

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

Nauset Public Schools

BSEA # 2301268

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 ch. 71B), the state Administrative Procedure Act (MGL ch. 30A), and the regulations promulgated under these statutes.

PROCEDURAL HISTORY

Nauset Public Schools (hereinafter, Nauset) requested an expedited hearing on August 5, 2022 which was scheduled for August 22, 2022. The hearing was held on August 22 and 24, 2022. Both Parties submitted written closing arguments on August 26, 2022 and the record closed on said date.

Those present for all or part of the hearing were:

Mother

Student

Carla Leone

Patrick Clark

Sean Fleming

Chris Ellsasser

Stephen Boskus

Esta Montano

Brooke Clenchy

Mary Buchanan

Joanne Birchall

Nancy Yurgelun

Paul Lapuc

Amanda Citrone

Erin Sullivan

Matthew Hilton

Dan Burnham

Caitlin Leach Mulrooney

Carol Kusinitz

Catherine Putney-Yaceshyn

Attorney, Parent/Student

Principal, Nauset Regional High School

Former Assistant Principal, Nauset Regional High School

Former Principal, Nauset Regional High School

Guidance counselor, Nauset Public Schools

Friend of Student's family

Superintendent of Schools, Nauset Public Schools

Director of Student Services, Nauset Public Schools

Teacher, Nauset Regional High School

Teacher, Nauset Regional High School

Consulting Psychologist, Nauset Public Schools

School psychologist, Nauset Regional High School

Special Education Coordinator, Nauset Regional High School

Social Worker, Massachusetts Department of Children and Families

School Resource Officer, Nauset Public Schools

Attorney, Nauset Public Schools

Court Reporter

Hearing Officer

The official record of this hearing consists of Nauset Public Schools' exhibits marked S-1 through S-14; Parents' exhibits marked P-1 through P-14 and approximately 12.5 hours of recorded oral testimony.

ISSUE

Whether maintaining Student's current placement is substantially likely to result in injury to Student or others.

SUMMARY OF THE EVIDENCE

1. The student (hereinafter, "Student") is a sixteen-year-old rising eleventh grade student within the Nauset Public Schools. His current diagnoses include Attention Deficit Hyperactivity Disorder, Combined type and Oppositional Defiant Disorder¹. (S-2(C)) Student has a personal strength in language based reasoning skills, falling within the average range. His visual spatial skills are low average. His working memory skills are an area of relative weakness, falling within the low average range. His processing speed skills are an area of significant weakness, falling within the extremely low range. On the BASC-3 Student indicated positive peer/parent relationships and good self-esteem, at-risk feelings toward teachers, sensation seeking, and levels of hyperactivity. The BASC-3 further reflected clinically elevated levels of attention problems. His teachers noted clinically elevated concerns with hyperactivity and at-risk concerns with aggression, conduct problems and attention. (S-1(C)) Student's last accepted IEP, accepted by Parent on February 15, 2022, contained one goal, in the area of executive functioning. The A Grid included consultation with the special education teacher 1 x 10 minutes per 10 day cycle, and consultation with the school adjustment counselor 1 x 10 minutes per 10 day cycle. There were no B Grid services. The C grid provided for academic support with a special education teacher 5 x 85 minutes per 10 day cycle. (S-1(C))
2. When Student was in the sixth grade at Nauset Regional Middle School, he was referred to Paul Lapuc, Ph.D., for a risk and safety evaluation. Dr. Lapuc detailed his findings in a report dated April 22, 2018. (S-2(A)). As noted in Dr. Lapuc's report, school staff had expressed concerns related to a number of behaviors which were broadly categorized as "1) taking materials belonging to peers; 2) non-response or inconsistent response to limit setting; and 3) inappropriate language and physical boundary issues including those of a sexualized nature." In his evaluation report, Dr. Lapuc noted that Student had little sense as to how he came across and had difficulty accepting personal responsibility. Dr. Lapuc reported that Student "tends to be overly solicitous of attention; he also presents as overly familiar and doesn't seem to understand that even in positive exchanges he violates boundaries assuming familiarity not earned." He further noted that Student tends to be excitable and impulsive, to the point that he does not consistently filter what he is saying. Dr. Lapuc further observed that Student's "responses tend to either rationalize his words and actions; indicate that he doesn't see what the big deal is; and reflects his difficulty with empathy and perspective taking."

¹ Dr. LaPuc noted that Student's current presentation is much less confrontational and his oppositionality tends to be more passive aggressive in nature than when he assessed him in 2018. (S-2(C))

Dr. Lapuc concluded that Student met the criteria for a diagnosis of persistent depressive disorder (dysthymia). He noted that Student is highly sensitive to environmental cues and often responds on the basis of perceptions that may not be valid. Dr. Lapuc found Student to be defensive, guarded, and controlling and diagnosed an oppositional defiant disorder. He also endorsed a diagnosis of Attention Deficit Disorder, noting that Student has difficulty with working memory and does not learn from previous experiences resulting in difficulty planning and understanding social relationships. He further noted issues with verbal working memory, manifested by blurting out responses or saying inappropriate statements without thinking about consequences. Dr. Lapuc found at that time Student was at moderate to high risk of continuing to manifest non-compliant behaviors including boundary transgressions. He based his opinion on Student not effectively profiting from feedback, consequences, and limit setting. He noted Student misinterprets social cues and reacts impulsively with words and actions that push others away. He found that Student had difficulty considering the likely outcomes or consequences of actions, appreciating how his behavior is affecting other people and empathizing with others.

