**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS SPECIAL EDUCATION DUE PROCESS HEARING**

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| C[redacted] M. | : | |
| v. | : | DUE PROCESS |
| | : | COMPLAINT # LL16-21 |
| NORTH KINGSTOWN SCHOOL DEPT. | : | |

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## DECISION

## TRAVEL

The Parents of [redacted] M. (Parents, hereinafter) filed the above captioned Due Process Complaint (Complaint, hereinafter) on January 3, 2017 with the RI Department of Education (RIDE, hereinafter). The North Kingstown School Department (District, hereinafter) filed a timely response. On January 4, 2017, an IEP was scheduled and held at the request of the parents, subsequent to this meeting there were two apparent failed attempts to schedule a resolution session. As a result of not being able to convene a resolution meeting the District contacted RIDE to inform that the parties could not reach an agreement through resolution which subsequently led to the undersigned's appointment as the Hearing Officer.

A pre-hearing conference was held on February 21, 2017 the result of which again failed to produce any agreements between the parties. The matter was then scheduled for hearing and heard over nine (9) non-consecutive days. The dates of hearing included: March 1, 2017; March 8, 2017; March 22, 2017; April 4, 2017; April 12, 2017; April 13, 2017; May 10, 2017; May 25, 2017; and May 27, 2017. At the conclusion of the hearing, the parties agreed to complete Memorandum of Law to be due by Parents on or before June 30, 2017 and by District on or before July 30, 2017. Both parties complied.

Of note, a MOTION TO STAY HEARING was filed by Parents on February 20, 2017, some 48 days after the due process request was filed, with a timely objection filed by District. The Parents requested the hearing be stayed until April 10, 2017 and/or a period of 15 days after the completion of additional evaluation and observation that they were requesting and that were in progress. This matter was argued by both parties and an

Order issued on February 21, 2017. The Order in pertinent part stated the following: Parent's request to stay the hearing was denied; Parent's claim related to retaliation would be heard within the context of this due process hearing; Parents were granted leave to serve two Subpoena Duces Tecum with District's right to argue their objection preserved for hearing where and when appropriate; and generally that both parties would comply with the five (5) day discovery rule and Parents would be given leave to supplement documents from any ongoing evaluation or observation as the same became available to them. That Order of February 21, 2017 is attached hereto and made a part of the record herein as *Exhibit 1*.

It is from this posture that the within Decision emanates.

## BACKGROUND

1. C.M. is six years old student in the District who is diagnosed with autism. C.M was diagnosed at approximately 3.5 years of age; *Tr. Vol 1 at p. 43*
2. C.M. began receiving services in the District in September of 2014 pursuant to an IEP that placed him in an integrated special education pre-school program (Fishing Cove) including children with and without special needs; *Tr. Vol 1 at p.73-75* and *Parent's Exhibit 7*
3. The IEP team determined in a team meeting dated October 17, 2014 that C.M. was eligible for special education services in the areas of speech and language, and needed a physical therapy and occupational therapy evaluation; *Parents Exhibit 4, 5 and 6*
4. C.M., as a result of the October 17, 2014 meeting, remained placed at Fishing Cove; *Parents Exhibit 7*
5. During the 2014-2015 school year C.M.'s IEP was amended to include physical therapy and occupational therapy services; *Tr. Vol 1 at p. 76*
6. C.M. demonstrated academic skill development needs in areas including: increasing independence in the classroom, need to increase social interactions with peers, and need in the area of expressive language development; Generally, *Parents Exhibits 22, 23 and 27*
7. The IEP team met again on May 20, 2016 to discuss ESY services, recommendations for services going forward into the Kindergarten year, and three options for Kindergarten placement including: "mainstream" at Stoney Lane, the Leaps program at Forest Park, and the Next Steps program at Hamilton; *Tr. Vol 1 at p. 86*
8. The Leaps program was described to Parent as a combination of special education services and regular classroom education; *Tr. Vol 1 at p. 86* and further generally described by Dr, Pezzullo, (District Director of Pupil Personnel Services) as a program with "very intensive resource" *Tr. Vol 7 at p. 685*
9. At the time of the May 20, 2016 IEP meeting C.M. was described (by Dr. Pezzullo in her testimony) to have behavioral issues including difficulties with consistently attending to lessons, following directions, needing adult assistance

from a teacher assistant, and needing to be in a small group for lessons; *Tr. Vol 7 at p. 677-78*

