**COMMONWEALTH OF MASSACHUSETTS**

**DIVISION OF ADMINISTRATIVE LAW APPEALS**

**BUREAU OF SPECIAL EDUCATION APPEALS**

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**DECISION**

**STUDENT v. WESTFIELD PUBLIC SCHOOLS**

**BSEA # 2212235**

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**BEFORE**

**HEARING OFFICER**

**ALINA KANTOR NIR**

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**PARENTS, PRO SE**

**ALISIA ST. FLORIAN, ATTORNEY FOR THE SCHOOL**

**COMMONWEALTH OF MASSACHUSETTS**

**DIVISION OF ADMINISTRATIVE LAW APPEALS**

**BUREAU OF SPECIAL EDUCATION APPEALS**

**In Re: Student and Westfield Public Schools BSEA # 2212235**

**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.

A hearing in the above-noted matter was held via a virtual platform on April 3 and 4, 2023 before Hearing Officer Alina Kantor Nir. Parents proceeded *pro se*, and Westfield Public Schools was represented by counsel. Those present for all or part of the proceedings, all of whom agreed to participate virtually, were:

Mother

Father

Alisia St. Florian Attorney for the Westfield Public Schools (Westfield or the District)

Deb Ecker Administrator of Special Education and Student Services, Westfield

Darlene Fernandez Special Education Supervisor for Westfield High School (WHS)

Kerry Cox Special Education Supervisor for Westfield Intermediate School (WIS)

and Westfield Middle School (WMS), Westfield

Jennifer Metz Special Education Teacher, Language Learning Disability (LLD)

Program, Westfield

Anthony Ascolillo Special Education Teacher, Westfield

Anthony Saccomani School Adjustment Counselor, Westfield

Andrew Butler School Psychologist, Westfield

Dr. Tonia Bonner Assistant Principal, Westfield High School (WHS), Westfield

Court Reporter Carol Kusinitz

The official record of the hearing consists of documents submitted by Westfield and marked as Exhibits S-1 to S-35; documents submitted by the Parents and marked as Exhibits P-1, P-2a through P-2d, P-3a and b, P-4a and b, P-5a and b, P-6, P-7b, P-8; approximately 1 day of recorded oral testimony and argument; and a two volume transcript produced by a court reporter. A transcript of the proceedings was sent to the Parties, and as requested by the Parties, a postponement was granted until May 8, 2023 for submission of written closing arguments, and the record closed on that date.

**ISSUE IN DISPUTE**:

The issue to be decided is whether Parents’ refusal to consent to the extended evaluation in a therapeutic milieu proposed by Westfield will result in the denial of a FAPE to Student, in which case, substitute consent is appropriate.

**RELEVANT PROCEDURAL HISORY:**

On June 17, 2022 Parents filed a due process complaint with the BSEA, asserting claims under both the Individuals with Disabilities in Education Act (IDEA) and Section 504 of the Rehabilitation Act of 1973 (Section 504). In part, Parents alleged that in violation of the IDEA, the District “committed significant procedural violations that resulted in a denial of [a Free Appropriate Public Education (FAPE)]” to Student “by changing [Student’s] placement through procedural inadequacies in connection with school discipline” and by denying Parents meaningful participation during the manifestation determination review meeting.[[1]](#footnote-1) On June 17, 2022, the BSEA granted the matter expedited status pursuant to the IDEA and the applicable *BSEA Hearing Rules*. On June 27, 2022, the District proposed to expunge from Student’s record the 34-day suspension and the manifestation determination meeting related to said incident, for purposes of settling the pending expedited claims. On June 28, 2022, the District filed the *Westfield Public Schools’ Motion to Dismiss* *Expedited Claims* arguing that in light of the District’s proposal, the pending claims should proceed on a regular track along with any counter claims. On June 29, 2022, in my *Ruling on* *Westfield Public Schools’ Motion to Dismiss* *Expedited Claims*, I allowed the motion, finding, in part, that because the District had offered to expunge from Student’s record the 34-day suspension and the manifestation determination meeting related to said incident, no claims remained that satisfied *BSEA Hearing Rule II(C)*, the standard for expedited hearings*.* The remaining issues were scheduled for hearing.

On July 1, 2022, the District filed *Westfield Public Schools’ Partial Motion to Dismiss Parents’ Amended Hearing Request and Counterclaim*.[[2]](#footnote-2) The District requested an order allowing it to implement the Extended Evaluation the Team had proposed; according to the District, an Extended Evaluation was necessary for the Team to observe Student in a therapeutic milieu and gather data in order to write an IEP and propose a placement that would support Student to access the curriculum and make meaningful academic and social/emotional progress. On July 26, 2022, I allowed, in part, and denied, in part, the District’s *Motion to Dismiss Parents’ Amended Hearing Request and Counterclaim.*[[3]](#footnote-3) As such, the issues for hearing included whether an extended evaluation in a therapeutic milieu was necessary to ensure that Student is able to receive a FAPE, in which case substitute consent was appropriate.

On September 19, 2022, Parents filed *Parents’* *Motion for Partial Summary Judgment* asserting that Parents are entitled to judgment as a matter of law on the issue of whether Westfield discriminated against Student in violation of § 504 on the basis of his disability through a pattern of excessive/disproportionate suspensions between June 17, 2019 and June 17, 2022, inclusive of beginning and end dates. On September 26, 2022, Westfield filed *Westfield Public Schools’ Motion in Opposition to Parents' Motion for Partial Summary Judgment*. *Parents’* *Motion for Partial Summary Judgment* was denied on September 29, 2022.

Subsequently, the Hearing dates were postponed several times for good cause, including on January 23, 2023. At that time, a postponement was allowed until April 3, 2023 as Parents had recently accepted an IEP Amendment (January 2023 IEP) for Student to begin in the Language Learning Disability Program (LLD) in the District.[[4]](#footnote-4)

On March 24, 2023, Parents withdrew their Hearing Request. Via email dated the same day, the District indicated that it wished to proceed on its counter-claim. On March, 25, 2023, Parents filed *Parents’ Motion to Dismiss District’s Counter-Claim*. Specifically, Parents asserted that on February 4, 2023, the District proposed and Parents accepted in full, an IEP proposing that the Student attend the in-District LLD program; “no notation of the need for additional assessments” was included in the fully accepted IEP; and no Team “member suggested that the data to write the IEP was inconclusive, or that more evaluative data was needed.” On March 27, 2023, the District filed its *Opposition* asserting that Student was “not [] access[ing] his education or mak[ing]any educational progress despite all of the District's best efforts.” On March 28, 2023, Parents filed a *Motion to Reply to Westfield Public Schools’ Opposition of Parents[’] Motion to Dismiss WPS Counterclaim* (*Rebuttal*) asserting, in part, that the District failed “to provide the specific evaluations and testing” to be administered during the extended evaluation nor had Parents received an Extended Evaluation Form (EE-1 and EE-2). On March 28, 2023, in my *Ruling on Parents’* *Motion to Dismiss District’s Counter-Claim*, I denied Parents’ *Motion to Dismiss District’s Counter-Claim* finding, in part, that if the District asserts that the absence of such evaluative information will result in a denial of a FAPE, a fully accepted IEP does not bar the District from seeking additional information regarding Student’s needs.[[5]](#footnote-5) The matter proceeded to Hearing on April 3, 2023.

**FACTUAL FINDINGS:**

1. Student is a ninth grade Westfield resident attending the LLD Program at Westfield High School. Student is eligible for special education and related services pursuant to the Neurological and Health disability categories. He has been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD), Anxiety, Dyslexia, Depression, and Disruptive Mood Dysregulation Disorder (DMDD). (S-1, S-2, S-16, S-18, S-20, S-21, S-32, P-1, Butler) Student has a lot of friends at school and is very social. (S-1, P-2a)
2. Student has a lengthy history of academic challenges. (S-2, S-10, S-16, S-18, S-20, S-21, S-22, S-28, S-32, S-33, P-1, P-4b, Butler, Ascolillo, Metz) Although he has average cognitive abilities, Student struggles “to decode multi-syllabic unfamiliar words[,] to understand text that is not at his instructional level[, and] to hold onto verbally presented information.” He has challenges with word retrieval and can be impulsive with his answers. Student also struggles with written expression, mathematics, focus, executive functioning, and transitions. (S-2, S-16, S-18, S-20, S-21, S-32, P-1, P-4b, Butler, Metz, Ascolillo)
3. Student has long struggled with emotional and behavioral regulation.[[6]](#footnote-6) His behavioral challenges manifest as noncompliance, classroom disruption, elopement from the classroom, with inappropriate and racially charged language, absenteeism, and tardiness. (S-2, S-6, S-7, S-8, S-9, S-10, S-11, S-13, S-16, S-17, S-18, S-20, S-21, S-22, S-24, S-25, S-27, S-28, S-29, S-30, S-31, S-32, P-1, P-2a, Cox, Ecker, Butler, Metz) These behaviors began to increase at the end of the 2018-2019 school year. (S-20, S-21) The District conducted a Functional Behavior Assessment (FBA) of Student’s behaviors in the spring of 2018 and again in the fall of 2019. (S-24)
4. According to Parents, in September 2019, Student was placed in a hold and “spent the day in a small classroom without peers.” Subsequently, Student became an “emotional wreck.” He “was never able to recover, leading to the ongoing behaviors which culminated in his long-term suspension.” (S-21) Due to the incident, Student also developed a “heightened sense of ‘fight or flight’ and a distrust of teachers and administrators.” (S-19)
5. In December 2019 and January 2020, Dr. Alex Hirshberg completed a Psychological Assessment of Student, at the Team’s request. As part of the assessment, Dr. Hirschberg administered several formal tests to Student.[[7]](#footnote-7) Assessment results revealed difficulties with attention, task-monitoring, comprehension, and phonological processing. Dr. Hirshberg noted

“some significant concerns with [Student’s] emotional functioning. Student endorsed statements suggesting that he experience[d] satisfaction from interpersonal conflict. Student also ascribe[d] negative intent to others. When [] threatened, he [went] on the attack. He anticipate[d] criticism and believe[d] he [would] not be treated with warmth and compassion from others, leading to a hopeless anger that manifest[ed] in acting out behavior.”