Dr. Lapuc recommended that Student receive outside therapy. He also suggested that it is essential “to intervene at the point of performance” at school and home. He explained this to mean that it was important to respond when the undesirable or unacceptable behavior occurs. He found that “Immediacy of reinforcement is the key to [Student]’s understanding of and learning how to operate socially.” He recommended that Student be provided with written reminders regarding acceptable behavior due to his ADHD. He also recommended that Student have a behavioral contract that clearly spells out what is expected of him and at the very least, indicates that physical contact with peers and teachers is not acceptable.

Dr. Lapuc concluded that Student had not developed internalized controls and required close supervision and immediate interventions. He noted that despite being assigned a 1:1 assistant, his boundary issues had not abated and Student continued to project blame for his actions on others. He recommended that Student be given a more structured therapeutic school placement with a counseling component that can set limits and address developing internalized controls. (S-1(C))

3. Student attended the Waypoint Academy for his seventh and eighth grade years. At the end of his time there he had earned the highest level in the point and level system and had shown great progress. While at Waypoint he struggled with remote learning without the normal supports in place and had difficulty following his schedule and keeping up with assigned work. (S-1(D))
4. Student transitioned to Nauset Regional High School for ninth grade. The Nauset Regional High School campus is comprised of seven separate buildings which contain classrooms and administrative offices. There is a library and a science building with labs. There is a large open courtyard and gardens and concrete walkways. It looks more like a community college campus than a typical high school campus. There is a significant construction project going on which necessitated constructing a “village” of 18 modular classrooms on

the back side of campus. In January 2023, half of the campus will close and become a construction zone. (Clark)

5. For grade 9, Student was in a substantially separate setting. He earned the following final grades that year: English: A; Integrated math: A; Freshman science: A; World History: A. (S-1(D), S-10)
6. As a tenth grader, Student was placed in a full inclusion setting at Nauset Regional High School. (S-1(D))
7. On September 28, 2021, Student was involved in an incident with Student A². Student A filed a police report with the Eastham Police Department on September 29, 2021. Her report states that she was standing on a ledge at her school when Student walked up to her and got very close to her. He shoved her and she began to fall off of the ledge, but was caught by a friend standing next to her. Student then told her, "I could violate you, know I have the power to." Student A reported that she felt very uncomfortable and ran off. She reported the incident to school staff. Later that day, Student and his girlfriend approached Student A and her friend and yelled at her, "You're really gonna report me for something and not talk to me about it." And "Imagine still being racist in 2021." Student A's police report further alleged that Student has always made her uncomfortable and tried to put his arms around her before. She reported that Student always invaded her space and came very close to her. (S-8(B))
8. Detective Daniel Burnham, school resource officer at Nauset, filed a narrative with respect to the incident. He spoke to the Assistant Principal, Sean Fleming. Mr. Fleming told him that Student A had contacted her guidance counselor, Steve Boskus, regarding the comments made to her by Student. Det. Burnham informed Student A's mother that they could seek a protective order through the Orleans District Court. (S-8(B))
9. Patrick Clark was an Assistant Principal during the 2021-2022 and is now the Principal of Nauset Regional High School. He and Stephen Boskus (Guidance Counselor) worked with Student A after the incident involving Student. Mr. Clark described Student A as clearly distraught after the incident.
10. Student received detention, and a verbal and written stay away order was issued requiring Student to stay away from Student A. (S-13)
11. Stephen Boskus is a guidance counselor at Nauset Regional High School. Student A reported concerns to him after an incident involving Student in September 2021. She was incredibly distraught and scared. He recalled Student A explaining that Student had gotten in her face and was within a few inches of her when he moved into her space which pushed her back and caused her to almost fall. He further explained that Student A understood Student's statement that he could violate her to be in a sexual context. Throughout the school year, Student A came to him to report times that Student violated the stay away order and was near her at school. He found Student A to be a reliable

² This student will be referred to as Student A throughout the decision to protect her confidentiality.

reporter, noting that she was mature in her communication and not overly dramatic. Her fear of Student seemed genuine to him. At some point Student A told him that she might have to transfer to a different school. Mr. Boskus recounted Student A's report about the time that Student came into the small cafeteria where she was and got between her and the exit. She immediately left to go see Mr. Boskus and reportedly left her belongings in the cafeteria because she was afraid to get them while Student was there. He described another instance in which Student was waiting near her bus. She explained that he was not on her bus, and she was concerned that he would know what bus she was on, and she did not want him to know where she lived. Student A was very fearful when she spoke to Mr. Boskus. (Boskus)

Mr. Boskus believed that Student A's level of fear of Student was reasonable in light of the September interaction. He has observed Student on campus and has noted his larger than life personality. He has observed Student move aggressively on campus and be in rooms he should not have been in. (Boskus)