10. In or around the middle of August 2016 there was a decision made that C.M. would attend Stoney Lane; *Tr. Vol 1 at p. 91*
11. Parent, specifically Ms. Pazienza, decided to work as a teacher assistant (TA) initially part time prior to C.M.'s placement at Stoney Lane; *Tr. Vol 1 at p. 48*
12. Ms. Pazienza. obtained certification as a teacher assistant; *Id at p. 49*
13. In the fall of 2016 Ms. Pazienza. applied for 1:1 full time TA position at the high school; *Id at p. 135*
14. Ms. Pazienza. was not the top choice for the position but was encouraged to sign up for Source4teachers (a private company) for on call substitute work; *Id at p. 137*
15. Ms. Pazienza performed substitute work in the District during the fall of 2016; *Id at p. 53*
16. Near the end of 2016, Ms. Pazienza was asked if she still had interest in the full time 1:1 position, that she was not the top choice for, as the position had become available again to which she responded that she would accept the offer; *Id at p. 139*
17. While waiting for the administrative paperwork to be done, Ms. Pazienza began working at the high school as 1:1 and worked for approximately 2-3 weeks; *Id at p. 56, 140*
18. At no time was Ms. Pazienza made aware of any issues with her performance and numerous witnesses testified that they had heard of no complaints about her behavior or performance; *Id at p. 58*
19. According to Deborah Gardiner (District Supervisor of Human Resources) Ms. Pazienza passed all preliminary administrative inquiry including: physical exam, background check, and all related paperwork; *See generally the testimony of Deborah Gardiner Tr. Vol 4 at p. 403*
20. On or around December 5, 2016, an IEP meeting was held at which time Next Steps was discussed as the preferred placement for C.M. *Tr Vol 2 at p. 186*
21. Among others present at the December 5, 2015 meeting there was Ms. Pazienza, Joanna Scocchi (hired by Ms. Pazienza as an advocate), pathway behavior analyst (Stacy Mahoney) and C.M.'s Kindergarten teacher (Tara Aperson); *Tr. Vol 2 at p. 181*
22. Ms. Pazienza testified that she had not received prior written notice regarding the meeting dated December 5, 2016; *Tr. Vol 1 at p. 196*
23. According to Ms. Pazienza, Parent received C.M.'s IEP dated 12-5-16 in his backpack which had C.M. placed at Hamilton; *Tr. ol 1 at p. 191*
24. Ms. Pazienza testified that she sent a letter to Dr. Carson, copied to Superintendent Auger, on or around December 13, 2016 to express disagreement with placement at Hamilton, request a set of evaluations, complain about lack of Prior Written Notice (PWN) and to request an emergency IEP; *See Parents Exhibit 49*
25. Ms. Pazienza further testified that she received no response other than a telephone call on December16, 2016 confirming C.M. would be moved to Hamilton starting December 19, 2016; *Tr. Vol 1 at p. 193, 196*

