulation process, or caused a deprivation of educational benefits”).

<sup>18</sup> See 20 U.S.C. §1415(k)(1)(E)(i); 34 CFR §300.530(e).

school year; (ii) the child’s behavior is substantially similar to the child’s behavior in previous incidents that resulted in the series of removals; and (iii) because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another.<sup>19</sup>

Within ten (10) days of a decision to change the placement of a child with a disability because of a violation of a code of student conduct, as described above, the school district, the parent, and relevant members of the IEP Team (as determined by the parent and the school district) “shall review all relevant information in the student’s file, including the child’s IEP, any teacher observations, and any relevant information provided by the parents to determine – (I) if the conduct in question was caused by, or had a direct and substantial relationship to, the child’s disability; or (II) if the conduct in question was the direct result of the [school district]’s failure to implement the IEP.”<sup>20</sup> If the district, the parent, and the relevant members of the Team determine that either of these factors is applicable for the child, “the conduct shall be determined to be a manifestation of the child’s disability.”<sup>21</sup>

If the student’s conduct is determined to be a manifestation of his disability, the Team is required to conduct an FBA and implement a behavioral intervention plan for the child, provided that one has not already been conducted; review any behavioral intervention plan that has been developed and modify it as necessary to address the behavior, and, with exceptions enumerated below, “return the child to the placement from which the child was removed, unless the parent and the local educational agency [school district] agree to a change of placement as part of the modification of the behavioral intervention plan.”<sup>22</sup>

If the student’s conduct is determined not to be a manifestation of his disability, the relevant disciplinary procedures applicable to children without disabilities may be applied in the same manner and for the same duration in which the procedures would be applied to children without disabilities.<sup>23</sup> The school district, however, must still provide the student with FAPE, though this may occur in an interim alternative educational setting.<sup>24</sup>

Regardless of whether the behavior is determined to be a manifestation of the child’s disability, a student may be removed to an interim alternative educational setting (IAES) for not more than forty-five (45) school days in limited circumstances involving possession of weapons or drugs on school grounds or at school functions, or the infliction of serious bodily injury upon another person on school premises.<sup>25</sup> The IDEA provides that the “parent of a child with a disability who disagrees with any decision regarding placement, or the manifestation determination under this subsection, or a local educational agency that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or to others, may request a hearing.”<sup>26</sup> In these circumstances, a hearing officer may either return the

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<sup>19</sup> 34 CFR §300.536(a).

<sup>20</sup> 20 U.S.C. §1415(k)(1)(E)(i); 34 CFR §300.530(e)(2).

<sup>21</sup> 20 U.S.C. §1415(k)(1)(E)(ii); 34 CFR §300.530(e)(2).

<sup>22</sup> 20 U.S.C. §1415(k)(1)(F); 34 CFR §300.530(f).

<sup>23</sup> 20 U.S.C. §§ 1415(k)(1)(C); 34 CFR §300.530(c).

<sup>24</sup> 20 U.S.C. §§ 1415(k)(1)(C), 1412 (a)(1)(A); 34 CFR §300.530(c).

<sup>25</sup> 20 U.S.C. §1415(k)(1)(G); 34 CFR §300.530(g).

<sup>26</sup> 20 U.S.C §1415(k)(3)(A).

child to the placement from which he was removed or order a change in placement to an IAES if she “determines that maintaining the current placement of such child is substantially likely to result in injury to the child or to others.”<sup>27</sup>

## 2. *Changes in Placement Require Parental Consent*

Although the language of the IDEA allows for an interim change in a student’s then-current educational placement outside of the IEP or disciplinary processes, it permits such a change only “where parents and school officials are able to agree on one.”<sup>28</sup> This prohibition on changes of placement absent parental consent reflects Congress’s intent “to strip schools of the *unilateral* authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school.”<sup>29</sup> As such, with the exception of removal to an IAES in the narrow circumstances described above, if a District wishes to change the placement of a student with a disability even temporarily and the parent does not agree to the change, the District must maintain the student’s then-current educational placement until the dispute is resolved.<sup>30</sup>