12. Mr. Fleming wrote a letter to Student, dated October 18, 2021. It stated that Student was told during a September meeting with Mr. Fleming that he was required to stay away from Student A at school. Mr. Fleming noted that Student was near her on October 6, and he directed him to keep his distance. He further wrote that Mr. Clark directed him to keep his distance on October 15. The letter concluded by reminding Student he had been verbally warned twice before to keep his distance from Student A and the letter constituted a third and formal directive. It stated that failure to stay away from Student A in the future could result in consequences from then High School Principal Dr. Ellsasser. (Clark, S-4(E))
13. On February 2, 2022, Mr. Clark received a report of an incident involving Student and Student B³ from one of the school counselors. He investigated the incident and completed a Bullying/Harassment/Intimidation Incident Reporting Form and Investigation Form. It was reported that Student and three other students, including Student B were on the unsupervised side of the gym⁴ and there was no teacher present. It was reported that Student put his hand down the back of Student B's pants. Specifically, Mr. Clark's investigation concluded that Student received a vape pen from Student B and went to the restroom to use it. He returned to the gym and put the vape pen down Student B's pants and grabbed her bare rear end for some length of time. Two boys who witnessed the incident stated that Student appeared uncomfortable or alarmed. The boys stated that the incident was awkwardly long, and Student B stood frozen. Mr. Clark's investigation concluded that Student had engaged in sexually harassing behavior.
14. Dr. Ellsasser conducted a hearing on February 10, 2022 regarding the allegations involving Student B. He concluded that Student "put his hands down the back part of a female student's pants without her consent." In making his determination, he considered an interview with Student B; review of school video cameras; an independent interview of two students who witnessed the event; and an interview with Student. Dr. Ellsasser

³ This student will be referred to as Student B throughout the decision to protect her confidentiality.

⁴ Student was supposed to be in art class at the time that he was in the gym. (Fleming)

concluded that Student violated Nauset's Code of Conduct, which prohibits sexual harassment and student assault. He suspended Student for 86 days. Student's Team was to convene to address the provision of educational services during the suspension period. (S-4(D)) Dr. Ellsasser believed that the suspension of Student was appropriate because he was concerned by the pattern of Student's behavior. He thought it would be beneficial for Student to be in a different environment and to get support from specialists outside of school to ensure Student did not continue on what seemed like a negative path. Dr. Ellsasser believed it was in Student's best interests to not be on campus and get as much support as possible before returning to the same place. He was concerned about recidivism and escalation of behaviors. (Ellsasser)

15. On February 23, 2022, Ms. Clenchy issued a Superintendent's Determination of Appeal Under M.G.L. c. 71, 37H13/4. She found that Student had committed the disciplinary offense he had been accused of. However, she reduced the duration of Student's suspension to 45 days. Her letter stated her understanding that Student's Team had convened and that a 45-day evaluation at an out of district program (Waypoint Academy/Cape Cod Collaborative) had been proposed, which would include a functional behavior assessment and risk assessment. (S-4(C)) Ms. Clenchy explained that she shortened Student's suspension because she thought Student did a very nice job of representing himself at the hearing. He was articulate, respectful, and appropriate and appeared to show remorse for the incident. She thought he understood that there needed to be some remediation of his behavior. She was under the understanding that he was going to receive some services during his suspension at the Cape Cod Collaborative. She later learned that Mother had rejected the Team's proposal and Student had not received services during his suspension. (Clenchy)
16. On March 10, 2022, Student A's mother filed a Title IX Discrimination Complaint Form. Mary Buchanan, Nauset's Director of Student Services and Title IX Coordinator conducted an investigation. Ms. Buchanan interviewed Student A and her mother, Sean Fleming, Patrick Clark, 7 student witnesses, and Steve Boskus. She did not interview Student because Mother cancelled his interview and did not reschedule it. The incidents Student A complained of included the incident in September when Student told Student A that he could violate her and had the power to do so and later on in that day when Student approached her and yelled at her and accused her of being a racist. Student A further reported Student had always made her feel uncomfortable by calling her cutie and shorty and putting his arms around her. Student A further alleged that in October Student had repeatedly approached her and stood very close to her and she would have to keep backing up. She also had to leave places where Student would show up. There was an incident during the October pep rally when Student was very close to Student A and she could not leave because she would have had to walk right by him to exit. In December, while Student A was eating lunch alone, Student stood right in front of her while talking to another student. While Student A was waiting for her bus, Student was walking back and forth in front of her. In February Student A was eating in the small cafeteria which had only three tables. Student came into the small cafeteria and was talking to girls at another table. In order for Student A to get her things she would have had to walk right past

Student. She left the cafeteria and went outside. She approached Student and reminded him he had to stay away from her. (S-7)

Ms. Buchanan concluded that there had been sexual harassment consistent with continued and unwanted sexual advances toward Student A. She sent a preliminary report of her findings to Parent on April 21, 2022, along with a letter inviting Mother to provide the investigator with any additional evidence she would like to be considered; to provide additional questions she would like propounded to any witness; or to respond to any information contained in the preliminary investigation. (P-9)

17. Dr. Lapuc conducted a risk and safety evaluation of Student and wrote a report dated March 31, 2022. Student was not in school at the time and Dr. Lapuc met Student at the administrative offices. His report was based on interviews with staff, Mother, and Student. Dr. Lapuc noted that Student presented as gregarious, outgoing, and extremely confident. He noted that Student denied the allegations regarding his prior behaviors. Dr. Lapuc reported, “On the one hand, [Student] works hard to make a good impression. On the other hand, he makes impulsive statements and doesn’t filter what he is saying and seems oblivious to how his words may be interpreted.” Dr. Lapuc was struck by how much Student’s presentation paralleled the description he wrote of four years before. He concluded that Student manifests functioning consistent with Attention Deficit Hyperactive Disorder combined type, that he is impulsive, a self-described adrenaline junkie, and can be boisterous and boastful. He found that an oppositional defiant disorder diagnosis continued to be warranted, though he noted Student’s current presentation was more passive aggressive than confrontational, however Student no longer met the criteria for Persistent Depressive Disorder that he met at the time of his prior evaluation. (S-2(A))