Dr. Hirschberg concluded that “Student [could not] tolerate redirection or consequences for his bad behaviors because he [was] quick to assume that others [did] not care about him or [were] out to persecute him. This resentment fuel[ed] his desire for revenge that then manifest[ed] in increased disruptive and disrespectful behavior.” (S-21)

1. Dr. Hirschberg diagnosed Student with Disruptive Mood Dysregulation Disorder, Moderate Major Depressive Disorder, single episode, ADHD, and a Specific Learning Disorder with impairment in reading. He recommended Cognitive Behavioral Therapy (CBT) to improve Student’s ability to notice social cues in the moment to help inform his behavior. (S-21)[[8]](#footnote-8) Parents found Dr. Hirshberg’s diagnoses of Disruptive Mood Dysregulation Disorder and Moderate Major Depressive Disorder to be “extreme” based on relatively limited testing. (S-19)
2. On June 5, 2020[[9]](#footnote-9), the Team convened and developed an IEP for a full inclusion placement (2020-2021 IEP) with goals in the areas of Reading, Social Emotional/Behavioral, Language Arts, Executive Functioning, and Mathematics. To support these goals, the District proposed the following services: A Grid: Consult (Behaviorist and BCBA), 1x30 monthly, Consult (Special Education Teacher), 1x30 weekly; B Grid: Academic Support/Behavior, 1x30 weekly, Academic Support/ELA, 1x80 daily, Academic Support/Math, 1x80 daily; C Grid: Counseling, 1x30 weekly, Academic Support/Reading, 1x40. (S-18)
3. Parents partially rejected the 2020-2021 IEP. According to Parents, Student had been suspended from school due to lack of proper supports, and they requested that a series of accommodations be added to the 2020-2021 IEP. Parents also sought support for Student during unstructured times, such as specials. (S-19)[[10]](#footnote-10)
4. Parents referred Student for a neuropsychological assessment with Dr. Alissa Talamo of NESCA, which took place in June and July 2020. Dr. Talamo administered several formal assessments.[[11]](#footnote-11) Her testing revealed Student’s FSIQ to be in the average range, but he struggled with language weaknesses. Dr. Talamo concluded that Student continued to meet criteria for ADHD, Anxiety, Depression, Dyslexia (Specific Learning Disability (SLD) in Reading, Writing and Math), and Disruptive Mood Dysregulation Disorder (DMDD), as his “acting out responses” were “significantly more than is typical for ‘just’ ADHD, and these issues [had] escalated over time.” According to Dr. Talamo, Student struggled with self-regulation and presented with a lack of self-confidence and distrust of others. Academically, he had “consistent difficulties” with decoding, encoding, and written expression. He also struggled with math fluency, calculation, and reasoning. According to Dr. Talamo, Student was “emotionally fragile” presenting with “significant levels of emotional distress and poor impulse control, putting him at great risk of continuing to engage in poorly considered behaviors. Therefore, [Student] should be considered at extremely high risk for an escalation of his already very serious social, emotional, and academic challenges unless he [was] provided with the appropriate intensive and comprehensive services.” (S-20)
5. At the time of her assessment, Dr. Talamo was “extremely concerned with [Student’s] return[] to the same public school system for the next several years. [Student] already believe[d] that he [was] perceived as a ‘bad kid’” and that his teachers “view[ed] him negatively.” She noted that “if placed within the same school system (even a new school within the same school system), [Student] [was] at great risk to respond with anxiety and learned behaviors that [would] not allow him to access instruction or make academic or social/emotional gains.” (S-20)
6. Dr. Talamo recommended placement in a “trauma sensitive school that has teachers trained in a trauma sensitive approach when engaging with student, and who know how to appropriately respond to behaviors stemming from anxiety.” She suggested placement with peers who have “primary problems with anxiety, depression, and learning disabilities.” Student also required a positive behavior plan to support his anxiety management as well as goals focusing on increasing coping strategies and specialized instruction in reading, writing, and math. (S-20)[[12]](#footnote-12)
7. Student continued to struggle in seventh grade. According to Parents, Student’s IEP was not being followed and his academic, behavioral, and social/emotional needs were not being met. His grades were poor. Student’s school performance continued to be inconsistent, and he engaged in frequent non-compliance, work refusal, and disruptive behavior. (S-16) During the 2020-2021 school year, Student accrued 46 disciplinary referrals for disruptive behavior, inappropriate language, defiance, and skipping class. Positive incentive plans were created without success. Student refused to meet with the school adjustment counselor, and Parents insisted he should not meet with the counselor. When all students returned to in-person learning at the end of April 2021, Student’s behaviors escalated and became more difficult to manage. He was suspended twice for a total of 6 days (3 days for disruptive behavior and another 3 days for vaping at school). He also served a bus suspension after jumping out of the bus window when it was parked.[[13]](#footnote-13) (S-10, S-11, S-24, S-25, Cox, Ecker)
8. On May 7, 2021, the District proposed an IEP and full inclusion placement for Student (2021-2022 IEP) with goals in the areas of Reading, Social Emotional/Behavioral, Writing, Executive Functioning, Mathematics, and Decoding. To support these goals, the District proposed the following services: A Grid: Consult (Behaviorist and BCBA), 1x30 monthly, Consult (Special Education Teacher), 1x30 week; B Grid: Academic Support/Behavior, 1x30 weekly, Academic Support, 2x45 daily, Academic Support/Math, 1x45 daily; C Grid: Counseling, 1x30 weekly, Academic Support/Reading, 2x45, Academic/Reading, 1x45. ESY was also proposed. (S-16)
9. Debra Ecker is the Director of Special Education in Westfield. She has served in the role for two years following serving one year as the Interim Director of Special Education. Ms. Ecker holds a bachelor’s and a master’s degree in special education and several licenses through the Department of Elementary and Secondary Education (DESE). Ms. Ecker also has an extensive professional history working in special education and special education administration. She first became acquainted with Student during the 2020-2021 school year. (Ecker)
10. Kerry Cox is the Special Education Supervisor for Westfield Intermediate School (WIS) and Westfield Middle School (WMS).[[14]](#footnote-14) She participated in and facilitated Student’s IEP meetings beginning in seventh grade.[[15]](#footnote-15) (Cox)
11. Due to Student’s daily struggles with dysregulation, insubordination, work completion, and out of bounds behavior, on June 4, 2021, the District proposed an extended evaluation at the RISE Program at Westfield Middle School for the period August 30, 2021 to October 21, 2021. (S-15, Cox, Ecker) The RISE program is a small substantially separate program with a small student to staff ratio for students who struggle with emotional and behavioral regulation. (Cox) The Extended Evaluation Form indicated the following: “The additional information that is needed for [Student’s] evaluation are [sic] as follows: To complete the Functional Behavior Analysis that [had] already been started.”[[16]](#footnote-16) (S-14, Cox)
12. At the end of the 2020-2021 school year, the District conducted another FBA. According to the FBA, “consistent with previous behavioral assessments, interfering behavior appear[ed] to be maintained through the provision of acquired attention from an audience of staff and peers, and the desire to escape/avoid perceived aversive demands.” Time on task and Student’s ability to access instruction was “at time significantly reduced and appears variable depend[ing] upon the learning environment and expectations. Additionally, and over time, there appear[ed] to be a progression in the topography and magnitude of maladaptive responding.” (S-24, Cox, Ecker)
13. The FBA recommended both antecedent and consequence-based interventions. A structured reinforcement system was indicated. (S-24) As a result of the FBA, Student’s Behavior Intervention Plan (BIP) targeted the following behaviors: participation (identifying feelings, identifying strategies for engagement and resolution, implementing strategies, engaging in activities and tasks, complying), perspective taking (calling out, interrupting, identifying another’s perspective), and self-regulation (eloping, destroying property, de-escalating, and reengaging). The FBA concluded that “the information following the 45-day assessment in the RISE classroom will be important feedback to [Student’s] educational team and future educational programming.” (S-17, S-24, S-29, Cox, Ecker)
14. Student began the 2021-2022 school year in the RISE program which was staffed by a special education teacher, a paraprofessional, and a behavior interventionist. Nine students attended the program with varying degrees of inclusion. (Cox)
15. Even in the small group setting at RISE, Student continued to struggle daily with vaping, eloping, swearing, and using unsafe language. (S-10, S-11, S-13, Cox, Ecker) Work demands in particular resulted in dysregulation, and the Team continued to decrease demands to manage Student’s outbursts. (Cox)
16. The Team did not feel that the extended evaluation at RISE was “working.” (Cox) On September 23 and 28, 2021, the Team met, and on October 4, 2021, Westfield proposed that Student be referred to an out-of-district school for an extended evaluation and/or direct out of district placement. As grounds for this proposal, the District noted the “recommendation from the FBA [from RISE] and his current behaviors.” The Team relied on Student’s then-current academic performance, behavior data, and FBA which suggested that “Student was not making progress in the District’s most restrictive setting.” (S-12, Cox, Ecker) The Team proposed the Student Stabilization Diagnostic Center in Holyoke, Massachusetts (SSDC). (S-12, Cox, Ecker) SSDC is not a placement but rather a diagnostic center only. (Cox, Ecker) SSDC is “more of a clinical therapeutic setting.” (Ecker)
17. SSDC employs special educators, counselors, behaviorists, psychologists, and interventionists. There are three to four students per class. Had Student attended the extended evaluation at SSDC, the Team would have reconvened after four weeks to discuss progress. After eight weeks, the Team would have convened to discuss the results of the evaluation and identify what setting and services Student required in order to be successful. (Ecker) According to Ms. Ecker, the purpose of an extended evaluation is not diagnosis. (Ecker)
18. Parents toured the proposed locations[[17]](#footnote-17) for the extended evaluation. (Ecker) Student did not attend all the tours. (Ecker) Parents did not support an extended evaluation at SSDC, and Student continued to attend the RISE Program. (Cox, Ecker) Ms. Ecker testified that the “paperwork” for the extended evaluation at SSDC could not be generated before the referrals were sent out to the programs. Here, absent parental consent, she did not generate the Extended Evaluation Form for SSDC. (Ecker)
19. During his tenure at the the RISE Program, Student continued to have repeated disciplinary referrals and he even had two long-term out-of-school suspensions. (S-11, S-13, Cox) For instance, in April 2022, Student was suspended long term for threatening assault to a staff member.[[18]](#footnote-18) (S-8, S-23, Cox) The Team concluded that Student’s behavior was not a manifestation of his disabilities. The Team also determined that Student’s IEP was being “implemented with fidelity” at the time of the incident. Parents disagreed. On June 17, 2022, Parents filed for a due process hearing with the BSEA. (S-6, Cox)[[19]](#footnote-19)
20. Due to his long-term suspensions, Student missed significant time in school during the 2021-2022 school year. (Cox)
21. On July 1, 2022, Ms. Ecker filed a counterclaim with the BSEA seeking substitute consent for the proposed extended evaluation. (Ecker) Ms. Cox testified that, in her opinion, Student required an extended evaluation at SSDC to manage his emotional regulation. (Cox)
22. Student transitioned to Westfield High School (WHS) in the fall 2022. (Fernandez, Ascolillo) At that time, the District proposed, and Parent consented to a three-year reevaluation of Student. The following assessments were proposed: Psychological Assessment, Academic achievement, Ed Assessment A and B, and FBA. (S-5, P-6)
23. Darlene Fernandez is the Special Education Supervisor for WHS. She has served in this role for eighteen years.[[20]](#footnote-20) (Fernandez) Ms. Fernandez testified that on September 7, 2022, the District, at Parents’ request, agreed to remove reading services from Student’s academic schedule but declined to remove the service from Student’s IEP because Student continued to require the service. (S-15, S-23, Fernandez)
24. The Team convened again in October 2022 for a progress monitoring meeting. The Team observed that Student was experiencing significant challenges, especially with putting his phone away in class and refusing to complete work in school. (S-15)
25. Anthony Ascolillo co-taught Student’s inclusion math and English Language Arts (ELA) classes from September 2022 until January 2023. He also served, and continues to serve, as his Academic Support teacher.[[21]](#footnote-21) He testified that Student and he have a good relationship. According to Mr. Ascolillo, it was “very challenging” to get Student to engage in academics, especially in the larger inclusion classes, where Student was more head down on the table, or walked out of class when faced with work demands. Student did not respond to redirection and required a lot more of Mr. Ascolillo’s attention than the other students whom Mr. Ascolillo was instructing. Student was more comfortable in a one-to-one setting or in the smaller Academic Support class but still failed to complete his work. Student’s attendance was “spotty” from the beginning of the 2022-2023 school year. Student reported to Mr. Ascolillo that he does not want to be in school and that he intended to drop out. Mr. Ascolillo testified that he modified schoolwork for Student, and that with modified work and support, Student should be able to complete his work. However, “what kind of modification would work with [Student] … was difficult to ascertain, because of his failure to … engage.” (Ascolillo)
26. Another progress monitoring meeting took place in December 2022. The Team discussed Student’s significant attendance and tardiness issues as well as his failing grades. The Team considered other options for Student, such as the LLD program, in the hopes that such a placement would increase attendance, participation, and engagement and would elicit progress. (S-15, Fernandez)
27. On January 11, 2023, a case conference meeting was held to discuss Student’s “trial in the LLD program for his academics.” As such, the service delivery was amended to reflect that ELA and math services would be delivered in the C Grid rather than in the B Grid. (S-3, S-23, Fernandez)
28. Also in January 2023, the District conducted an FBA due to concerns relating to refusal, inappropriate vocalizations, and elopement. Formal observations were conducted on seven occasions. As with previous FBAs, the function of Student’s behaviors was determined to be social reinforcement (escape/access to preferred activities/attention). A “differential reinforcement” system was recommended to “[m]aximiz[e] all rewards for adaptive behaviors and minimize[e] the rewards for challenging behaviors.” (S-27)
29. The Team convened on January 23, 2023 to review the results of Student’s reevaluation. (S-1)
30. As part of the reevaluation, Andrew Butler, school psychologist at WHS since 2000, attempted to complete a Psychoeducational Assessment. (S-23, S-32, P-4a, Butler)[[22]](#footnote-22) (Butler) He testified that Student was “striking” in the “effort it took to find him.” Specifically, although Mr. Butler tested Student on three occasions, there were multiple other instances when he attempted to locate Student, and Student was not in attendance. Other times, Student refused to meet with Mr. Butler even when Mr. Butler adjusted the time of day when to attempt testing. On some occasions, Student came to Mr. Butler’s office for testing but left, complaining that he was “hot” or that he did not want to participate. (Butler)
31. Due to Student’s noncompliance and refusal to participate, Mr. Butler could not complete the assessment. (S-32, S-23, P-4a, Butler) Mr. Butler testified that in consultation with Parent, he decided to stop attempting to locate Student for testing as he was causing Student distress. As a result, Mr. Butler completed only sixty to seventy percent of the testing that he wanted to administer. He did not assess Student’s writing, nor did he have an opportunity to do more in depth social emotional or executive functioning testing. (S-32, P-4a, Butler)
32. Based on the testing completed, Mr. Butler concluded that Student has significant executive functioning difficulties. Although academic testing could not be completed due to Student’s “frustration when presented with academic challenges,” the completed measures demonstrated difficulties in reading, reading comprehension, math concepts and applications, and math computation. Rating scales completed by Parents demonstrated mildly problematic scores in the adaptive skills domain as well as more significant struggles with emotional and cognitive regulation. Mr. Butler testified that Parents’ responses on the social/emotional rating scales were “mostly” consistent with his observations of Student, but, based on his own observations of Student’s behaviors, he believes that Parents’ scores were “deflated.” Dr. Butler found that Student was “rigid in his expectations such that he [did] not tolerate change.” He was “easily irritated,” had trouble regulating his emotions when upset, and was “quick to make somatic complaints, often as a means of avoiding something.” He was angry, disaffected, and quick to give up. (S-32, P-4a, Butler)
33. According to Mr. Butler, his testing “was and was not” an accurate reflection of Student’s abilities. Specifically, his testing reflected Student’s resistance to engagement and his low frustration level. Student was not invested or engaged in the testing process and checked his phone “nonstop” even when asked not to do so. He also appeared fatigued throughout testing. The results of Student’s academic testing are likely be an underrepresentation of Student’s abilities as Student’s effort and engagement during testing were minimal. (Butler)
34. According to Mr. Butler, although the results from the assessment were limited because of Student’s non-compliance,