## 3. *Procedural Errors May Constitute a Deprivation of FAPE*

The IDEA recognizes that procedural errors may amount to a deprivation of FAPE: “In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies – (I) impeded the child’s right to a free appropriate public education; (II) significantly impeded the parents’ opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents’ child; or (III) caused a deprivation of educational benefits.”<sup>31</sup>

### C. Application of these Standards Demonstrates that Taunton Committed Significant Procedural Violations That Amounted to a Violation of FAPE

#### 1. *Taunton Changed Adam’s Placement Without Following Proper Procedures*

Taunton acknowledged that with Adam’s three (3)-day suspension starting on March 11, 2016 for the incident that occurred the previous day, he had been suspended for thirty (30) days during the 2015-16 school year. His suspensions were for similar behaviors: insubordination, disrespect, use of vulgar language, and inappropriate behavior. Moreover these suspensions were occurring regularly and resulted in a significant amount of time out of school. Pursuant to the IDEA, this series of removals constitutes a pattern, such that Adam’s suspension on March 11, 2016 constituted a change in placement for purposes of removals of a child with a disability from his educational placement.<sup>32</sup>

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<sup>27</sup> *Id.* at §1415(k)(3)(B).

<sup>28</sup> *Honig v. Doe*, 484 U.S. 305, 324-25 (1998).

<sup>29</sup> *Id.* at 323.

<sup>30</sup> See 20 U.S.C. §1415 (j).

<sup>31</sup> 20 U.S.C. §1415(f)(3)(E)(ii).

<sup>32</sup> See 34 CFR § 300.536(a).

Since the suspension, Adam has not been permitted to return to his last accepted placement, a full inclusion program at THS. Taunton personnel made it clear in no uncertain terms that Adam could not attend THS unless and until he underwent an evaluation, communicating multiple times that THS was not an option for him and in fact serving him with a “No Trespass” notice the first time he stepped on campus for a manifestation review.

Taunton offered Adam and his family the option of a one-day evaluation at READS and a 40-day “evaluation placement” at South Coast Educational Collaborative or READS. Neither of these options would have been a placement. In fact, regulations specify that an extended evaluation (which is how I construe a 40-day evaluation “shall not be considered a placement.”<sup>33</sup> Adam’s current placement, according to Taunton, is home tutoring. Given that Adam received tutoring for a maximum of six (6) hours a week, and he does not receive counseling (a service listed on his IEP), there is no question that tutoring “results in dilution of the quality of [his] education or a departure from [his] LRE-compliant setting.”<sup>34</sup> No placement form or “agreement otherwise” was submitted to suggest that Adam’s guardians consented to this change in placement. Moreover Taunton did not file for hearing at the BSEA to obtain an order to support its placement of Adam in tutoring, nor did it identify the 40-day “evaluation placement” as an IAES and proceed to the BSEA for hearing to obtain an order to support such placement.

## *2. Taunton’s Failure to Timely Convene a Manifestation Determination Led to the Improper Change in Placement*

Despite the District’s representations to the contrary, had it convened and properly executed a manifestation determination review in March 2016, Adam may not have been suspended for the incident that occurred on March 10, 2016. In fact, had the District convened an MDR at any time after Adam had been suspended for ten (10) days during the 2015-16 school year, it is likely – based on its own Discipline Code – that he would have been referred for an FBA and a behavioral intervention plan (BIP), whether or not the District found his conduct in any of those incident to be a manifestation of his disability.<sup>35</sup> To determine whether the existence of an FBA and a BIP would have altered the course of the events on March 10, 2016 requires too much speculation, but in any event, it would have provided additional information on which the Team could have based its manifestation determination. That his headmaster believed, for some reason, that Adam was no longer on an IEP is no justification for Taunton to have failed to convene an MDR at any point during the 2015-16 school year, up to and including in connection with the March 10<sup>th</sup> incident.