Dr. Lapuc opined that Student found Student “does not consistently respect boundaries. He assumes a role of personal familiarity that he may not have earned. He does not learn easily from previous experiences. He continued to repeat behaviors that have been unacceptable in the past.” He concluded that Student presented as a low to moderate risk to display non-compliant behaviors including physical boundary transgressions. He noted Student does not profit from feedback, consequences and limit setting. He stated, “He [Student] does not employ forethought and anticipate the potential consequences and impact of his actions on others.” “He has difficulty empathizing with others, appreciating another person’s perspective or point of view.” “He does not express remorse. He does not have an appreciation of what may constitute the appearance of unacceptable behavior.” Dr. Lapuc recommended that at the very least, interventions such as psychoeducational approaches that address human sexuality, appropriate sexual behavior, and social interaction skills be considered. He also recommended using a multi-media approach to teaching Student to internalize social expectations, as well as a behavioral contract that identifies expectations and what constitutes a boundary violation. Dr Lapuc further suggested cognitive behavioral therapy. (S-2A)

18. Ms. Buchanan sent her final report to Ms. Clenchy and the families of the involved students on May 3, 2022. Ms. Buchanan became aware of a video posted by Student on social media later that night. (Buchanan)
19. Nauset's administration became aware of the video Student had posted to social media on or around May 3, 2022. (S-6) (Clark) The video was widely circulated. (Clenchy) It was brought to Mr. Clark's attention from multiple sources because it caused widespread alarm among students and faculty. Mr. Clark described the video as threatening, racist and sexual. Mr. Clark was alarmed by the video. t. (Clark, S-6) Ms. Clenchy was horrified when she viewed the video. (Clenchy) The video was filmed close to Student and he spoke in a serious tone of voice. Nauset staff transcribed the video as follows.

“Hey to all you Nauset [expletive] don't [expletive] with me. There is something genuinely like weird about you I don't be doing [expletive] I don't be talkin' [expletive] I don't be kickin' it with nobody you're gonna [expletive] with me at Nauset that's just weird [expletive] you're weird. I'm just keeping it flat bean. Any [expletive] that's concerned with me coming back you could text me personally and I'll keep it (inaudible). I ain't gotta hide [expletive]. I ain't got nothing I'm trying to keep under the rug or nothing but for any [expletive] that's trying to run their mouth like cray or come at me with any rapist [expletive] [expletive] I'll smack the [expletive]out of you. You're not gonna get a reaction. I'm not gonna yell. I'm not gonna scream [expletive] if I see you I will hurt you. It's just that simple. Don't talk to me sideways cause I don't' talk about you sideways. You don't talk to me sideways. I won't tolerate disrespect.” (S-6)

Ms. Clenchy noted that a high level of concern ran throughout the district. She was struck by how different Student appeared in the video from the young man she has seen at disciplinary hearings. Viewing Student in the video gave Ms. Clenchy some perspective as to why there was fear in the high school with regard to Student. She further noted that the video did not identify anybody specific as the target of Student's threats. That left a question as to who Student was addressing. The district did not know who Student was referencing when he referred to “Nauset” in the video. She reached out to the Eastham police chief. They did not know if Student was referring to Nauset Regional High School, Nauset Regional Middle School or the central office staff who had been involved in the Title IX hearing. Thus, the district and police felt compelled to take actions to maintain safety for all. Because they did not know who the video was directed at, the police chiefs of all of the towns in the district were notified. There was heightened security at the high school for several days after the video was posted. They enacted additional security measures at the middle school and the elementary school Student had attended. Ms. Buchanan felt personally insecure after watching the video as she thought, given the timing of its posting, that it could be in retaliation for the Title IX report. (Buchanan) The central office was placed in lock down. (Clenchy) On May 4, 2022, Ms. Clenchy issued a no trespassing Order barring Student from Nauset Regional High School until further notice. (S-5, Clenchy) Ms. Clenchy and the school committee received a number of phone calls from concerned parents. (Clenchy)

Ms. Clenchy had not been aware that Student claimed to have posted the video in response to other students on a website calling him names, including rapist. It would not have mattered to her assessment of the situation. The video was incendiary and very threatening. (Clenchy)

20. Ms. Clenchy held an appeal hearing on May 6, 2022 with regard to the long-term suspension issued by Dr. Ellsasser as a result of the Title IX investigation's findings. She upheld the long-term suspension assigned by Dr. Ellsasser. After watching Student's video and noting his threatening tone and the words he used, she realized that Student had not learned things that he needed to learn. She was not sure that Nauset could offer the right support system for Student. (Clenchy)
21. Dr. Ellsasser would have safety concerns regarding Student's posting the video regardless of the context in which Student posted it. He was concerned about the way people on campus and in the community would receive the video. (Ellsasser)
22. As Principal of Nauset Regional High School, Mr. Clark has ongoing safety concerns if Student were to return to Nauset. From what he has observed, he does not believe Student has the self-management skills to conduct himself appropriately on a regular high school campus. He has even more concerns about Student's ability to manage himself on Nauset Regional High School's very open campus, which consists of many buildings. He does not trust Student to safely transition from class to class. In his view, Student is dangerous, most importantly to himself. He noted that one to two dozen staff members have expressed concerns to him about Student during the last school year, including counselors in addition to Mr. Boskus. He described Student's behavior as erratic. He noted that his biggest concern is for Student's own safety and well-being. (Clark)
23. Mr. Fleming indicated that after seeing the video, which contained threats of retaliation, he was concerned about the safety of students, so he contacted Dr. Ellsasser, Mr. Clark, and Officer Burnham. He added that he has concerns for the safety of Student and others during unsupervised time and in unsupervised areas, as Student makes poor decisions regarding what he is doing and what activities to get involved in. He is further concerned because Student has in the past been physical with Student A and Student B, and if the physical contact escalates it could be a safety issue for other students. (Fleming)
24. Detective Burnham never interviewed Student with respect to any of the incidents. He explained that there were no criminal charges filed regarding the video Student posted because the district attorney's office determined it did not constitute a direct threat to anybody. He further noted that he had been involved in a conversation with the district attorney's office, and Student A's mother regarding a magistrate's hearing with respect to the September 2021 incident. He testified that he would consider Student dangerous due to the two incidents in which he was involved when he was found to have put his hands on female students. (Burnham)
25. Dr. Ellsasser, the principal of Nauset Regional High School during the 2021-2022 school year, was familiar with Student. There had been concern from staff regarding Student not