“this in itself [was] suggestive of [Student’s] poor coping strategies, reduced cognitive stamina, and limited resilience in the face of adversity. Unlike in the previous assessment completed in July 2020, [Student] presented in this assessment as an angry disaffected young man with little tolerance for the challenges presented to him in the assessment; he was quick to give up or only put forth minimal effort. Further, he has become disengaged from the learning environment such that he struggle[d] to put forth the minimum effort in order to make progress in school…. Because of [his] lack of self-confidence, history of academic struggles, and an external locus of control, [Student] resort[ed] to avoidance and escape when he [was] presented with challenging expectations.” (S-32, P-4a, Butler)

1. Mr. Butler did not make any new diagnostic determinations as part of his assessment. (Butler) He concluded that although Student did not fully comply with the evaluation procedures, “the collected evidence continue[d] to support the previous determination of Depression, Anxiety, and Disrupted Mood Dysregulation Disorder, as well as learning disabilities in reading and math.” Mr. Butler opined that Student’s “attendance issues or grades issues [can be] attributed to an emotional issue.” (S-32, P-4a, Butler)
2. Mr. Butler recommended, in part, “a discussion of an alternative educational setting to help provide remedial instruction to fill in the gaps in his academic skills.” (S-32, P-4a)
3. At the January 2023 Team meeting, the Team agreed that Student’s attendance should be targeted first, and “academics [will] come after that.” (Metz) Parents indicated that they would be “happy” if Student attended school fifty percent of the time. (Fernandez) Parents did not want Student to suffer consequences for his lack of engagement. (Ascolillo)
4. No Team member mentioned additional testing or an extended evaluation at the January 2023 Team meeting. (Fernandez, Butler, Metz, Ascolillo, Saccomani) Mr. Butler testified that although his own testing was “incomplete” and “notable parts were missing” from his assessment, he did not “disagree with” the January 2023 IEP because IEP development relies on more than just formal testing. Mr. Butler was aware that the Team was considering additional interventions for Student, and he was hopeful that the change in placement to the LLD Program would be sufficient. At the time of the IEP meeting, he was “not sure” that Student required additional testing. (Butler)
5. On January 24, 2023, the District proposed, and Parents accepted in full, an Amended IEP with a placement in the substantially separate LLD Program (January 2023 IEP) with goals and services in the areas of ELA (Reading/Writing), Social Emotional/Behavioral, Executive Functioning, and Mathematics. Services included: A Grid: Consult (Behaviorist and BCBA), 1x30 monthly, Consult (Special Education Teacher), 1x30 week; B Grid: Academic Support/Behavior, 1x30 weekly; C Grid: Counseling, 1x30 monthly, Academic Support/ELA, 5x46, Academic Support, 5x46, Academic Support/Mathematics, 5x46. ESY was also proposed. (S-1, S-2, P-1, Fernandez)
6. The January 2023 IEP does not indicate that the Team needed additional information to draft the IEP. Nor does it note that an extended evaluation was proposed. (S-1, Fernandez) According to Ms. Fernandez, she did not note the extended evaluation in the IEP because the proposal was made by WMS, not by WHS. She was, moreover, aware that the District was pursuing substitute consent for the extended evaluation through the counterclaim filed by the District in July 2022. (Fernandez)
7. According to Ms. Ecker, despite Parents’ refusal to consent to the extended evaluation, the District was still responsible for proposing an IEP and placement for Student. It met this obligation by proposing the January 2023 IEP. (Ecker)
8. Jennifer Metz is Student’s LLD teacher. She holds several DESE licenses and has worked in the LLD program at WHS for five years. There are thirteen students in the program, all of whom have language-based disabilities. Classes move at a slower pace, and the curriculum is modified. (Metz) Ms. Metz and Ms. Fernandez testified that the Team wanted to see “over the next few weeks” how Student progressed in the LLD program. (Metz, Fernandez) Although the IEP was developed for a year, the Team agreed to reconvene in May to discuss how Student was doing. (Metz) According to Ms. Metz, “It was felt by the team that it was a switch that was worth trying, to see if it would benefit [Student].” (Metz) Ms. Fernandez too testified that the LLD Program was proposed to see if a change in placement would improve Student’s attendance and engagement. At the time it was proposed, Ms. Fernandez believed the January 2023 IEP was appropriate for Student. (Fernandez)
9. The LLD program is not a therapeutic program. (Metz)
10. Anthony Saccomani is Student’s school adjustment counselor at WHS.[[23]](#footnote-23) At the start of the school year, he provided Student with 1x30 minutes/week of counseling. In January 2023, the Team agreed to reduce services to 1x30 minutes/month.[[24]](#footnote-24) The reduction was due to the fact that Student did not want to meet with Mr. Saccomani.[[25]](#footnote-25) Student has missed multiple sessions with Mr. Saccomani due to absenteeism or refusal to meet. Although Student’s “affect has lightened since the beginning of the year,” he has not made progress on his IEP goal. Student reported to Mr. Saccomani that he stays up late and is tired in the mornings. He also reported to him that he does not care about school and wants to drop out. (S-4a, S-35, Saccomani)
11. Dr. Tonia Bonner is the Assistant Principal responsible for ninth graders at Westfield High School. She has over 20 years’ experience in education, but this is her first year in Massachusetts and at Westfield. Dr. Bonner is not a service provider and does not work directly with Student, but Student sees her as a trusted adult. Dr. Bonner has not reviewed Student’s evaluations and is unfamiliar with his diagnoses. However, she attended Student’s last IEP meeting and agreed with the additional accommodations it offered to Student. She has no opinion as to whether he requires therapeutic supports. Dr. Bonner testified that Student has not had any “major” office referrals since 2023, and she considers that progress, since in the first part of the school year, he had three. She described the range of behaviors for which students are referred to her to include skipping, being tardy, and disrupting class. She testified that her involvement in student discipline depends on the teacher making the referral. (Bonner)
12. According to Ms. Fernandez, historically, work demands have resulted in Student having “outbursts.” The improvement in Student’s behavioral presentation during the 2022-2023 school year is due to the minimal work demands placed on him. (Fernandez)
13. Student has not passed any of his classes during the 2022-2023 school year.[[26]](#footnote-26) (S-4, S-31, S-33, P-4b, Ascollilo, Fernandez) He is not eligible to attend summer school as he requires a grade average of fifty or above in order to do so. As such, Student is unlikely to be promoted to tenth grade. (Fernandez)
14. As of the date of the Hearing, Ms. Metz had worked with Student for a “very short time.” (Metz, Ecker) Student “officially” began in the LLD program on January 30, 2023. Since then, five of the nine weeks that Student has been placed in the program, either Student or Ms. Metz were absent.[[27]](#footnote-27) In her class, Student completes some assignments depending on his “intrinsic motivation.” He is “barely” passing her class for the third quarter. Student is often on his phone in class, or he puts his head on the desk and refuses to work. He is not fully engaged. Ms. Metz testified that she could not be certain whether Student is working to his capacity; specifically, she does not know what his capacity is in light of her “limited” time with him. Ms. Metz believes that Student would benefit from additional time in the LLD program. She testified that she has begun to build a relationship with Student. (Metz)
15. Although Student had begun the iReady assessment with Ms. Metz, he did not complete it.[[28]](#footnote-28) She has not completed any other formal assessments of Student. (Metz)
16. Ms. Metz noted Student’s progress, albeit minimal. For instance, when he is in school, he has been staying in her class and not leaving. According to Ms. Metz, based on the Team’s discussion at the January 2023 meeting, “this is progress,” even though Student is still not completing much work. When in class, he does “something academically related” half of the time. Ms. Metz does not know what motivates Student to engage on those occasions when he is engaged. She testified that if *“*the goal is for him to be attending class and staying in class and completing some sort of academic work, to an extent, he has begun to do that.” However, “his attendance, either not coming or leaving early or coming late, has impacted his ability to fully make the progress that he would be capable of making.”[[29]](#footnote-29) She testified that with modified work, and the supports and services of his January 2023 IEP, Student has “the opportunity to make progress.” (P-2b, P-7b, Metz) Because she had only worked with Student for a “short time,” Ms. Metz could not answer whether Student has made progress on the objectives on his IEP.[[30]](#footnote-30) (Metz)
17. According to Ms. Metz, other students in her class also have attendance and work completion issues. (Metz)
18. To date, during the 2022-2023 school year, Student has accrued thirty-eight absences, approximately twenty-five of which were unexcused.[[31]](#footnote-31) He has been tardy or dismissed on approximately fifty-nine occasions, fifty-one of which were unexcused.[[32]](#footnote-32) Student often texts Parents during school and is subsequently dismissed. On average, Student is tardy on a daily basis and is dismissed from school twice per week. (S-4, Fernandez) In February, Dr. Bonner filed a report of suspected abuse or neglect with the Department of Children and Families pursuant to MGL c.119, § 51A (“51A”) because of Student’s failure to attend school regularly. She testified that although she subsequently received the pediatrician’s letter from Parent documenting Student’s sleep issues, “at the time of [her] filing on February 20th, [she was] not under the impression that there was any medical excusal for his attendance” issues as she had not been getting excusal “letters on a regular basis.” (P-2a, Bonner)