Had a manifestation determination review been convened properly in March 2016, it would likely have included Adam’s teacher Ms. Mota, whose notes on his progress reports and testimony at hearing reveal that she had some insight into the impact of Adam’s disabilities on his behavior. Moreover the District would have reviewed Adam’s evaluations, which included the following information:

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<sup>33</sup> 603 CMR 28.05(2)(b)(5).

<sup>34</sup> See *A.W. ex rel. Wilson v. Fairfax County Sch. Bd.*, 372 F.3d 674, 682 (4th Cir. 2004)..

<sup>35</sup> According to the THS Discipline Code, a student’s Team must refer him for an FBA and behavioral intervention plan (BIP) if it finds his conduct to be a manifestation of his disability and may refer him for an FBA and BIP, as appropriate, if it finds that his conduct was not a manifestation of his disability. (P-19)

Adam’s “difficulties with behavior and social/emotional issues negatively impact his ability to express himself in an appropriate manner. This impacts his ability to relate to others, problem solve and interact with . . . adults in an appropriate manner.” (S-5)

Adam “does present with significant concerns related to ability to maintain focus, regulate behavior, and maintain appropriate interpersonal relationships.” (S-5)

Adam presents with a communication disability, specifically in the area of social communication. (S-3)

“[F]rom a behavioral perspective, the prominence of his oppositional and defiant tendencies was rather dramatic. While these could reflect the PTSD and complex psychosocial history, he also meets criteria for an Oppositional Defiant Disorder.” (S-6)

The District also had the following information on its own then-current IEP:

Adam’s “difficulties with behavior and social/emotional issues negatively impact his ability to express his ideas, wants, and feelings in an appropriate manner. This impacts his ability to relate to others, to problem-solve . . . and to interact with . . . adults in an appropriate manner.” (S-2)

“Significant amount of consistency is needed for [Adam] to make effective progress with his social emotional issues.” (S-2)

“Deficits in pragmatic/social communication can affect [Adam]’s ability to communicate effectively with adults for academic problem solving and social acceptance.” (S-2)

Even recognizing that behavior and symptomology may change over time, the District had before it sufficient information to determine that Adam’s conduct on March 10, 2016 – up to and including his escalation, foul and aggressive language, agitation, and “physically posturing” toward school staff while waiting in the office for an indeterminate period of time, was “caused by, or had a direct and substantial relationship to” his disabilities.<sup>36</sup> For these reasons, the District’s manifestation determination decision, which it rendered as “inconclusive” in March 2017, cannot stand.

The District argues that it would have required Adam to participate in a 40-day evaluation placement to complete the safety evaluation, which he had to undergo pursuant to the THS Discipline Code, even if it had properly convened a manifestation determination review in

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<sup>36</sup> See 20 U.S.C. §1415(k)(1)(E)(i); 34 CFR §300.530(e)(2). Furthermore, even if District personnel did not recognize the inconsistent enforcement of school rules (such as the wearing of headphones) as a problem for Adam, the District was aware that he was not attending counseling. Best practice would have been for the Team to reconvene to discuss other ways to support him.

March 2016. The Discipline Code, however, provides for a safety evaluation only when a student is *suspended* for certain behaviors. As Adam's conduct on March 10, 2016 was a manifestation of his disabilities, he could not have been suspended for the incident. It follows that he could not have been referred for a safety evaluation. The District would not have been able to change his placement, whether to tutoring or an IAES, without parental consent or an order from the BSEA. Furthermore, had the District convened an MDR in March 2016, and suspended him anyway, the procedural safeguards notice that would have been sent by the District to Adam's guardians may have led them to appeal the MDR. As such, I cannot find that Taunton's failure to convene an MDR in March 2016 was anything other than egregious. Moreover, Taunton's refusal to make a determination when it finally convened the MDR in March 2017, instead proposing an evaluation, circumvents the purpose of the process, which aims to prevent a student from being disciplined for conduct that is a manifestation of his disability.