always being where he was supposed to be. He had had a number of conversations with Student's teachers trying to figure out how to help Student manage the freedoms of the campus as responsibly as possible. Although he is no longer the principal of Nauset Regional High School, Dr. Ellsasser still has concerns about Student attending Nauset Regional High School. He would want an independent expert to be able to tell the staff exactly what Student needed in order to maintain safety for Student and others. Dr. Ellsasser viewed the video Student posted and was concerned for the safety of the school. He was also concerned for Student and wondered whether he understood how that message might be received and experienced by others. Dr. Ellsasser found Student to be consistently confused about how he was received by others despite having received support in the collaborative setting in the past. (Ellsasser)

26. Dr. Lapuc testified that he has concerns over Student's "considerable deficient emotional self-regulation." He stated that he thought an extended diagnostic placement would be exceptionally helpful to get a clearer perspective and to reexamine some of Student's behaviors and history, so as to be able to determine the best treatment, interventions, and supports for Student. He thought Student would benefit from a placement that is structured, supportive, provide feedback and determine whether Student was utilizing the feedback. He viewed the video Student posted to social media and found it disconcerting that Student's presentation on the video was inconsistent with his presentation when he had met with him. He described his impression that Student appeared to be a much angrier person in the video. He noted that the testimony he heard during hearing showed that when Student is in a structured setting, he is quite responsive, but when there is a lack of structure, he engages in behaviors that seem to be inappropriate. Although he did not recommend a change of placement in his March 2022 report, he has changed his opinion about what Student requires based upon the additional information that he has heard at the hearing, including the video and the Title IX report. If he had known about the aforementioned evidence, he would have recommended that Student be placed in a more structured placement, such as the collaborative. After learning about the details of the Title IX report, Dr. Lapuc opined that there was a pretty high risk that Student would "be in a situation where there's some cost, on the basis of ... that he doesn't always read the cues very correctly, he could be impulsive, and in so doing, until he can demonstrate that 'I've got it straight and I'm not going to react,' he's at risk." (Lapuc)
27. Student's Team convened on June 30, 2022 at the request of Mother and her attorney to discuss educational planning. Nauset posited that Student may require a more restrictive setting than Nauset Regional High School due to the serious behavioral incidents that occurred during the 2021-2022 school year. The District proposed sending packets to Cape Cod Collaborative, READS Academy, and Pilgrim Academy. The district was also willing to consider having Student complete an extended evaluation at any of those locations. (S-1(A)) Mother did not respond to Nauset's request for consent to send referral packets to the above placements. (Buchanan)
28. Joanne Birchall was Student's biology teacher during the 2021-2022 school year. Ms. Birchall described Student as a valued student in her class and noted that he had been meeting all of his IEP goals. Her performed well. She enjoyed having Student in her class

and her other students did as well. She did not consider him to be a student with behavioral issues. She spoke to him a few times about his clothing, as he liked to show his underwear. When she spoke to him, he apologized and pulled his pants back up. Although he was a little impulsive, he was easy to re-direct. He was very social and bounced from one group to another. He was not always focused on the purpose of the lesson. He was one of the kindest students to some classmates with special needs. Ms. Birchall never observed Student outside during unstructured time, only in the structured setting of her classroom. She was not aware of the issues in which Student had been involved prior to the Hearing. (Birchall)