19. There has been little to no significant improvement in Student’s attendance[[33]](#footnote-33) or work completion since he started in the LLD program.[[34]](#footnote-34) (S-4, S-35, P-2a, Ascolillo, Fernandez) Student continues not to produce much work in class.[[35]](#footnote-35) (Fernandez, Metz) Mr. Ascolillo testified that it is possible that Student is “more at ease” in the LLD program but it is “difficult” to say because “typically” the Team saw “behaviors” when they “pushed” Student to engage in academics, and they have not been pushing him because that would “upset him” and “make things worse … for him and for everyone else in the classroom.” (Ascolillo)
20. Mr. Ascolillo testified that an extended evaluation is necessary for Student because “any additional information on how best to reach [Student] so he would be more willing to engage” would be helpful to the Team. (Ascolillo)
21. Ms. Fernandez opined that an extended evaluation in a therapeutic milieu will allow the District an “opportunity to see what [Westfield] can do to [help Student] access his education.” Student needs to attend school daily and to participate in class. In Ms. Fernandez’s opinion, Student’s lack of attendance is not related to his language-based needs or to his ADHD. (Fernandez)
22. Mr. Saccomani testified that Student would benefit from an extended evaluation in a therapeutic program because it is “hard to access the curriculum when there are other things on your mind.” Mr. Saccomani did not recommend an extended evaluation at the January 2023 Team meeting because he was aware that the District had a matter pending before the BSEA regarding the issue. (Saccomani)
23. Mr. Butler testified that if Student’s approach to testing “parallels” his approach to schoolwork, then Student requires “more” supports and services than what he is currently receiving at WHS. (Butler) He testified that the biggest impediment to Student’s progress is his attendance. (Butler)
24. Ms. Ecker testified that the District has provided Student with all the interventions it has to offer, including inclusion and pull-out services, the RISE Program, and the LLD Program. Moreover, testing of Student in his current setting has already been attempted but there are “still gaps in order for him to access the environment and … the curriculum.” (Ecker)
25. According to Mr. Butler, an extended evaluation need not include “structured testing.” It can be an “observation of [Student’s] engagement with tasks.” (Butler) Ms. Ecker testified an extended evaluation takes place in a “different setting.” Testing can and often does occur. In Student’s case, the incomplete psychoeducational assessment could be completed during the extended evaluation. Student would be observed in a therapeutic setting where counseling is “embedded throughout the day.” A therapeutic milieu is appropriate for Student because it is a smaller setting, and he struggles in the larger inclusion setting. A therapeutic setting may “get to the bottom” of what causes Student’s disengagement and lack of motivation. (Ecker)
26. According to Ms. Ecker, there were no rejected options for the January 2023 IEP because everyone agreed to the additional interventions and supports of the LLD Program in the hopes that this would allow Student to be successful. If the change in placement had been successful, the extended evaluation would not have been necessary. However, Student did not make progress; as such, the District proceeded to Hearing to obtain substitute consent. Effective progress for Student would have encompassed engagement, attendance, and participation which should have translated into better grades and progress toward IEP goals. (Ecker) While Ms. Metz testified that she has not had enough time with Student to form an opinion as to whether he requires an extended evaluation in a therapeutic setting, she also testified that “it would be important to complete the social and emotional testing that Mr. Butler had proposed to do.” (Metz)
27. According to Parents, Student struggles with sleep, which impacts his ability to attend school on time. In March 2023, Student’s pediatrician noted that “[m]ost of the medicine [Student has] tried had not worked … and because of this, he has a hard time waking up early in the morning.” She requested that Student “receive an accommodation for this condition.”[[36]](#footnote-36) He also has multiple doctors’ and dentists’ appointments necessitating early dismissals. (S-1, S-23, P-2a, P-3a, P-3b, P-3c)
28. According to Parents, Student has “only been in his current placement for 5 weeks. It would be devastating for him to be removed [from his current placement]…. He is just starting to feel comfortable with school and the routine. He is starting to talk about plans for his future. Ms. Metz is doing more than others might realize. She is instilling in him that he can do things and he can have a bright future.” (P-2c)
29. Ms. Ecker opined that so far, the LLD supports have not impacted Student’s attendance and engagement. She observed that remediation in dyslexia is only part of the picture, and Student’s social emotional needs must also be addressed. (Ecker)
30. According to Parents, the District “will use anything against [Student] to try to push him out [of the District].” (S-23, P-2d, P-4b)
31. District staff testified that Student is not making academic progress, and he is not making progress on the goals and objectives of his IEP. (Ascolillo, Fernandez, Ecker, S-35) Ms. Ecker testified that an extended evaluation is appropriate because Student is disengaged from school, lacks motivation, does not participate or complete classwork, leaves class when demands are placed on him, and struggles with attendance. Although Student does not exhibit the behavioral outbursts he did in the past, his nonengagement is “still a behavior” that impacts his access to the curriculum. Student’s current program is not meeting his needs. (Ecker)

**LEGAL STANDARDS AND DISCUSSION:**

1. ***Legal Standards***
2. *Free Appropriate Public Education in the Least Restrictive Environment*

The Individuals with Disabilities Education Act (IDEA) was enacted "to ensure that all children with disabilities have available to them a free appropriate public education" (FAPE).[[37]](#footnote-37) To provide a student with a FAPE, a school district must follow identification, evaluation, program design, and implementation practices that ensure that each student with a disability receives an Individualized Education Program (IEP) that is: custom tailored to the student's unique learning needs; "reasonably calculated to confer a meaningful educational benefit"; and ensures access to and participation in the general education setting and curriculum as appropriate for that student so as "to enable the student to progress effectively in the content areas of the general curriculum.”[[38]](#footnote-38)  As recognized by the Supreme Court, the IEP is the “primary vehicle” for implementing the goals of the IDEA.[[39]](#footnote-39) The IEP sets out the child's present educational performance, establishes annual and short-term objectives for improvements in that performance, and describes the specially designed instruction and services that will enable the child to meet those objectives.[[40]](#footnote-40) The IEP must be individually tailored to the student for whom it is created.[[41]](#footnote-41)  When developing the IEP, the Team must consider parental concerns, the student’s strengths, disability-related needs, recent evaluations, present level of achievement, the academic, developmental and functional needs of the student, and the student’s potential for growth.[[42]](#footnote-42)

“School districts may not ignore disabled students' needs, nor may they await parental demands before providing special education services; instead, they must proactively identify, locate, and evaluate children with disabilities who are in need of special education, and then develop an IEP for each such child.”[[43]](#footnote-43) Pursuant to the IDEA, before a child with a disability may begin receiving services, a school district must “conduct a full and individual initial evaluation"[[44]](#footnote-44) to determine if a child is eligible for special education, and if so, what services the child's IEP should include.[[45]](#footnote-45) The evaluation must utilize “a variety of assessment tools and strategies.”[[46]](#footnote-46)

1. *Legal Standard for Extended Evaluations*

The U.S. Education Department explained in Appendix A to the IDEA Part B regulations, Question 14 (1999), that an IEP must precede placement, but this “requirement does not preclude temporarily placing an eligible child with a disability in a program as part of the evaluation process -- before the IEP is finalized -- to assist a public agency in determining the appropriate placement for the child. However, it is essential that the temporary placement not become the final placement before the IEP is finalized."[[47]](#footnote-47) In Massachusetts, 603 CMR 28.05(2)(b) allows for extended evaluations under very specific circumstances. The regulation states, in part, that if “the Team finds the evaluation information insufficient to develop an IEP, the Team, with parental consent, may agree to an extended evaluation period.” However, the “extended evaluation shall not be considered a placement.”[[48]](#footnote-48)

The Massachusetts Department of Elementary and Secondary Education’s *Administrative Advisory SPED 2019-2 – Extended Evaluations* further clarifies “that an extended evaluation is not a ‘diagnostic placement’ used to determine whether a particular school, setting or program is an appropriate placement for the student.” *Administrative Advisory SPED 2019-2* also describes the extended evaluation process:

“If the Team has determined that a student is eligible for special education and that an extended evaluation is appropriate, the Team shall write a partial IEP with the information available. In the ‘additional information’ section of the IEP Form, the school district should specify that an extended evaluation is being conducted and list the assessment(s), location of where the extended evaluation will take place, and the estimated date of completion. In addition, the school district must complete an Extended Evaluation Form (EE1 and EE-2). On this form, the district will indicate the current evaluation findings, what assessments need to be completed, the location where the extended evaluations will be completed, the anticipated completion date, among other required information (internal citations omitted).”