3. *Taunton's Procedural Errors Both Impeded Adam's Right to FAPE and Caused a Deprivation of Educational Benefits*

It is currently May 17, 2017. Adam last attended Taunton High School on March 10, 2016, over a year ago. Due to Taunton's failure to conduct a timely manifestation determination review, and to conclude as a result of that MDR that Adam's conduct on March 10, 2016 was a manifestation of his disabilities, Adam was referred to a safety evaluation. Taunton's safety evaluation process is triggered by a suspension; had the MDR been timely convened, Adam's Team would have recognized that he could not be suspended and as such, could not have prevented him from returning to THS unless and until he agreed to an evaluation. Adam has missed more than one year of academic instruction and therapeutic supports. At most, he received four to six hours of tutoring in some (but not all) of his academic subjects during this time. Although Adam he may have earned some credits and made some academic progress during the course of home tutoring, tutoring is not the placement on his last accepted IEP. Taunton's procedural errors, without a doubt, impeded Adam's right to FAPE, as provided in his IEP dated October 29, 2015 to October 28, 2016, and caused him to be deprived of the educational benefits he would have received had he been permitted to return to THS at the conclusion of an MDR within ten (10) days of his suspension.<sup>37</sup>

## CONCLUSION

After reviewing the testimony and documents in the record, I conclude that Parent has met her burden to prove that Taunton failed to convene a timely manifestation determination review for Adam in connection with his suspension for the March 10, 2016 incident and that, as a result of the District's procedural error, Adam has received minimal educational services for over a year. Taunton did not set forth any valid grounds to mitigate its obligation to conduct a timely MDR. Adam is entitled to return to his last accepted placement, a full inclusion program at Taunton High School, immediately, and he is entitled to compensatory services for the months during which he received home tutoring rather than the program and services to which his IEP

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<sup>37</sup> 20 U.S.C. §1415(f)(3)(E)(ii); see *Roland M.*, 910 F.2d at 994.



entitled him. The District must move forward as though Adam's conduct on March 10, 2016 was a manifestation of his disabilities by conducting an FBA and developing a BIP as soon as is practicable following his return to school.

I am concerned, following my review of all of the evidence, about Taunton Public School personnel's lack of understanding of the interplay between school discipline and special education, particularly with respect to manifestation determination reviews and its safety evaluation process. I strongly recommend that Taunton secure training for its staff with respect to discipline of students with disabilities.

I will also be referring this matter to the Massachusetts Department of Elementary and Secondary Education, so that DESE may follow up as it deems appropriate.

### **ORDER**

Taunton Public Schools is hereby directed to convene a Team meeting within two (2) school days of receipt of this decision to develop a transition plan that will permit Adam to return to Taunton High School next week.

Adam's Team is hereby to directed arrange for Adam to undergo a Functional Behavioral Assessment and will develop a Behavior Intervention Plan as soon as is practicable following Adam's return to school. The Team is also hereby directed to initiate the three-year reevaluation process for Adam, to take place at THS unless Parent agrees otherwise, before the end of the 2016-17 school year.

Adam's Team is hereby directed to convene within thirty days to devise a compensatory services plan to include the manner in which Taunton Public Schools will deliver the services it owes to him. These services will occur at THS, unless an alternate location is agreed to by Adam's parent, and will focus on credit recovery. The Team will work with Adam, his tutor, and his teachers at THS to maximize the credit he receives for the work he has completed through tutoring.

A Hearing Officer-initiated Conference Call will take place at 11:00 AM on June 2, 2017 to discuss the remainder of Parent's *Hearing Request*.

By the Hearing Officer:

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Amy M. Reichbach  
Dated: May 18, 2017<sup>38</sup>

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<sup>38</sup> The Decision issued to the parties on May 18, 2017 inadvertently contained the date May 17, 2017. The date has been corrected on this version.