26. Ms. Pazienza said she wrote a second letter dated December 20, 2016 to Superintendent Auger again stating her disapproval with placement and stating her opinion that District actions were potential violations of state and federal law; she expressed that she thought District action was "unconscionable and cruel"; she expressed thought that District was retaliating against her in "merciless" manner because she was advocating for C.M.; specifically that Dr. Carson was being "unbelievable hard hearted and willfully destructive" in her decision to move C.M. from his present classroom; she made complaints that her prior requests for data and comprehensive assessment were ignored; and finally made a request for stay put indicating that she was filing for mediation with RIDE. Ms. Pazienza copied this letter to Superintendent Auger, the District School Committee, the Commissioner of RIDE and the North Kingstown Standard Times; *See Parents Exhibit 52*
27. Superintendent Auger testified that, after review of the letter, he understood that Ms. Pazienza intended to exercise her legal rights *Tr. Vol 4 at p. 447*; Mary king then testified that she reviewed the letter with Dr.Auger which resulted in Ms. King and Dr. Auger deciding that they would not hire Ms. Pazienza for the 1:1 position that she was in process on and that her name would be removed from the substitute list; *Tr. Vol 4 at p. 439*
28. On December 27, 2016 Ms. Pazienza was notified that she would not be hired for the 1:1 position and that the offer was rescinded. She was also told that this was because the job should have been posted internally first and that if no union member wanted the job she could re-apply; *Tr. Vol 2 at p. 199*
29. Ms. Pazienza returned to the high school to work her prior 1:1 assignment on January 3, 2017 at which time she was told that the District could no longer hire substitute teachers and they had to make do with what they had; *Tr. Vol 2 at p. 202*
30. Ms. Pazienza. later contacted Source4Teachers and was told that the District said she was not a "good fit"; *Tr. Vol 2 at p. 204*; Ms. King testified that the letter written by Ms. Pazianza dated December 20, 2016 "certainly was" the reason a decision was made to rescind the job offer to Ms. Pazienza; *Tr. Vol 4 at p. 434-5*; the letter, according to Ms. King led to a decision to not hire Ms. Pazeinza and to remove her from the substitute list; *Tr. Vol 4 at p. 439*
31. On or around January 4, 2017 an IEP meeting was held wherein Parents with their advocate, Ms. Scocchi asked for specific information about services and mainstreaming opportunity for C.M. to which there was a response that there was no specific plan as the staff at Next Steps would need to get to know C.M.; *Tr. Vol 2 213, Vol 3 at p. 338 Vol 7 at p. 694*
32. On or around March 17, 2017 another IEP meeting was held at which time the results of the augmentative communication evaluation were reviewed; *Tr. Vol 6 at p. 639*
33. Dr. Carson testified that the augmentative communication recommendations would be necessary to implement regardless of C.M.'s placement in mainstream or Next Steps; *Tr. Vol 6 at p. 650*; the District would not implement the recommendations because of stay put; *Tr. Vol 3 at p. 341*
34. Ms. Black, an educational consultant engaged by Parents, reviewed C.M.'s

educational record; *Tr. Vol 5 at p. 482*; Ms. Black performed a classroom observation of C.M. on or around February 28, 2017; *See Parents Exhibit 76*; Ms. Black noted that C.M. had behavioral regulation challenges at times but could not tell why in that observation period; *Tr. Vol 5 at p. 505*; Ms. Black testified that it would be important to understand the reason for the behavior issues and what could be done to intervene or change the behavior such as would be done through a functional behavioral assessment; *Tr. Vol 5 at p. 505*

35. Ms. Black further testified that the teacher had done a good job of arranging the classroom so that C.M. could engage and that the aide was close to him and understood when C.M. needed help; *Tr. Vol 5 at p. 507*
36. Ms. Black testified that C.M. had difficulty generalizing skills in one setting to another; Tr. Vol 5 at p. 509
37. Ms. Sabourin, C.M.'s speech pathologist since the beginning of the school year, testified that a way to improve generalization is to teach the concept in the setting that it will be used; *Tr. Vol 5 at p. 583*
38. Ms. Black testified to the basic skills C.M. demonstrated and stated that with support he could continue to make educational progress; *Tr. Vol 5 at p. 520*; she did not believe a self-contained classroom was appropriate for C.M. and that he would have transition problems if moved to a self-contained classroom and that he needs opportunities for peer role models; *Tr. Vol 5 at p. 521-522*
39. An augmentative communication assessment was completed for C.M. and reviewed with the IEP team on March 17, 2017. To date the recommendations have not been implemented.

## ISSUES PRESENTED

As a result of the above complaint, testimony and argument ensuing thereafter the following issues are presented:

1. Did Parents prove by a preponderance of the evidence that the placement determined by the District would not provide C.M. access to a Free Appropriate Public Education (FAPE) in the least restrictive environment;
2. Did Parents prove by a preponderance of the evidence that the District denied Parents their right to have opportunities for input into C.M.'s education thus denying him FAPE; and
3. Did Parents prove by a preponderance of the evidence that District retaliated against Ms. Pazienza for advocating for C.M. by withdrawing an employment offer?

## BURDEN OF

## PROOF

The U.S. Supreme Court has held that in cases involving the IDEA, "[t]he burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief." *Schaffer v. Weast.126 S. Ct 528, 537 (2005)*.

It is the Petitioner, in this case, the Parents who carry the burden to prove that the District has not provided an education adequate for the child. This position is clearly supported by the law. They must also carry the burden of showing that the District deprived Parents of their right to participate in educational decision making for C.M. and that deprivation of this right resulted in a denial of FAPE for C.M.