1. *Legal Standard for Substitute Consent*

Although parental consent is generally required for an evaluation to occur, limited exceptions exist.[[49]](#footnote-49) A school district may secure substitute consent through the hearing process in order to reevaluate a student without parental consent when the evaluation is "warranted."[[50]](#footnote-50) Circuit courts have found that an evaluation is warranted where, in its absence, the school would be unable to secure information that could reasonably lead to the development of an individually tailored IEP or where a student experiences significant changes in his circumstances or presentation.[[51]](#footnote-51)

Massachusetts law limits the availability of evaluations over parents' objections to situations (other than initial evaluations) in which school district personnel believe an evaluation, other than an initial evaluation, is necessary for the district to provide a FAPE.[[52]](#footnote-52) In these circumstances, the district may proceed to the BSEA for a hearing as follows:

“If, subsequent to initial evaluation and initial placement and after following the procedures required by 603 CMR 28.00, the school district is unable to obtain parental consent to a reevaluation or to placement in a special education program subsequent to the initial placement, or the parent revokes consent to such reevaluation or placement, the school district shall consider with the parent whether such action will result in the denial of a free appropriate public education to the student. If, after consideration, the school district determines that the parent's failure or refusal to consent will result in a denial of a free appropriate public education to the student, it shall seek resolution of the dispute through the procedures provided in 603 CMR 28.08.”[[53]](#footnote-53)

As a diagnostic placement is a method of evaluation, not an educational, a hearing officer may order an extended evaluation.[[54]](#footnote-54) Because parental participation is paramount with respect to determinations involving the special education of eligible students, "in order to be successful in any claim regarding substitute consent for reevaluation, the school district must show that it has informed parent as to which evaluations and instruments it seeks to employ and must also show that it has made reasonable efforts to obtain said informed consent from the parent prior to proceeding to the BSEA."[[55]](#footnote-55)

1. *Burden of Persuasion*

In a due process proceeding, the burden of persuasion is on the moving party.[[56]](#footnote-56) As such, the moving party must prove its case by a preponderance of the evidence. If the evidence is closely balanced, the moving party will lose.[[57]](#footnote-57)

1. ***Application of Legal Standard:***

It is undisputed that Student is a student with a disability who is entitled to special education services under state and federal law. The fundamental issue in dispute is whether Parents’ refusal to consent to the extended evaluation proposed by Westfield will result in the denial of a FAPE to Student, in which case, substitute consent is appropriate.

As the moving party in this appeal, the District bears the burden of persuasion.[[58]](#footnote-58) In accordance with the legal standard set forth above, to prevail, Westfield must prove by a preponderance of the evidence: 1) that the District provided Parents with prior written notice of its intent to conduct an extended evaluation; 2) that Parents refused to provide consent for the extended evaluation; and 3) that failure to conduct the extended evaluation in a therapeutic milieu would result in a denial of a FAPE to Student.[[59]](#footnote-59)

Based upon two days of oral testimony, the extensive exhibits introduced into evidence, and a review of the applicable law, I conclude thatWestfield has satisfied its evidentiary burden of persuasion. As such, Westfield is entitled to substitute consent to proceed with its proposed extended evaluation of Student at a therapeutic milieu.

My analysis follows.

1. Westfield Has Provided Parents with Prior Written Notice of the Extended Evaluation, And Parents Have Refused Consent.

Parents argue that Westfield has not provided them with Prior Written Notice as to what assessments the District intends to administer as part of the extended evaluation it proposes[[60]](#footnote-60) nor has the District completed the Extended Evaluation Forms relative to its proposal.[[61]](#footnote-61) However, the evidence does not support Parents’ position.

The District’s initial proposal for an extended evaluation was for the RISE Program at WMS for the period August 30, 2021 to October 21, 2021. At that time, the District completed the Extended Evaluation Form, indicating that the reason for the extended evaluation was to “complete the Functional Behavior Analysis that [had] already been started.” Parents agreed to the extended evaluation at RISE, but, as Student continued to struggle significantly in that setting, on October 4, 2021, Westfield proposed an extended evaluation at SSDC as Student’s then-current academic performance, behavior data, and FBA suggested that Student was not making progress in the District’s most restrictive setting. Parents did not consent to have Student complete the extended evaluation at SSDC, and, as such, Ms. Ecker filed a counter-claim with the BSEA seeking substitute consent.

Parents are correct that the District did not assert the need for additional evaluative data at the January 2023 IEP Team meeting, nor did Westfield note such need in Additional Information section of the January 2023 IEP.[[62]](#footnote-62) Nevertheless, at that time, Parents were aware of the pending BSEA matter and of the District’s continued concerns relative to Student. District staff persuasively testified that it was their hope that the change in placement to the LLD program would elicit a change in Student’s engagement and presentation. Moreover, District staff testified that in light of the pending BSEA hearing regarding the October 2021 proposed extended evaluation at SSDC, the WHS Team did not see a need to reiterate the proposal at the time of the January 2023 Team meeting. [[63]](#footnote-63)

However, even if, *arguendo*, the District’s failure to re-propose the extended evaluation in the January 2023 IEP amounted to a procedural violation, such procedural error did not rise to a denial of FAPE. Specifically, Parents were not denied the opportunity for meaningful participation, and Student has not suffered any loss of educational opportunity.[[64]](#footnote-64) At all times, Parents were active participants in the Team process; they expressed their concerns, and the Team incorporated their requests repeatedly into Student’s programming. [[65]](#footnote-65) For example, at Parents’ request, Student was not expected to attend reading pull-out services nor did he incur any consequence for his lack of engagement. Moreover, as discussed *infra*, the evidence shows that Student, in fact, requires an extended evaluation to receive a FAPE, and therefore, even had the District committed a procedural violation, Parents could not demonstrate that Student suffered any educational loss as a result thereof.

Nor is Parents’ argument persuasive that Westfield failed to specify what assessments would be completed as part of the extended evaluation or what additional information Westfield seeks. The initial extended evaluation was proposed to conduct an FBA at a therapeutic setting, and target behaviors have consistently included Student’s nonparticipation and work-avoidance. These behaviors motivated the Team to “try” Student in the LLD Program, and they remain a concern for all District staff.

Because I found that the District provided Parents with prior written notice of the extended evaluation, and Parents withheld consent, I now examine whether Parents’ refusal to consent to the extended evaluation will result in a denial of a FAPE to the Student.

1. Failure To Conduct The Extended Evaluation Will Result In A Denial Of A FAPE To Student.

As indicated in the **Legal Standards** section *supra*, when seeking substitute consent to evaluate, a school district must establish that a reasonable likelihood of educational harm will result absent the requested evaluation.[[66]](#footnote-66) After reviewing the record, I conclude that the District has proven that an extended evaluation in a therapeutic milieu is necessary to determine Student’s needs and to develop an appropriate IEP and placement.

Westfield has an obligation to ensure that Student’s IEP is reasonably calculated to enable him to make progress that is appropriate in light of his circumstances.[[67]](#footnote-67) Westfield has an obligation to conduct a reevaluation “if conditions warrant a reevaluation.”[[68]](#footnote-68) Here, District staff testified that without the extended evaluation in a therapeutic setting, there is no reliable way to determine the components of a FAPE for Student.[[69]](#footnote-69) Specifically, despite his average cognitive abilities, and despite support from Westfield staff, Student has not been able to meet the attendance,[[70]](#footnote-70) behavioral or work production demands of his substantially separate placement.[[71]](#footnote-71) Despite the change in placement to the LLD Program, Student is failing the majority of his classes[[72]](#footnote-72) and is unlikely to be promoted to tenth grade. According to the consistent testimony of District staff who work or have worked with Student, to date, behavioral interventions, including a change in placement to a more restrictive setting, have not been effective in improving Student’s attendance, participation, and engagement. Ms. Ecker testified persuasively that the District has exhausted its interventions without much success. An extended evaluation has already been attempted in the District’s most restrictive setting, and, whatever limited recommendations resulted from said evaluation, they, like all subsequent interventions, have proven ineffective. I do not afford great evidentiary weight to Ms. Metz’s assessment of Student’s progress in her class; Ms. Metz worked with Student for a very short time. In addition, she based her assessment of the “little progress” that Student has made almost solely on his staying in class on the days he is in attendance. Although Ms. Metz opined that Student would benefit from additional time in the LLD Program, I did not find her to be a convincing witness. Her knowledge of Student and his needs was minimal. In addition, her opinion that Student’s IEP provides him the opportunity to make progress glaringly ignored the fact that Student does not avail himself of the opportunity offered to him and is not, in fact, making progress on his IEP goals. Similarly, I place little weight on Dr. Bonner’s assessment of Student’s behavioral progress; Dr. Bonner has limited interactions with and knowledge of Student and his disability-related needs. Her assessment that Student has made progress appears limited to behavioral outbursts, but Student’s interfering behaviors are far more complex and have remained unimproved. [[73]](#footnote-73) Save for Ms. Metz and Dr. Bonner, District staff testified consistently that Student requires an extended evaluation at this time.

I especially credit the testimony of Mr. Ascolillo who has worked with Student since the beginning of the school year and who has formed a close and trusted relationship with him. He offered credible testimony that Student’s needs are not being met in his current placement. Mr. Ascolillo supported an extended evaluation for Student; he observed that Student has not made progress regardless of his change in placement, and that it was important to figure out how to engage Student so that he could be successful. Mr. Ascolillo testified that, at this time, Student is at risk of not being promoted, as his attendance is sporadic and his work completion is minimal. Mr. Ascolillo’s testimony is supported by the documentary evidence of report cards, attendance records and progress reports. Like Mr. Ascolillo, Mr. Saccomani convincingly testified that Student would benefit from a therapeutic program where his mental health needs could be assessed and addressed; in his current setting, Student was not making progress on his counseling goal.[[74]](#footnote-74)

Mr. Butler’s testimony proved the most persuasive in support of an extended evaluation at a therapeutic milieu. Mr. Butler, a school psychologist with extensive experience, began his testimony by highlighting the substantial difficulty he encountered in attempting to “locate” Student for testing. He testified that he could not complete thirty to forty percent of his testing due to Student’s absenteeism and refusal to engage in the process; despite parental encouragement and reminders to Student regarding the importance of the process, “notable” testing instruments, especially in the social emotional realm, were not completed. I rely on Mr. Butler’s testimony because he captured Student’s “greatest impediment” in the school environment when drawing a “parallel” between Student’s reluctance to engage in testing to Student’s ineffective approach to schoolwork. Echoing the testimony of Ms. Fernandez, Ms. Ecker, Mr. Ascollilo, and Mr. Saccomani, Mr. Butler concluded that an extended evaluation was necessary to get to the bottom of Student disengagement.

Parents’ argument that the District relied on prior school years’ behaviors to assert the need for an extended evaluation at a therapeutic milieu is unpersuasive. Student’s lack of engagement and participation, as well as his absenteeism, have been pervasive throughout Student’s education. Although his vocal outbursts have decreased, Ms. Fernandez credibly testified, and her testimony was supported by that of Mr. Ascolillo, that work demands have been substantially reduced which resulted in the decrease. Nor did I find Dr. Bonner’s testimony regarding the decrease in “major” office referrals since 2023 demonstrative of progress since she also testified that the definition of “major” is subjective based on the referring teacher.

I note too that in the instant matter a therapeutic out-of-district school is the least restrictive environment in which the extended evaluation can take place.[[75]](#footnote-75) Student has attempted both the full inclusion setting and the substantially separate LLD classroom at WHS. Neither has allowed him to make academic, social, emotional, or behavioral progress. During the previous school year, Student participated in the RISE Program, but his tenure was marked by dysregulation, behavioral outbursts, and notable lack of academic, emotional, or behavioral progress. Moreover, Student’s need for an “alternative educational setting” in a therapeutic program has been suggested by previous assessments, including by Mr. Butler and by Parents’ own independent evaluator from NESCA. As such, I find that SSDC, or a similar location, is the least restrictive environment for the extended evaluation.[[76]](#footnote-76)

The evidence as a whole underscores the importance of an extended evaluation for Student. Based on Student’s profile and significant disengagement from school, it is equally important that Student be evaluated in an environment that has the needed therapeutic and behavioral supports for him.[[77]](#footnote-77) The District has met its evidentiary burden.