29. Ms. Birchall explained that given Student's impulsivity, she could see how Student could get "himself into something a little too far and doesn't know when to back off." She does not think Student would do anything dangerous to purposely hurt somebody or himself. However, she stated that if there is a way for him to get more help and he is willing to get it, it may set him up for a brighter future. (Birchall)
30. Nancy Yurgelun was Student's study skills teacher. Her class was very small, with six students and two adults. She never observed him in the general education setting and rarely in unstructured settings. She considered Student to be a powerful positive presence who had the potential to be a real leader. She found him to be verbally quick and interesting, having an interesting way with words. (Yurgelun) His strengths could also be weaknesses at times as he would sometimes overtake a situation and he would have to be ratcheted down. (Yurgelun, P-3) . She noted that Student's very forceful presence can be a presence of positivity, though she hypothesized that in a situation where he felt threatened, the same forceful personality could be challenging He would sometimes enter her classroom and sit down right next to somebody and she would have to remind him to go to his assigned seat. She never observed Student acting inappropriately toward any of the girls in his class, except that he would sit right next to the girls that were sitting at a table. He would return to his own seat when she directed him. Ms. Yurgelun emphasized that Student is very bright and deserves to have a high-quality academic education whether it is at Nauset or a different setting. She did not believe that Student posed any danger in her small classroom with six students and two adults. She has never seen Student inflict injury on another person and she was not afraid of him. Ms. Yurgelun agreed that Student is impulsive. She noted that at the high school level, with an open campus and ongoing construction, she thinks it would be difficult to provide Student with non-invasive supervision for the entire time he was at school. (Yurgelun)
31. Mr. Fleming had a positive relationship with Student during the year, and worked with him with respect to staying away from Student A about a dozen times throughout the year. He spoke to Student multiple times each day. (Fleming)
32. Student stated that he does not know why he was sent to Cape Cod Collaborative during his seventh and eighth grades, but he was not sufficiently academically challenged while he was there. He also found that the other students had more behavioral issues than he did, including fighting and licking chalk boards. He was not able to play sports while at the Collaborative and sports, including football, basketball, and track are important to

him. He believes that he has matured since his time at the collaborative. During his freshman year he did not have any issues with other students. He sees his personality as a strength. He noted that he could be a “pain in the butt,” but could also be an empathetic friend. He participated in the Best Buddies program during his freshman and sophomore years. He considered himself to be a good student and wrote poetry and reports. He noted that his ADHD impacts him, and he can have difficulty maintaining attention, but he has been learning how to redirect himself. He noted that his biggest social struggle is that sometimes he does not perceive his actions the way others perceive them.

Student gave a lengthy description of his version of the incident that occurred with Student A on September 28, 2021. In his version, Student A touched him several times and pulled on his shirt. He stated that he got frustrated with her “rambling” and pulling on his shirt and said, “I could violate you now. You know I have the power to.” He said that he meant that he wanted her to stop touching him. He stated that Student A was standing on a ledge that was only about 1.5 feet off the ground. He did not mention the presence of the friend who reportedly caught Student before she fell off the ledge. Student denies that he ever touched Student A. He stated that Student was upset by the conversation he was having with her because he was telling her that her boyfriend was not ready to be in a relationship. He explained that he understands that his use of the word violate could have impacted Student A and acknowledged that it was a poor choice of words. He was surprised that Student A reported his behavior to the administration. He did not know why she was so mad. Later that afternoon when he was walking to parking lot with his girlfriend, they saw Student A. He told her he did not know why she was trying to get him in trouble for something that they could have talked about. He then stated that he could not believe there were still racists in 2021. He believed Student A was targeting him because of his race. Student stated that he never started another conversation with Student A again during the school year, but that she had spoken to him.

Student stated that at the pep rally he had arrived first and was sitting in his seat. He stated that Student A arrived later and sat right next to him. He recorded her on his phone to show that she approached him. He was concerned at that time that Student A was “weaponizing herself” against him to control where he could and could not go. He told Sean Fleming about his version of events concerning the pep rally, but Mr. Fleming believed Student A. Student also described how one of his classes was in a classroom next to Student A’s and they would often be in the hallway outside at the same time. He stated that she would always make a noticeable face of disgust when she saw him. He reported that he informed Mr. Fleming and Dr. Ellsasser about that.

Student testified that he joined a covid vaccination protest on the school campus one afternoon. Student A was participating in the protest, but Student testified that he did not see her. He said he was holding up signs and the other protesters were cheering him on. He further stated that he is not anti-vax and only joined the protest because his friends were involved and there were a lot of people holding signs and he really wanted to participate.

Student took exception to Student A's version of what happened in the small cafeteria. He stated that he had not even realized that she was there until she came over and started yelling at him. He stated that he apologized to her for anything that may have happened that school year. He also stated that Mr. Fleming observed the situation passively from across the room. Student testified that Mr. Fleming later told him that he had to be the bigger person and walk away from Student A.

Student had a lengthy explanation as to what happened with respect to Student B in the gym. He denied ever touching Student B and stated that he thought that she was trying to cause Student and his girlfriend to break up. His version of the facts was completely different from what was reported by Student B or the two witnesses to the incident.

With respect to the video that Student posted on social media, he testified that he posted it in response to posts that he had seen directed at him on an on-line platform. He stated that there were old photos of him and references to him being a rapist. He had just found out that he would not be returning to Nauset Regional High School that year. He was feeling very stressed and like everything was falling apart. He went to his Instagram or Snapchat and posted a "live reaction." He now wishes he had done something different. He stated that his comments were not directed at any individual. He wanted people to understand the hate and sadness he was feeling. His emotions were overflowing and he immediately regretted posting the video. He thought that his video would appear for less than twenty-four hours and would then disappear. He stated that when he referenced Nauset in the video he was not threatening the school or staff. He wanted people to understand that he was going through something and wanted to be left alone.

Student does not wish to return to a collaborative setting, and he does not believe that he has done anything wrong. He wants to be able to return to school and for people to understand that he is not the person that others have painted him to be. (Student)

33. Student's Mother describes Student as being resilient, charismatic, cheerful, empathetic, adaptable, helpful, and kind. She noted that one of Student's challenges is that he sometimes says things and thinks he is communicating one thing when he is actually saying another. Although he is a bright kid he is sometimes misunderstood because he does not articulate the right thing. Mother first became aware of the September 28 incident involving Student A when Dr. Ellsasser called her to come into school. Mother chastised Student and explained that the word "violate" has an insidious meaning and he should not have said it. She does not believe that Student always says the words that he means. She understood why he was punished, but she did not think that incident, which she deemed to be a typical teenage argument, would be as explosive as it turned out to be. She was not aware that the incident was considered sexual harassment until after the February incident. With respect to the stay away order regarding Student A, Mother did not think that it was fair that Student always had to be the one to retreat if he saw her. She did not like the fact the administrators told Student that he was responsible for leaving the area if he were there first. She thinks that this is biased and unfair to Student. Student told Mother that he thought Student A was trying to get him into trouble.