Similarly, Parents must also prove by a preponderance of the evidence that District engaged in retaliation in that there is a direct nexus (causal connection) between Parent's advocacy and an adverse action against a person protected by the IDEA.

The person who seeks court action should justify the request, which means that the plaintiff bears the burden on the elements in their claims. *Weast Id. at 534.*

The court has further held that the *Weast* holding applies not only to issue of FAPE, but to any challenge to the IEP including LRE issues. *L.E. v. Ramsey Board of Education, 435 F.3d 384*.

Parents throughout must carry their burden by producing evidence at hearing that proves, by a preponderance that C.M. was deprived of FAPE inclusive of the state and federal statutory and regulatory provisions and supported by case law, and/or in the case of retaliation prove by a preponderance of the evidence that the causal connection/nexus referenced above exists.

## WITNESSES

Witness:

1. [redacted] parent of C.M.;

2. Sydney Culbertson: a special educator in the life skills program at North Kingstown High School;
3. Briand Lacroix: a special education teacher at North Kingstown High School;
4. Amy Messerlian-Magidin: special education teacher at North Kingstown High School, department head;
5. Heidi Varrecchione: a speech pathologist in the District;
6. Joanna Scocchi: a parent advocate employed through a non-profit Rhode Island Advocacy for Children and engaged by Parents as an advocate;
7. Donna Sweet: the assistant Principal of student services at North Kingstown High School;
8. Deborah Gardiner: the supervisor of Human Resources in the District;
9. Mary King: the Director of Administration in the District;
10. Philip Auger: the Superintendent of the District;
11. Nancy Black: an educational consultant engaged by parents, employed in a private practice offering psychotherapy and educational consulting;
12. Nicole Hitchener: the Principal of Stony Lane school in the District;
13. Keleigh Sabourin: C.M.'s speech and language pathologist during the school year, employee of the District;
14. Wendy Amelotte: the Principal of Forest Park school in the District;
15. Kim Rothwell-Carson: Director of Special Education in the District;
16. Patricia Pezzullo: Director of Pupil Personnel Services in the District;
17. [redacted] parent of C.M.;
18. Edward Ferrario: worked for District as elementary teacher; Principal at Stony Lane school; retired; returned as substitute Principal;
19. Tara Apperson: elementary school teacher at Next Steps program at Hamilton in the District;
20. Stacy Mahoney: behavior analyst employed by Pathways Program works as consultant to the Next Steps;
21. Kelly Craig: Kindergarten teacher at Stony Lane school in the District.

## ARGUMENT

As appropriately stated by the District, the standard of review for FAPE can be found in the U.S. Supreme Court case of *Board of Education of the Hendrick Hudson School District v. Rowley*, *553 IDELR 656(1982*). The *Rowley* decision established a two-part test to determine the appropriateness of a student's education: 1. Has the state complied with the procedures set forth in the IDEA, and 2. Is the IEP developed to reasonably calculated to enable the child to receive educational benefits.

The IDEA further provides that a proper IEP is one that is reasonably calculated to provide benefit in all of the disabled child's areas of needs and that FAPE through the IEP includes addressing all of the child's special needs including academic, physical, emotional, social, and behavioral. See *Rowley*, pages 176, 2017.

**FIRST: Proposed placement at Next Steps**

District contends that the IEP team's recommendation to place C.M. in the Next Steps program would provide FAPE and specifically allow C.M. to make educational progress, which at the time of the hearing, he was not. District describes Next Steps as a self-contained program that provides students the opportunity to be mainstreamed in the "regular" educational environment in accordance with the specific needs of each student.

District relies on the definition of an "appropriate education" quoting *Endrew F. v. Douglas County School District* that an appropriate education is "reasonably calculated to enable a child to make educational progress appropriate in light of the child's circumstances," *Endrew v. Douglas County School District, District RE-1, 69 IDELR 174 (U.S. 2017)*