**ORDER**:

I hereby grant substitute consent for Westfield to conduct an extended evaluation of Student at a therapeutic milieu.[[78]](#footnote-78)

So Ordered,

By the Hearing Officer,

/s/ Alina Kantor Nir

Alina Kantor Nir

May 15, 2023

COMMONWEALTH OF MASSACHUSETTS

BUREAU OF SPECIAL EDUCATION APPEALS

EFFECT OF BUREAU DECISION AND RIGHTS OF APPEAL

# Effect of the Decision

20 U.S.C. s. 1415(i)(1)(B) requires that a decision of the Bureau of Special Education Appeals be final and subject to no further agency review. Accordingly, the Bureau cannot permit motions to reconsider or to re-open a Bureau decision once it is issued. Bureau decisions are final decisions subject only to judicial review.

Except as set forth below, the final decision of the Bureau must be implemented immediately. Pursuant to M.G.L. c. 30A, s. 14(3), appeal of the decision does not operate as a stay. Rather, a party seeking to stay the decision of the Bureau must obtain such stay from the court having jurisdiction over the party’s appeal.

Under the provisions of 20 U.S.C. s. 1415(j), “unless the State or local education agency and the parents otherwise agree, the child shall remain in the then-current educational placement,” during the pendency of any judicial appeal of the Bureau decision, unless the child is seeking initial admission to a public school, in which case “with the consent of the parents, the child shall be placed in the public school program.” Therefore, where the Bureau has ordered the public school to place the child in a new placement, and the parents or guardian agree with that order, the public school shall immediately implement the placement ordered by the Bureau. *School Committee of Burlington v. Massachusetts Department of Education*, 471 U.S. 359 (1985). Otherwise, a party seeking to change the child’s placement during the pendency of judicial proceedings must seek a preliminary injunction ordering such a change in placement from the court having jurisdiction over the appeal. *Honig v. Doe*, 484 U.S. 305 (1988); *Doe v. Brookline*, 722 F.2d 910 (1st Cir. 1983).

# Compliance

A party contending that a Bureau of Special Education Appeals decision is not being implemented may file a motion with the Bureau of Special Education Appeals contending that the decision is not being implemented and setting out the areas of non-compliance. The Hearing Officer may convene a hearing at which the scope of the inquiry shall be limited to the facts on the issue of compliance, facts of such a nature as to excuse performance, and facts bearing on a remedy. Upon a finding of non-compliance, the Hearing Officer may fashion appropriate relief, including referral of the matter to the Legal Office of the Department of Elementary and Secondary Education or other office for appropriate enforcement action. 603 CMR 28.08(6)(b).

# Rights of Appeal

Any party aggrieved by a decision of the Bureau of Special Education Appeals may file a complaint in the state superior court of competent jurisdiction or in the District Court of the United States for Massachusetts, for review of the Bureau decision. 20 U.S.C. s. 1415(i)(2).

An appeal of a Bureau decision to state superior court or to federal district court must be filed within ninety (90) days from the date of the decision. 20 U.S.C. s. 1415(i)(2)(B).

# Confidentiality

In order to preserve the confidentiality of the student involved in these proceedings, when an appeal is taken to superior court or to federal district court, the parties are strongly urged to file the complaint without identifying the true name of the parents or the child, and to move that all exhibits, including the transcript of the hearing before the Bureau of Special Education Appeals, be impounded by the court. See *Webster Grove\_School District v. Pulitzer Publishing*

*Company*, 898 F.2d 1371 (8th. Cir. 1990). If the appealing party does not seek to impound the documents, the Bureau of Special Education Appeals, through the Attorney General's Office, may move to impound the documents.

Record of the Hearing

The Bureau of Special Education Appeals will provide an electronic verbatim record of the hearing to any party, free of charge, upon receipt of a written request. Pursuant to federal law, upon receipt of a written request from any party, the Bureau of Special Education Appeals will arrange for and provide a certified written transcription of the entire proceedings by a certified court reporter, free of charge.

1. With no objection from the District, Parents submitted an Amended Request for Hearing on June 23, 2022, eliminating some claims for relief. In their amended Hearing Request, Parents also asserted that the District discriminated against Student in violation of Section 504 “through a pattern of suspensions and manifestation determination review decisions [in 6th, 7th and 8th grade] made in bad faith and with gross misjudgment”; and that Student's “[p]unishments [were] disproportionately severe for [the] offenses [committed] and [amounted to] differential treatment.” Parents sought to have the BSEA “[o]verturn MDRs from 2019 and 2022”; “[e]xpunge discipline records” from 2019 to 2022; “return [Student] to school, provide an appropriate continuum of services and supports that will allow him to attend his neighborhood school in order to be in [the least restrictive environment (LRE)] with his peers”; “[p]rovide all compensatory services in a manner that allows [Student] to access and benefit from said educational services by a fully qualified and licensed professional in-person”; “[a]llow [Student] to register for his classes at Westfield High School”; reimburse Parents for “all legal fees incurred by parents since 2019”; and award any “other such remedies BSEA deems necessary to make corrective measures.”  [↑](#footnote-ref-1)
2. In its *Partial Motion to Dismiss Parents’ Amended Hearing Request*, the District asserted that many of Parents' claims in the instant matter fell beyond the IDEA's 2-year statute of limitations, were moot, or were overly broad. [↑](#footnote-ref-2)
3. In *In Re: Student v. Westfield Public Schools (Ruling on Westfield Public Schools’ Partial Motion to Dismiss Parents’ Amended Hearing Request and Counterclaim)*, BSEA # 2212235 (Kantor Nir, 2022), I dismissed all claims accruing prior to June 17, 2020 asserting a denial of a FAPE to Student resulting from the District’s substantive and procedural violations relative to school discipline as these claims were subject to the two-year statute of limitations of IDEA. I also ruled that any claims asserting discrimination in violation of § 504 on the basis of disability through the administration of disproportionately severe punishments were not FAPE or IDEA based claims as they were not based on a dispute concerning Student’s eligibility under the IDEA or § 504 or the discharge of the District’s procedural and substantive responsibilities under the IDEA or Section 504. As such, I found that the three-year statute of limitations applicable to allegations of civil rights violations in Massachusetts governed such claims, and I dismissed all such claims that accrued prior to June 17, 2019. As such, the then remaining issues for Hearing included:

   A. Whether the District discriminated against Student in violation of Section 504 on the basis of his disability through a pattern of excessive/disproportionate suspensions between June 17, 2019 and June 17, 2022, inclusive of beginning and end dates?

   B. Whether the District denied Student a FAPE, during the time he was not attending school as a result of being suspended between June 17, 2020 and June 17, 2022, inclusive of beginning and end dates?

   C. If the answer to (A) or (B) is yes, what is the appropriate remedy?

   D. Whether Student requires additional supports and services at his current placement at Westfield High School in order to receive a FAPE in the LRE?