Mother first learned of the February 2, 2021 incident when she received a call from the assistant principal. She immediately called Student to ask him what happened. He told her that a crazy girl said that he put his hand in her pants and fingered her. She grilled Student about whether he had touched her and he insisted that he had not. She wanted to believe Student, but thought there had to be more to the story. She thought it was outlandish for somebody to say they were fingered in the middle of gym class, and she wanted to get to the bottom of it. Student was suspended for 86 days and there no discussions about making changes to his IEP.

Mother testified that Student was not offered cognitive behavior therapy by Nauset after Dr Lapuc's report was discussed. She was not notified of the video Student had posted until the appeals hearing regarding Student A. When she learned of the video and asked Student about it, he told her that there had been a website on which students were anonymously calling him the Nauset School Rapist. Student has never had criminal charges brought against him for inappropriate sexual behavior. She did not approve of how Student handled himself. She is always telling Student that he has to be aware of himself and his words and be more careful than he is. She's told him that he does not have the leeway that other kids might. She believes that his words are taken very seriously and sometimes exaggeratedly. Mother stated that she is fighting a school district by herself. She is fighting for fair treatment, against biased treatment, and trying to keep Student safe and feeling like he matters. Mother is concerned that Nauset did not provide Student with any support for cyberbullying and did not seek to understand his motivation for posting the video.

Mother knows that Student is not a danger to anybody in the school community or the community at large. He has never been involved in a physical fight or physically hurt anybody. She does not believe that Student requires an assessment at this time. He has already been to the collaborative and has had JRI wrap-around services. She believes that what has happened to Student this year has been unjust. He has already been punished for the incidents with Student A and Student B and Mother believes he should be allowed to return to school. (Mother)

FINDINGS AND CONCLUSION:

Student is an individual with a disability, falling within the purview of the Individuals with Disabilities Education Act (IDEA)⁵ and the state special education statute.⁶ As such, he is entitled to a free appropriate public education (FAPE). Neither his status nor his entitlement is in dispute.

The IDEA was enacted "to ensure that all children with disabilities have available to them a free appropriate public education [FAPE] that emphasizes special education, employment and

⁵ 2C 1400 *et seq.*

⁶ MGL c. 71B.

independent living.”⁷ FAPE must be provided in the least restrictive environment. Least restrictive environment means that, “to the maximum extent appropriate, children with disabilities are educated with children who are not disabled, and special classes, separate schooling or other removal of children with disabilities from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”⁸

The burden of persuasion in an administrative hearing challenging an IEP is placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 534, 537 (2005) In the instant matter, Nauset is the party seeking relief, and as such has the burden of persuading the hearing officer of its position. Nauset seeks an Order from the Bureau of Special Education Appeals affirming its determination that maintaining Student’s current placement is substantially likely to result in injury to Student or others. For the reasons set forth *infra*, I find that Nauset has met its burden.

First, it is important to note that the purpose of this Hearing was not to re-litigate the determinations made by Nauset at its disciplinary hearings regarding the incidents of September 27, 2021 and February 2, 2022. I note that Student continues to deny that he engaged in the conduct that Nauset determined he had engaged in. Nauset’s conclusions were based upon the testimony of many witnesses who were not a part of this hearing. Further, the grant of jurisdiction to an IDEA hearing officer does not include appeal of matters properly raised and decided under the school district’s regular education student code of conduct. See e.g., *Poteet Indep. Sch. Dist.*, 29 IDELR 423 (SEA TX 1998) Thus, it is not within the jurisdiction of the BSEA to overturn the findings made by Nauset with respect to the disciplinary hearings held pursuant to M.G.L. c. 71 § 37H3/4 or the findings made pursuant to the Title IX investigation.

Nauset asks that, pursuant to 20 U.S.C. § 1415(k)(3)(B)(ii)(II), the Hearing Officer order a change of placement for Student. The statute authorizes a Hearing Officer to order a change in placement of a child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of such child is substantially likely to result in injury to the child or to others. Nauset has met its burden of showing that maintaining Student’s current placement is substantially likely to result in injury to Student or others. Nauset may, therefore place Student in an appropriate interim alternative educational setting, specifically a therapeutic day school. My reasoning follows.