Tara Apperson, the Next Step teacher opined that the placement would meet C.M.'s needs in light of the particular needs in the area of communication and because of the high staff to student ratio. She relied on her observations of C.M. to express her concerns about expressive language delay and low engagement in a lesson relying on prompting. *Tr. Vol 8 at p. 752.* In addition to this, two other witnesses, Stacy Mahoney (a behavior analyst with the Pathways program who consults to Next Steps) and Mr. Farrario (a former elementary school principal and qualified as an expert in elementary education for the purposes of this hearing) both rendered opinions that Next Steps would be an appropriate program for C.M. Ms. Mahoney stated that the smaller setting would

allow the educators to focus on the specific areas of need; *Tr. Vol 9 at p. 790*; Mr. Farrario, generally, thought that the program would provide a more intense educational experience which would have the flexibility to focus more time on the areas of need and increase the intensity of instruction; *Tr. Vol 8 at p. 721*

District acknowledges parent's argument that there is a mandate that students be educated in the least restrictive environment (LRE) including a requirement that a student be in the regular classroom setting to the maximum extent appropriate; *34 CRR 300.114(a)*; however, District contends that the mandate of LRE does not override their requirement that the student be afforded FAPE which significantly in this case, requires that the C.M.'s placement confers a "meaningful benefit". It relies on *P. v. Newington Bd. of Education*, for support of the proposition that if the regular educational environment does not confer a "meaningful benefit" then the child is entitled to be placed in a more restrictive environment. *P. v. Newington Bd. of Education, 51 IDELR 2 (2nd Cir. 2008)*

Further, and in reliance on two unpublished decisions, District posits that if the regular education environment would not provide FAPE to a student then the placement is not that student's LRE. The District's responsibility is to ensure a student with a disability receives *FAPE. B.S. v. Placentia-Yorba Linda Unified School District, 51 IDELR 237 (9th Cir. 2009) and L.G. v. Fair Lawn Bd. of Education, 59 IDELR 65 (3d Cir. 2012)*

Ms. Craig (C.M.'s Kindergarten classroom teacher) convincingly testified that by the end of the Kindergarten school year, C.M. was not interacting with other students, had difficulty saying good morning to other students even with the assistance of a picture board. *Tr. Vol 9 at p. 827*. The District relies on this testimony for the conclusion that if a student is not learning from exposure to other children and is isolated from classmates, interaction with peers should not be considered a non-academic benefit weighing in favor of inclusion. *Hudson v. Bloomfield Hills Public School 23 IDELR 613 (E.D. Mich. 1995).*

In reliance on the above District states that C.M.'s placement in the regular education classroom did not provide him FAPE. Additionally, District contends that even if Parents could meet their burden of showing that Next Steps was not an appropriate placement for C.M. they still did not show that C.M. remaining in the

mainstream environment would provide FAPE.

District relies on Mr. Ferrario's testimony for its proposition that C.M. is being short-changed in the regular education classroom because of the extra and intense support C.M. needs each day. *Tr. Vol 8 at p. 719*

Parents argue and rely heavily on the issue of mainstreaming and the importance of mainstreaming as it relates to the requirements of the IDEA. They state that mainstreaming is an important part of the educational experience and as equally important as academic progress when considering how a student with a disability is being prepared to participate outside the school environment. Parents cite the First Circuit in *Roland M. v. Concord Sch. Comm., 901 F.2d 983, 992-93 (1st Cir. 1990)* stating generally that mainstreaming cannot be ignored even to fulfill substantive educational criteria and that an IEP must support a student with a disability being educated with children who do not have disabilities.

C.M. is a student on the autism spectrum and parents opine that inclusion in the mainstream is not only a civil right associated with education but "is the autistic child's education". There is no dispute that C.M. experiences delayed language and social development skills; and has difficulties generalizing skills which indeed impede C.M.'s education and that these issues must be addressed in educational programming for C.M. Parents put forth that mainstreaming is essential to the development of the areas where C.M. demonstrates delays; particularly language skills and social skills.

Parents point to Ms. Hitchener's (Nicole Hitchner is in her first year as Principal of the Stony Lane school) testimony which recognized the importance of inclusion in the mainstream for a child on the spectrum. Tr. Vol 5 at p. 567-68); and the testimony of Ms. Sabourin (C.M.' speech and language pathologist) who recognized the importance of mainstreaming when she took C.M. out of his resource room and had sessions with him in the "regular classroom". Tr. Vol 5 p. 579-81

It is further asserted that if C.M.'s placement was to be outside of the mainstream, courts would look to see if efforts were made to educate C.M. in the mainstream to the maximum extent appropriate. Parents rely on *Oberti v. Bd. of Education*, to support factors that must be examined to determine if the District made "maximum" mainstreaming efforts. Those factors have wide support in similar instances where courts

look at:

1. The steps district takes to accommodate the child in the regular classroom;
2. A comparison of the academic benefits the child will receive in the regular classroom with those received in the special education classroom;
3. The child's overall educational experience in regular education, including non-academic benefits; and
4. The effect on the regular classroom of the disabled child's presence tin that classroom.