   E. Whether an extended evaluation in a therapeutic milieu is necessary to ensure that Student is able to receive a FAPE, in which case substitute consent is appropriate? [↑](#footnote-ref-3)
4. In addition, a psycho-educational evaluation had just been completed which the Team planned to review at an upcoming Team meeting. [↑](#footnote-ref-4)
5. Specifically, I found that taking as true (a) Westfield’s allegations that that Student continues not to make progress and that the District has been unable to asses Student’s needs in his current program due to his numerous absences, tardies, and dismissals; and (b) any inferences that may be drawn from them in the District’s favor, the District’s “[f]actual allegations … raise[d] a right to relief above the speculative level.” See *Blank v. Chelmsford Ob/Gyn, P.C*., 420 Mass. 404, 407 (1995); *Golchin v. Liberty Mut. Ins. Co.*, 460 Mass. 222, 223 (2011) (internal quotation marks and citations omitted). [↑](#footnote-ref-5)
6. For instance, a Functional Behavior Assessment (FBA) completed by the District when Student was in third grade noted Student’s struggles “to engage in the general education setting.” Student was “unmotivated,” disruptive and refused to complete his work or to take breaks when directed to do so by staff. (S-21) [↑](#footnote-ref-6)
7. These included: Test of Variables of Attention (TOVA), Neuropsychological Test for Children-Second Edition (NEPSY-2), Delis Kaplan Executive Function System (D-KEFS), Rorscharch Inkblot Test – Exner Scoring System, Millon Pre-Adolescent Clinical Inventory (M-PACI), Beck Youth Inventories, Second Edition (BYI-2), Behavior Rating Inventory of Executive Function, Second Edition, Parent Form (BRIEF-2), Conners, Third Edition, Parent Form (Conners-3), Devereux Student Strengths Assessment, Parent Form (DESSA). (S-21) [↑](#footnote-ref-7)
8. Parents were concerned that Dr. Hirschberg’s assessment did not accurately reflect Student’s then-current functioning. (S-19) [↑](#footnote-ref-8)
9. Parents’ partial rejection letter dated July 11, 2020 notes that this date is incorrect and that the meeting was held on May 29, 2020. (S-19) [↑](#footnote-ref-9)
10. Before agreeing to behavioral services, Parents requested information regarding the behaviorist’s qualifications. (S-19) [↑](#footnote-ref-10)
11. These included: Wechsler Intelligence Scale for Children- Fifth Edition (WISC-V), Wechsler Individual Achievement Test – Third Edition (WIAT-III), Woodcock-Johnson Tests of Achievement – Fourth Edition (WJ-IV), Gray Oral Reading Tests – Fifth Edition (GORT-5), Gray Silent Reading Tests (GSRT), Comprehensive Test of Phonological Processing-Second Edition (CTOPP-2), Test of Word Reading Efficiency – Second Edition (TOWRE-2), Boston Naming Test (BNT), Automatized Series, Wide Range Assessment of Memory and Learning – Second Edition (WRAML-II), Beery-Buktenica Test of Visual-Motor Integration (VMI), Rey-Osterieth Complex Figure Test ROCFT), Grooved Pegboard, Rapid Automatized Naming and Rapid Alternating Stimulus Tests (RAN-RAS), Delis-Kaplan Executive Function System (D-KEFS), Comprehensive Assessment of Social Language – Second Edition (CASL-2), What I Think and Feel (RCMAS-2), Children’s Depression Inventory-Second Edition (CDI-2), and Achenbach Youth Self-Report (YSR). Parents also completed a developmental questionnaire, the Achenbach Child Behavior Checklist (CBCL), the Connors-3 Parent Short Form, the Behavior Rating Inventory of Executive Function-Second Edition (BRIEF-2), the Children’s Depression Inventory-Second Edition, Parent Report (CDI-2), and the Multidimensional Anxiety Scale for Children-Second Edition, Parent Report (MASC-2). Student’s special education teacher completed the Achenbach Teacher Report Form (TRF). (S-20) [↑](#footnote-ref-11)
12. It is unclear from the record if and when the District reviewed Dr. Talamo’s report. [↑](#footnote-ref-12)
13. Parents were offered specialized transportation for the time of the transportation suspension, but they refused, opting instead to drive Student to school. (S-11) [↑](#footnote-ref-13)
14. In Westfield, fifth and sixth grade students attend WIS whereas seventh and eighth grade students attend WMS. (Cox) [↑](#footnote-ref-14)
15. Ms. Cox has a bachelor’s and a master’s degree in special education. She has also completed her Certificate of Advanced Graduate Studies (CAGS) and holds several licenses from the DESE. Ms. Cox has worked in the District since 2017 in multiple roles, including as a teacher in the RISE Program. She currently oversees grades five through eight as well as all out-of-District placements. (Cox) [↑](#footnote-ref-15)
16. During the extended evaluation period, Student received 5x45 small group decoding instruction with the LLD teacher. (S-14, Cox) [↑](#footnote-ref-16)
17. The District provided Parents with several potential locations for the extended evaluation. However, Ms. Ecker testified that “[t]ypically the extended evals[sic] take place at SSDC. The other schools are more placement schools.” (Ecker) [↑](#footnote-ref-17)
18. Student was reported to have threatened to throw a ball at his pregnant teacher. (S-7, S-23, Cox) [↑](#footnote-ref-18)
19. Following Parents’ filing of the Request for Hearing with the BSEA, the District expunged the suspension from Student’s record. (Cox) [↑](#footnote-ref-19)
20. Ms. Fernandez has a bachelor’s degree and a master’s degree in special education and holds multiple licenses from DESE. She has extensive teaching experience and has served as the Director of the Pace Center School in West Springfield, Massachusetts, a Chapter 766 alternative school for students in Grades 6 through 12 with emotional and behavioral difficulties. (Fernandez) [↑](#footnote-ref-20)
21. Mr. Ascolillo is a DESE licensed special educator with eighteen years of teaching experience at WHS. (Ascolillo) [↑](#footnote-ref-21)
22. Mr. Butler is a DESE licensed school psychologist with a bachelor’s degree in psychology and a master’s degree in educational psychology. He also has a Certificate of Advanced Graduate Studies (CAGS) in school psychology. (Butler) [↑](#footnote-ref-22)
23. Mr. Saccomani has a bachelor’s degree in psychology and a master’s degree in mental health. He is in the process of completing his credentialing to become a licensed mental health counselor (LMHC). Mr. Saccomani holds several DESE licenses. This is his first year at WHS. (Saccomani) [↑](#footnote-ref-23)
24. Mr. Saccomani testified that services were reduced to 2x30/month, but the January 2023 IEP indicates that services was to be provided once per month. (Saccomani) [↑](#footnote-ref-24)
25. According to Mr. Saccomani, despite the change in service frequency on the January 2023 IEP, he still meets with Student once per week. (Saccomani) [↑](#footnote-ref-25)
26. In response to the Hearing Officer’s request, School Exhibit S-35 was admitted into evidence on May 1, 2023. Included in S-35 was Student’s most recent report card dated April 28, 2023. Said report card demonstrates that other than a 63 in ELA in Q3, all other term grades were in the failing range. His Q4 ELA grade, to date, was 100, but all other grades were in the single digits range. (S-35) [↑](#footnote-ref-26)
27. Student had many absences in February and March 2023, and Ms. Metz was out for two weeks. This time period also included two snow days and February break. (Metz) [↑](#footnote-ref-27)
28. Based on the completed portions, Student’s overall reading skills are at the third-grade level. (P-4b, Metz) [↑](#footnote-ref-28)
29. Regarding her grading policy, Ms. Metz testified that for “the grades that go in PowerSchool for [her] students, [she] typically [] grade[s] based on participation and effort. Then accuracy goes into … [the] progress report…. Because the work is modified significantly for each student, each student's looks a little different. So depending on [Student’s] attending classes and what [] doing the academic work looks like, [she] would grade [him] based on that.” (Metz) [↑](#footnote-ref-29)
30. Ms. Metz also testified that she has “been out of [her] classroom for two days, and … so [she had not] had a chance to look.” (Metz) [↑](#footnote-ref-30)
31. Student was absent 3 days in September, 4 days in October, 1 day in November, 1 day in December, 12 days in January, 7 days in February, 7 days in March, and 3 days in April. (S-4, S-35) [↑](#footnote-ref-31)
32. Parents submitted Exhibit P-3b to reflect the reasons for Student’s absences, dismissals and tardies. However, said Exhibit reflects Student’s visits to the orthodontist during the 2020-2021 school year but not the 2022-2023 school year. (P-3b) [↑](#footnote-ref-32)
33. According to Ms. Fernandez, Student’s attendance improved the week prior to Hearing. (Fernandez) [↑](#footnote-ref-33)
34. Mr. Ascolillo has continued to provide Student with academic support after his change of placement. (Ascolillo) In response to the Hearing Officer’s request, the District submitted evidence of Student’s attendance and most recent progress report and report card, all of which were admitted into the record as S-35. [↑](#footnote-ref-34)
35. Student’s updated report card was submitted after the conclusion of the Hearing but before the record closed. This updated reports card continues to show significant absences and work incompletion. (S-35) [↑](#footnote-ref-35)
36. Children with ADHD often suffer from insomnia or sleep disturbances. (P-8) [↑](#footnote-ref-36)
37. Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 (d)(1)(A). [↑](#footnote-ref-37)
38. See 20 U.S.C §§1401(9), (26), (29); 603 CMR 28.05(4)(b); Sebastian M. v. King Philip Reg'l Sch. Dist., 685 F.3d 84, 84 (1st Cir. 2012); C.D. v. Natick Pub. Sch. Dist., No. 18-1794, at 4 (1st Cir. 2019) (quoting Fry v. Napoleon Community Schools, 137 S. Ct. 743, 748-749 (2017));*Lessard v. Wilton Lyndeborough Cooperative School Dist.,* 518 F.3d 18 (1st Cir. 2008); *In Re: Chicopee Public Schools,* BSEA #1307346, 19 MSER 224 (Byrne, 2013). [↑](#footnote-ref-38)
39. Honig v. Doe, 484 U.S. 305, 311 (1988). [↑](#footnote-ref-39)
40. See id.; see also 20 U.S.C. § 1401(19). [↑](#footnote-ref-40)
41. *Endrew F. v. Douglas Cty. Reg'l Sch. Dist.*, 137 S. Ct. 988, 1001 (2017). [↑](#footnote-ref-41)
42. 34 C.F.R. § 300.324(a)(i-v); *Endrew F.*, 137 S. Ct. at 999; *D.B. v. Esposito*, 675 F.3d 26, 34 (1st Cir. 2012). [↑](#footnote-ref-42)
43. Reid v. District of Columbia, 401 F.3d 516, 518-9 (D.C.Cir.2005). [↑](#footnote-ref-43)
44. 20 U.S.C. § 1414(a)(1)(A). [↑](#footnote-ref-44)
45. 20 U.S.C. § 1414(a)(1). [↑](#footnote-ref-45)
46. 20 U.S.C. § 1414(b)(2). [↑](#footnote-ref-46)
47. Appendix A to the IDEA Part B regulations, Question 14 (1999). [↑](#footnote-ref-47)
48. 603 CMR 28.05(2)(b)(5). See *Administrative Advisory SPED 2019-2 – Extended Evaluations* which may be found at <https://www.doe.mass.edu/sped/advisories/2019-2.html#3>. [↑](#footnote-ref-48)
49. See 20 U.S.C. § 1414(a)(1)(C); 34 C.F.R. § 300.300(c). [↑](#footnote-ref-49)
50. See 34 C.F.R. § 300.303 (a)(1). [↑](#footnote-ref-50)
51. See *M.T.V. v. DeKalb Cnty. Sch. Dist*., 446 F.3d 1153, 1160 (11th Cir. 2006) (affirming Administrative Law Judge's order requiring parents to consent to School District's request to reevaluate student by an expert of its choice, or else forfeit services addressing his motor impairments pursuant to eligibility under "Other Heath Impaired" category); see also *Johnson v. Duneland Sch. Corp.,* 92 F.3d 554, 557-8 (7th Cir. 1996) (affirming Hearing Officer's order, under previous version of IDEA, that a three-year evaluation take place absent parental consent where a student's "condition had changed since he last attended school"). [↑](#footnote-ref-51)
52. See 603 CMR 28.07(1)(b); see also *In Re: Lowell Pub. Sch.*, BSEA #110039 (Crane, 2010) (granting substitute consent for parents after concluding that an updated three-year evaluation, which parents refused, was necessary for the school district to determine what educational services and placement are appropriate for the student and that "[w]ithout new evaluations, it simply is not possible to do what state and federal special education law require - that is, to determine whether special education or related services are needed, and to tailor any needed special education and related services to Student's current strengths and weaknesses"); *In Re: Maynard Pub. Sch.*, BSEA #106645 (Scannell, 2010) (finding that "many of the assessments requested by Maynard in the three year reevaluation proposal [were] necessary to determine [the student's] current functioning so that the proper special education services [could] be provided to him"); *In Re: Duxbury Pub. Sch. & Ishmael*, BSEA #072419 (Byrne, 2007) (where the District expressed concern about conflicting and missing information regarding his mental status and health, the Hearing Officer allowed the district to conduct a comprehensive psychiatric evaluation of student absent parental consent, where student’s mental health was the primary disability affecting his education). [↑](#footnote-ref-52)
53. 603 CMR 28.07(1)(b). [↑](#footnote-ref-53)
54. See *In Re: Williamstown Pub. Sch.,* BSEA # 04-4917 (Crane, 2004) (finding that a “BSEA Hearing Officer has the authority to order an evaluation ‘when necessary to determine the appropriate special education for the student’”) (citing to 603 CMR 28.08(5)(c)). [↑](#footnote-ref-54)
55. *In Re: Norwell Pub. Sch.*, BSEA #1901470 (Figueroa, 2018). [↑](#footnote-ref-55)
56. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). [↑](#footnote-ref-56)
57. *Id*. [↑](#footnote-ref-57)
58. See *id*. [↑](#footnote-ref-58)
59. See *In Re: Lowell Pub. Sch.*, BSEA #110039 (Crane, 2010). [↑](#footnote-ref-59)
60. Parents did not use the phrase “Prior Written Notice,” but, as they are *pro se* litigants, the Hearing Officer construes their argument as such. [↑](#footnote-ref-60)