The testimony was unanimous that Student continues to struggle to maintain appropriate behavior when he is in an unstructured setting. Even the teachers who testified regarding Student being a positive presence and a valued student in their classes, conceded that they had not seen Student in an unstructured setting. Ms. Yurgelon, who clearly cares about Student and his success, noted that Student’s very forceful presence which can be a presence of positivity, could be challenging in a situation in which Student felt threatened. Similarly, Ms. Birchall testified that she could see how Student’s impulsivity could get him involved in a situation in

⁷ 20 USC 1400(d)(1)(A). See also 20 USC 1412(a)(1)(A); *Mr. I ex. Rel. L.I. v. Maine School Admin. Dist. No. 55*, 480 F.3d 1 (1st Cir. 2007)

⁸ 20 USC 1412(a)(5). See also 20 USC 1400(d)(1)(A); 20 USC 1412(a)(1)(A); MGL c. 71B; 34 CFR 300.114(a)(2)(i); 603 CMR 28.06(2)(c)

which he may go a little too far and would not know when to back off. The incidents involving Student A and Student B occurred during unstructured times at school. In fact, the incident involving Student B occurred while Student was in an unsupervised gym where he was not supposed to be at that time. (Fleming)

With respect to the incident involving Student A, Student did not seem to appreciate the fact that his words and actions had put another student in fear. He continued to put himself in situations throughout the year where he was in her presence, despite being warned that it was not acceptable for him to do so.

In reaching my conclusion I have relied heavily upon the testimony of Dr. Lapuc. He had evaluated Student in 2018, prior to his placement at the Cape Cod Collaborative. At that time, he found that Student had little sense of how he came across, presented as overly familiar, and did not seem to understand that he violates boundaries, assuming familiarity not earned. He observed that Student did not learn from previous experience and made inappropriate statements without thinking about the consequences. He further noted that Student had difficulty appreciating how his behavior affected other people or how he is coming across or being perceived by others. (S-1(C)) When he evaluated him again, nearly four years later, he noted many of the same issues. He reported that Student makes impulsive statements and seems oblivious to how his words may be interpreted. He noted that he continued to repeat behaviors that had been unacceptable in the past. He found Student does not have an appreciation of what may constitute the appearance of remorse. Dr. Lapuc testified that he was struck by how much Student's presentation was similar to his presentation during his evaluation four years earlier. Dr. Lapuc had concerns over Student's "considerable deficient emotional self-regulation." He recommended that providing Student with an extended diagnostic placement would be "exceptionally helpful" to re-examine Student's behaviors and determine the best treatment, interventions, and supports to provide for Student.

Mother, who is clearly very supportive and concerned for Student and acknowledged the inappropriateness of some of his behaviors, echoed some of Dr. Lapuc's concerns. She noted that Student often says something which is misperceived by others. She further noted that she often reminds Student to be more careful about the words he uses.

Student's testimony further highlighted some of the concerns raised by other witnesses at the Hearing. With respect to the posting of the video, Student stated that he was feeling very stressed when he posted the video and immediately wished he had done something different. His explanation of what he had meant by his video is yet another example of how he thinks he is stating one thing, but is perceived differently by others. He stated that when he referenced "Nauset" in the video he did not intend to threaten the school or staff. However, as explained by Ms. Clenchy and Ms. Buchanan, many members of the Nauset community felt threatened. The video led to a large response, including additional security at multiple schools, a lockdown at the central office, and notification of four police departments. Student stated that he thought the video would disappear in twenty-four hours. Instead, it was widely circulated throughout the community.

The evidence before me demonstrates that Student continues to have difficulty with impulsivity and self-regulation. He also still appears to have some difficulty with self-awareness, as he testified that he did not know he was previously placed at the Cape Cod Collaborative. Dr. Lapuc was persuasive that based upon the totality of the evidence presented at the Hearing, there is a pretty high risk that Student could be in a situation where he does not correctly read the cues and there is a great consequence.

Based upon the record before me, I find that maintaining Student's placement at Nauset Regional High School is substantially likely to result in injury to Student or others. Because Student continues to struggle with impulsiveness and self-regulation, there is a substantial likelihood that his behaviors could result in further school discipline or even involvement with law enforcement. It is crucial that Student is provided with a setting and services which will enable him to learn to control his impulsiveness and self-regulate while he is still in the somewhat protective setting of high school.

Nauset may place Student in an appropriate therapeutic placement for a period not to exceed 45 school days. While in said placement, Student shall be evaluated to determine what services, supports, and accommodations he requires. This placement is not meant to be punitive. Rather, it is intended to provide additional information as to how Student's needs can best be met. The evidence shows that Student is very bright, has a charismatic personality, and leadership skills. It is crucial that he be able to manage his impulsivity and self-regulate so that he is able to use his talents in his future endeavors.

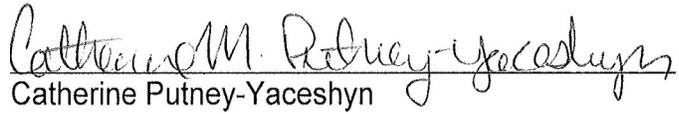
Although Nauset has met its burden of showing that maintaining Student's placement in the Nauset Regional High School is substantially likely to result in injury to Student or others, it did not present evidence that Student has been accepted into any program. Therefore, I am unable to order placement in a specific program. Given Student's teachers' testimony regarding how bright Student is, consideration should be made to placing him in a setting with high academic standards. Further, given Student's prior experience at Cape Cod Collaborative and his continued need to focus on the same areas of need that he focused on when he was enrolled there, Nauset should focus its search on placements other than Cape Cod Collaborative. It should also not limit its search to collaborative placements.

The Parties are urged to work together to locate an appropriate placement.

ORDER

Based upon the foregoing, I find that Nauset has met its burden of showing that maintaining Student in his current placement is substantially likely to result in injury to Student or others. Nauset is authorized to place Student in a therapeutic day school for a period not to exceed 45-school days.

So ordered by the Hearing Officer,

Handwritten signature of Catherine Putney-Yacashyn in cursive script.

Catherine Putney-Yacashyn

Dated: September 1, 2022