*See Oberti v. Bd. of Educ., 995 F2d 1204, 1215 (3d Cir. 1993)*

Parents contend that these factors support their contention that C.M. continue in the mainstream environment and that to move from the "regular education" classroom to the Next Steps (self-contained) program without thoughtful consideration of these factors is a leap too large given that testimony supports Parent's contention that there is a large gap between C.M.'s academic abilities and those of other students at Next Steps which should be and should have been a major consideration. In fact, in Parent's opinion, in May of 2016 the Team had stopped considering Next Steps as a serious option. *See Dr. Pezzullo's testimony, Tr. Vol 7 at p. 682-83*

Finally, Parents assert that the decision to transfer C.M. to a self-contained environment "represented a rush to judgment" and was not an example of a genuine effort to give C.M. a "fair chance" at mainstreaming which would include appropriate supports and services.

**SECOND: Receipt of Prior written notice**

Parents contend that prior written notice (PWN) was not received specifically as it related to the meeting of December 5, 2017. *Tr. Vol 2 at p. 195*. The IEP meeting held on that date is of particular significance as it is at the meeting that the team discussed Next Steps as the preferred placement for C.M. and that in this placement C.M. would receive more one to one support that would be tailored specifically to him. *Tr. Vol 2 at p 186*.

Parents state that District engaged in a pattern of procedural violations with respect to C.M.'s placement and that these procedural violations may be ground to "set aside" an IEP if there is "some rational basis" to believe that the procedure violations

compromised C.M.'s FAPE; seriously hampered parents' participating in IEP development; or caused a deprivation of educational benefit; *Roland M. v. Concord Sch. Comm. at P. 994.*

It is claimed that the District's actions in essence compromised parents' ability to participate in the educational decisions and that the evidence presented at hearing showed that the team made a placement decision based upon programming considerations and not the individualized needs of C.M. Effectively, Parents contend that the IEP team made a placement decision then wrote the IEP in a manner reflecting services and goals that matched what was offered in the placement; a practice referred to as "shoehorning", which is prohibited by the IDEA as it does not comport with the mandates around individualization. *Spielberg v. Henrico Co. Pub. Sch., 853 F.2d 256, 258-59 (4th Cir. 1988); and Doe v. Lincoln Sch. Comm., Comm'r of Educ., 4/28/2017, p. 9-10*

Parents point to the anticipated placement of C.M. in the LEAPS program sometime in August of 2016 which would have placed C.M. in regular education half time and special education half the time. *Tr. Vol 1 at p. 86*. This decision was apparently changed sometime thereafter but with no IEP meeting. In addition, parents claim that there was a September 8, 2016 IEP meeting to discuss mainstreaming options but school had prior started, and the decision to mainstream was made prior to the September 8th meeting, again, apparently outside of a team meeting.

They point to the testimony of Ms. Hitchener to posit their position that C.M.'s IEP was changed on September 8, 2016 in order to make the IEP conform to a placement that had already been made … "because the amount of services in the day was pulled out, and we were thinking he was mainstreamed we were doing things inside of the classroom, so we revised the IEP to reflect what our setting would look like." *Tr. Vol 5 at p .552*

In addition to this, Parents point to the testimony of Dr. Pezzullo to bolster their position that the District "shoehorned" C.M. and did not make educational placement decisions based upon his individualized needs but rather the decisions were made based upon the programming available. *See generally Tr. Vol at p. 679-684*

Finally, parents contend that the District continued to violate its procedural obligations even after the District believed mainstreaming C.M. was a mistake which led

to a decision to place C.M. in the most restrictive placement that C.M. would have experienced in the placement at Next Steps without a PWN to Parents.

**THIRD: Retaliation**

Parents asserted a claim that Ms. Pazienza's rights were violated when an offer of employment from the District to her as a 1:1 teacher assistant was withdrawn and she was additionally removed from the substitute list. Parents claim that these actions were taken because she advocated for C.M. complaining that his placement was inappropriate and that the District violated the law.