61. In their Closing Argument, Parents argued that “Westfield’s repeated violations of parents’ rights is at the heart of this due process hearing. Without a team meeting for [Student], crucial information was not shared, and concerns that could have, and should have, been addressed, were not.” They asserted that the “proposed [extended evaluation] was a holdover from middle school, for which no consent was requested.” [↑](#footnote-ref-61)
62. Cf. *Administrative Advisory SPED 2019-2 – Extended Evaluations*. [↑](#footnote-ref-62)
63. Parents argued that the District’s proposal of the January 2023 IEP suggests that an extended evaluation is unnecessary as the District was able to propose an IEP. However, at the time the IEP was proposed, the District was still grappling with Student’s behaviors, and the proposal for an extended evaluation was pending. Moreover, Mr. Butler, Ms. Fernandez, and Ms. Metz testified that the District agreed to “try” the LLD Program as an intervention to see if this change in placement would make a difference in Student’s engagement. See, e.g., *Edinburg Consolidated Indep. Sch. Dist.*, 010-SE-0915, 67 IDELR 132 (SEA TX 2015) (“the District's obligation is to provide a FAPE based on available information until better information can be obtained”). As such, Parents’ argument is unpersuasive. [↑](#footnote-ref-63)
64. See 34 CFR 300.513 (a)(2); see also *Maine Sch. Admin. Dist. No. 35 v. Mr. R*., 321 F.3d 9, 19 (1st Cir. 2003) (“We recognize that compensatory education is not an appropriate remedy for a purely procedural violation of the IDEA”); *Doe v. Attleboro Pub. Sch*., 960 F. Supp. 2d 286, 298 (D. Mass. 2013) (denying reimbursement for a private placement where the Hearing Officer did not err in concluding that none of the procedural violations interfered with the FAPE for the Does' son and did not deprive him of educational benefits); *Shawsheen Valley Reg'l Vocational Tech. Sch. Dist. Sch. Comm. v. Commonwealth of Massachusetts Bureau of Special Educ. Appeals,* 367 F. Supp. 2d 44, 58 (D. Mass. 2005) (procedural violations must be more than *de minimis* to warrant a compensatory remedy); *Hazen v. S. Kingstown Sch. Dep't,* No. CA 09–313 ML, 2010 WL 5558912, at \*23 (D.R.I. Nov. 22, 2010) *adopted by sub nom. Hazen v. S. Kingston Sch. Dep't*, No. CA 09–313 ML, 2011 WL 63499 (D.R.I. Jan. 7, 2011) (upholding the Hearing Officer's determination that the parents were not entitled to relief for a procedural violation because the student was not harmed and the parents were not significantly prevented from participating in the IEP process); *T.B. v. Warwick Sch. Dep't*, No. CIV.A. 01–122T, 2003 WL 22069432, at \*2 (D.R.I. June 6, 2003), *aff'd sub nom. Lt. T.B. v. Warwick Sch. Comm*., 361 F.3d 80, 82 (1st Cir.2004) (noting that the district court found that “any procedural violations were not sufficiently material to justify rejection of the IEP or tuition reimbursement and that the proposed IEP did not substantively deny [Plaintiff] FAPE”); *Marshall v Harwich Public Schools*, BSEA # 06-4721 (Beron, 2007) ("Marshall should receive an evaluation and a partial IEP and as such procedural violations in the issuance of this IEP and partial evaluation did not result in a deprivation of educational rights or deny a FAPE to Marshall). [↑](#footnote-ref-64)
65. Parents argued that if the District believed that Student was not making progress in the LLD Program, Westfield should have reconvened the Team. Parents are correct that if a student fails to make progress within a reasonable period of time, the district must convene an IEP meeting to address the student's lack of progress. See 34 CFR 300.324 (b)(ii)(A); see also *Questions and Answers on U.S. Supreme Court Case Decision Endrew F. v. Douglas County Sch. Dist., RE-1,* 71 IDELR 68 (EDU 2017) (stating that if a child is not making progress at the level the IEP team expected, the team must revisit the IEP with the *Endrew F.* standard in mind and revise it as necessary to ensure the student is receiving appropriate special education and related services and that the goals are individualized and ambitious). Ms. Fernandez, Ms. Metz, and Mr. Butler testified that the Team wanted to “try” the to see if it would work as an “intervention.” However, when Student was not progressing in that setting, the Team could not revise Student’s IEP without additional information. See *Malloy v. D.C.,* No. 20-CV-03219 (DLF), 2022 WL 971208, at \*7 (D.D.C. Mar. 30, 2022) (Student’s failing grades, truancy, and staff concerns signaled the need for an evaluation). As Parents disagreed with the need for an extended evaluation, and the matter of the extended evaluation was already pending before the BSEA, the District proceeded to Hearing for substitute consent. Because Parents had already participated in a Team meeting to address the extended evaluation when it was first proposed by the District, and voiced their objections thereto, no other Team meeting was necessary relative to this issue. See *E.B. v. Baldwin Park Unified Sch. Dist.,* No. CV-17-56-MWF (JCX), 2020 WL 5875149, at \*10 (C.D. Cal. Aug. 10, 2020) (“To determine whether another meeting was required, the Court examines whether E.B.'s parents were already afforded an opportunity to participate in the placement decision during the 2015 IEP meeting or the March 14, 2016 IEP addendum meeting”) [↑](#footnote-ref-65)
66. See *In Re: Ipswich Pub. Sch. and Soleil*, BSEA #1906526 (Byrne, 2019). [↑](#footnote-ref-66)
67. See *Endrew F.*, 137 S. Ct. at 1001. [↑](#footnote-ref-67)
68. 34 C.F.R. Sec. 300.536. [↑](#footnote-ref-68)
69. See, e.g., *In re: Student with a Disability*, 10-0070, 110 LRP 1292 (SEA CT 2009) (where Student had a “history of problems with various placements” and “his presentation, demeanor, severe behavioral problems … created serious challenges for the members of the [IEP team]," additional assessments were necessary to ascertain the student's disability, level of functioning and determine what changes to make to his program, and, given the student's history, it was imperative to evaluate him in a small, intensive therapeutic setting where he would receive both academic and emotional support”); *East Windsor Bd. of Educ*., 114 LRP 36178 (SEA CT 2014) (where a 13-year-old who engaged in disruptive and increasingly aggressive behavior toward his peers and teachers failed to respond to the behavioral intervention plan the district developed for him and made little progress toward his IEP goals even after he was placed in a small, self-contained program, the hearing officer granted substitute consent for the district’s proposed diagnostic placement); *In re: Student with a Disability*, 04-020, 41 IDELR 143 (SEA CT 2004) (school could not “fully evaluate and prepare an IEP for the Student without the comprehensive evaluation, completed in the [therapeutic] diagnostic placement”). [↑](#footnote-ref-69)
70. Parents argued that Student has missed school due to medical reasons, and Dr. Bonner testified that she has received the pediatrician’s note regarding Student’s sleep issues. However, to date, the majority of Student’s absences are unexcused. Parents also argued the Team failed to address Student’s sleep issues in the IEP and that Westfield’s “failure to address this concern, and subsequently using attendance as justification for the proposed extended evaluation, provides further evidence that the [extended evaluation] is not appropriate.” They also asserted that “the District provided no evidence to support the premise that his attendance would be improved through an extended evaluation in a therapeutic setting as his attendance difficulties are medically related.” I note, first, that the appropriateness of the IEP is not at issue in this case. In addition, Student’s absenteeism is only one factor that supports the need for an extended evaluation in a therapeutic milieu; even if, *arguendo*, Student’s attendance issues are “medically related,” this still does not explain his nonattendance in class when his at school nor does it explain Student’s chronic work refusal. [↑](#footnote-ref-70)
71. Parents argued that Student was not completing work because it was not being properly modified to his level by Westfield staff. They point to testimony by Mr. Ascolillo that he does not work directly with general education teachers to modify Student’s work. I note that the implementation of the IEP is not at issue in this Hearing, and even if, *arguendo*, it was an issue, Parents did not offer sufficient credible evidence to support their assertion. Mr. Ascolillo testified that he modified classwork for Student, and Student should have been able to complete the modified academic work. Up until Student’s transition to the LLD program, Mr. Ascolillo was present in Student’s co-taught classrooms and was familiar with Student’s assignments. Mr. Ascolillo also opined that the Team needs additional information about which modifications would work for Student since the ones included in the IEP were insufficient to produce work output. Parents’ implementation argument also fails because Ms. Metz testified that all work in her class is modified and paced to the instructional level of the students in the LLD Program, but Student still does not complete most of the assignments in her program. [↑](#footnote-ref-71)
72. Parents argued that, based on the updated report card submitted by the District (S-35), Student is now passing three of his classes which he attends with Ms. Metz. Parents’ argument is unpersuasive because a close examination of Exhibit S-35 demonstrates that Student is not completing the vast majority of his classwork even in the LLD program. Student is barely passing any classes, and any passing grades are based on the minimal assignments completed. (S-35) [↑](#footnote-ref-72)
73. Parents argued that Dr. Bonner’s testimony evidences behavioral progress. Although Parents are correct that Student no longer engages in the type of disruptive behaviors he demonstrated in the past, teacher testimony was also probative as to the limited demands being placed on Student which likely contribute to the “progress” referred to by Parents. Parents also pointed to staff testimony suggesting that Student is more “at ease” in school than he had been in the past. While this is encouraging, Student’s “ease” has not translated into work completion or improved attendance. [↑](#footnote-ref-73)
74. Parents argue that Mr. Saccomani’s testimony that Student’s “affect" had improved and that Student has begun to advocate for himself by telling Mr. Saccomani that he did not want to meet with him evidence progress. They further asserted that “[a]bsent behavioral challenges, benchmark numbers 1 and 3 of his social emotional goal simply no longer apply.” The appropriateness of Student’s goals and benchmarks is not an issue in this Hearing, but, even, *arguendo*, if appropriateness of benchmarks was at issue, Parents provided insufficient evidence to demonstrate that Student has made sufficient progress towards those benchmarks or that he has met them. Moreover, Mr. Saccomani testified that Student is not making progress on his social-emotional goal. [↑](#footnote-ref-74)
75. See, in contrast, *Mapletown Pub. Sch.*, BSEA # 14-06097 (Berman 2014) (where “the student has spent his entire educational career, albeit problematically, in full inclusion settings and needs an extended evaluation[, and the] School operates two district-wide programs that appear, on their face, to be appropriate” for an extended evaluation, the district did not prove that the proposed collaboratives was the least restrictive environment appropriate to meet the Student’s needs for evaluation”) (internal citations omitted). [↑](#footnote-ref-75)
76. Although Parents contend that the District was seeking to collect “negative” information regarding Student in order to force his “removal” from WHS, they offered no probative evidence to support their argument. Rather, in continuing to advocate for the extended evaluation, the District relied on objective evidence of lack of progress. See *Charles County Pub. Sch.*, MSDE-CHAS-OT-20-04755, 121 LRP 8601 (SEA MD 2020) (“Even though the Parent considered CCPS' request to place the Student at [ ] as pressure to get his agreement to that placement, even as diagnostic placement, which was a pre-text to recommending the [ ] program,” the Hearing Officer was not persuaded finding instead that “Student continued to demonstrate behaviors which interfered her ability to access the curriculum and that offering [ ] as [an] interim diagnostic bases was appropriate”). [↑](#footnote-ref-76)
77. See, e.g., *Timberlane Reg’l Sch. Dist.*, IDPH-FY-06-03-052, 45 IDELR 139 (SEA NH 2006) (finding that a diagnostic placement in a residential facility equipped to conduct a complete and comprehensive assessment was appropriate where the student, whose placement had been changed to a more restrictive setting just three months earlier, displayed psychotic symptoms, including hallucinations, disorganized thinking, and catatonic behaviors and could not access her education and she posed a substantial danger to herself or others); *In re: Student With a Disability*, 41 IDELR 143 (SEA CT 2004) (granting the district's request for a consent override where a diagnostic placement in a therapeutic setting was necessary to identify all of the child's special education and related services needs); *East Windsor Bd. of Educ*., 114 LRP 36178 (SEA CT 2014) (noting that because the district needed more information so that the teen's IEP could be revised "with a greater opportunity to learn and experience success," it was entitled to place the teen at a school in Massachusetts for the diagnostic placement). [↑](#footnote-ref-77)
78. In light of the approaching conclusion to the 2022-2023 school year and Parents’ concern, as expressed in their opening statement, for “tak[ing Student] away from his friends and his school,” the District may want to assess whether an extended evaluation in a therapeutic milieu during the summer session may be possible. [↑](#footnote-ref-78)