Retaliation related to advocacy by a parent for their child is actionable conduct under the IDEA, under Section 504 of the Rehabilitation Act and under the Americans with Disabilities Protection Act. The IDEA requires that in order to take such action parents must first exhaust their administrative remedies. *Weber v. Cranston Sch.Comm., 212 F.3d 41, p. 50-51 (1st Cir. 2000).*

Parents aptly point out that the purpose of this provision in the IDEA is to place parent's advocacy for their child at the forefront of the IDEA itself, providing a number of procedurals safeguards to help ensure that parents were involved and heard on matters involving their child's education. Id at 51-52

Citing Weixel v. Bd. of Educ. Of City of New York, parents state that in order to establish a claim for retaliation they are required to establish the following:

1. That parent engaged in a protected activity;
2. That an adverse decision or course of action was taken against her; and
3. That there is a causal connection between the protected activity and the adverse action. *Weixel v. Bd. of Educ. Of City of New York., 287 F.3d 138 (2d Cir. 2002)*

Further parents say that the "adverse action complained of must be such that a person of "ordinary firmness" would be dissuaded from advocacy. *Wenk v. O'Reilly, 783 F.3d 585., 594-95 (6th Cir. 2015)*

Generally, District agrees with this standard stating that the complainant has the burden of proving 4 elements of the claim, namely:

1. The complainant engaged in a protected activity;

2. The recipient was aware of the protected activity;
3. The recipient took an adverse action against the complainant contemporaneously with or subsequent to the participation in a protected activity; and
4. There is evidence of a causal connection between the adverse action and the protected activity. *Cherokee County School District, 54 IDELR 301*

As for the elements, it is clear C.M. had an IEP and that his parent advocating for his placement established or controlled by that IEP is a protected activity as contemplated by the IDEA. While the District contends that the actual dispute did not arise until the parent filed the due process complaint which occurred after the adverse employment decision, it still is clear that the parent had made her concerns about the placement of her child in Next Steps (advocacy) prior to her losing the job offer.

Parent testified that she wrote two letters to the District Administration, one dated December 13, 2016 the other dated December 20, 2016 See Parent Exhibit 49, and 51).

Significantly, the December 13th letter was addressed to Dr. Carson, and copied to the Superintendent, the Principal, a special educator, and the classroom teacher (and others), while the December 20th letter was addressed again to Dr. Carson and copied to the Superintendent (and others). The contents of these letters identify a dispute, identify Parent's concerns for their child's educational placement and identify the intent to further pursue legal remedies.

District contends that the content of the December 20th letter is what prompted Mary King, Director of Administration, to make the decision to withdraw the job offer to Ms. Pazienza and further argue the Ms. King had no knowledge of any of the issues occurring with C.M. and that she was not aware that Ms. Pazienza was disputing C.M.'s placement.

Ms. King also stated the she found the nature and character of the letter to be nasty, and threatening and the fact that the letter was sent to Dr. Carson, Superintendent, the School Committee and the local newspaper was an indication that Ms. Pazienza was taking her concerns to a sensational level and airing her own dirty laundry in public; *Tr. Vol 4 at p. 234*. All of this led to her decision to withdraw the job offer.

While one could argue the threatening or nasty nature of the letter; whether or not

the tone of the letter itself is justification for withdrawing the job offer may not be a determination for this forum – the only determination relates to whether or not the factors relates above are satisfied.

District's attempt to put Ms. King's decision in a vacuum fails to convince me that the District was not aware that Ms. Pazienza was engaging in a protected activity, and frankly, the letter that Ms. King was obviously intimately familiar with also made specific reference to a child with a disability, special education services, and the IDEA.

In addition, the letter of December 20th was the second letter of two addressed to the Director of Special Education – who saw and read both and the Superintendent. They clearly knew that Ms. Pazienza was and had been concerned about C.M. and was advocating for C.M. Even if one were to agree that the letter of December 20th was nasty and threatening there is no denying that what prompted the letter was Ms. Pazienza's attempt to advocate a position for her son, particularly as it related to his educational placement.

In fact, Ms. King's testimony is clear and unwavering in the causal connection between the December 20th letter and the rescission of the job offer to Ms. Pazienza's; *Tr. Vol 4 at p. 434-35*.

District points to Ms. King's testimony for a proposition that the letter was perceived to be threatening to an administrator in the District and the reason Ms. Pazienza's job offer was rescinded was because the threatening tone of the letter; *Tr. Vol 4 at p. 234*.

District further proposes that Ms. Pazienza was given copies of the procedural safeguards in which there are steps to take if you disagree with a team decision. Again, Ms. Pazienza sent two letters to two key administrators in the District, Dr. Carson and the Superintendent. The first letter of December 13th, clearly and concisely presents her disagreement with the team decision. This letter requested a set of evaluations, complained of a failure with respect to PWN and requested and emergency IEP; *Parents Exhibit 49.*

The Superintendent, Dr. Auger, acknowledged that he received both letters and that he was aware that Ms. Pazienza's may take further legal action related to C.M.'s placement. He also testified that as of the second letter he also knew that Ms. Pazienza

was offered a position as a teacher assistant position. *Tr. Vol 4 p.446-449*

Ms. Pazienza testified that the only response she received post the December 13th letter and prior to the December 20th letter was a phone call on December 16th "announcing" that C.M. would be moved to Hamilton on December 19th. *Tr. Vol 1 at p. 193*

The most thought-provoking argument for District's position relates to the characterization of the December 20th letter as threatening and using the threat as a pre-text for rescinding the job offer. I find nothing in the language provided regarding parent's advocacy that speaks to this aspect of District's defense and cannot view the December 20th letter in isolation with respect to Ms. Pazienza's advocacy and the District's awareness of C.M.'s status.

This argument may be appropriate ground to stand on as it relates to an employment related action, but ultimately this is a test under the IDEA and must be examined through the lens that affords parents the right to participate and, in fact, make complaints about their child's special education plan. In this setting, it may not be then appropriate to determine the nature and character of parent's attempt to advocate for their child, it may only be appropriate to determine that their attempt to advocate led to an adverse action and in this case there appears to be a clear nexus between the two things.

Parents, anticipating District's argument, counter by citing Beagan v. Dept. of Labor & Training which stands for the proposition that discipline in an employment setting must be predicated on employee conduct which has a sufficient nexus to the workplace. *Beagan v. Dept. of Labor & Training, 2017 WL 2656483.* They cite this case likening an adverse action taken by an employer against and employee for conduct not related to the employees' work performance as support for the proposition that Ms. Pazienza's tone in her December 20th letter pertained to her advocacy for C.M. and was not connected to the "workplace".

Again, I am not of the opinion that this is an issue that has to be reached here and as such the only focus is on whether or not the four-prong test noted above is satisfied. *See generally Cherokee County School District*

## FINDINGS AND CONCLUSIONS

As such I make the following findings and conclusions:

1. Parents failed to prove by a preponderance of the evidence that the District violated S.C.'s rights to a free appropriate education (FAPE) under the IDEA. C.M. should be placed in the Next Steps program at Hamilton; the IEP team should immediately convene to plan specific mainstreaming opportunities for C.M.; and the IEP team should immediately convene to incorporate the recommendations from the augmentative communications evaluation reviewed by the IEP team at the March 17, 2017 IEP meeting.

2. Parents proved by a preponderance of the evidence that the District engaged in procedural violation. However, Parents failed to show that the procedure violations are sufficient enough to set aside the IEP and failed to show a rational basis that these violations deprived C.M. FAPE under the IDEA. The District is directed to, henceforth, comply with the requirements of prior written notice under the Special Education Regulations so as to guarantee parental input into C.M.'s education.

3. Parents showed a direct connection between advocacy for C.M. and the adverse action in question and in fact proved that District did retaliate against Ms. Pazienza. I find no authority that allows me to differentiate, in this instance, between advocacy that might be termed positive and advocacy that might be termed hostile or inappropriate. In addition, I do not find any authority for ordering the relief requested by the parent and as such can only direct the District to comply with the requirements of the Special Education Regulations and guarantee parents have input into C.M.'s education.

**RESPECTFULLY ORDERED:**

***_/s/ S. Colantuono__***

Steven A. Colantuono, Esq.

Independent Hearing Officer

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**CERTIFICATION**

I, Steven A. Colantuono, hereby certify that on the **_29th_** day of **August 2017** I sent via email a true and accurate copy of the within **ORDER** to the following:

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***__/s/ S. Colantuono__***