STATE OF NEW HAMPSHIRE

STATE DEPARTMENT OF EDUCATION

Parents of Student K.[1] / SAU #53 – Epsom School District

SB-FY-12-07-001

PARENTS' MEMORANDUM OF LAW
OPPOSING DISMISSAL OF THIS ACTION

The parents of Student K. ("Parents"), by and through their attorneys, submit the following memorandum of law in opposition to the SAU #53 – Epsom School District's Motion to Dismiss and the Hearing Officer's recommendation that this matter be dismissed for lack of jurisdiction.

I. INTRODUCTION

Just last year, with the passage of New Hampshire's Pupil Safety and Violence Prevention Act of 2010, N.H. Rev. Stat. Ann. ("R.S.A.") §§ 193-F:2, et seq., the New Hampshire Legislature reaffirmed its intent "to protect our children from physical, emotional, and psychological violence by addressing bullying and cyberbullying of any kind in our public schools . . . and to prevent the creation of a hostile educational environment." N.H. R.S.A. § 193-F:2, III; *see also id.* at I (protecting children from bullying is "[o]ne of the legislature's highest priorities"). The Legislature likewise confirmed that "[a]ll pupils *have the right* to attend public schools . . . that are safe, secure, and peaceful environments." N.H. R.S.A. § 193-F:2, I (emphasis added). Yet,

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[1] Student K. and his Parents have requested to the Board of Education that they be allowed to proceed with this action by pseudonym, and that any documents with identifying information submitted in support of this memorandum, including the Affidavit of M.K., be sealed and impounded, in order to protect the privacy and safety of Student K., who continues to be targeted at school with bullying.

for Student K., these rights and protections are now being challenged by a school district that not only refused to protect him from severe and pervasive bullying, but now maintains that he and his Parents cannot seek review of the school district's failure to comply with its legal obligations under New Hampshire's anti-bullying law.

This memorandum opposes the Hearing Officer's August 31, 2011 recommendation to the State Board of Education (the "Board") to grant the SAU #53 – Epsom School District's (the "District") Motion to Dismiss. In that Motion, the District argued that: (1) there is no right to appeal this dispute to this Board, (2) even if such a right existed, Student K. and his Parents failed to properly appeal this dispute to this Board, and (3) even if they did properly appeal, Student K. and his Parents' hearing request did not meet minimum complaint standards.[2] Not only are the District's arguments meritless, but if successful would undermine the entire purpose of §193-F to protect student safety and deter school districts from ignoring the pervasive problem of bullying in New Hampshire's schools.[3] Accordingly, Student K. and his Parents respectfully ask this Board to reject the Hearing Officer's recommendation, deny the

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[2] While the Hearing Officer did not reach the merits of the District's second and third bases for dismissing this case, this Board should take this opportunity to reject those arguments as well, instead of remanding them to the Hearing Officer for further consideration. Not only are those arguments meritless, as explained below, but Student K. and his Parents should not be forced to wait any longer for a hearing on the merits of their substantive dispute with the District, particularly considering that this is Student K.'s senior year. Moreover, a year has passed since the original bullying incidents occurred. Without resolution or relief, Student K. continues to suffer from the pervasive bullying that he still faces in school.

[3] The New Hampshire House of Representatives Committee on Education heard ample testimony from students, parents, educational professionals and child advocates as to "the prevalence and seriousness of bullying" in New Hampshire's schools. *An Act Revising the Pupil Safety and Violence Prevention Act*, *Report of House Committee on Education*, at 51 (Feb. 16, 2010) (statement of intent). True and correct copies of the relevant portions of the legislative record are attached hereto as Attachment 1 for the Board's convenience.

District's Motion to Dismiss in its entirety, and remand this action for a hearing on the merits of their substantive dispute.

II. FACTUAL BACKGROUND

A. History Of Bullying Of Student K.

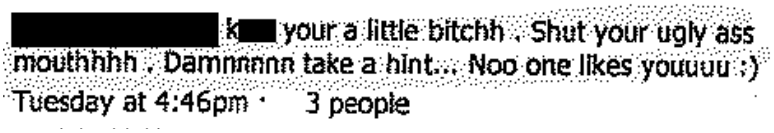
Student K. is currently a senior at Pembroke Academy, which is part of the SAU #53 – Epsom School district. Affidavit of M.K. ("M.K. Aff."), at ¶ 2.[4] He is a quiet teenager with a small group of friends, who enjoys playing soccer and watching television. *Id.* at ¶ 2. Beginning in September 2010, when Student K. was a junior and 16 years old, he was the victim of a vicious and targeted cyberbullying campaign organized by classmates on the social networking websites of Facebook.com and Formspring.com. *Id.* at ¶ 3.

On or around September 19, 2010, one of Student K.'s classmates created a fake Facebook profile under the alias "Nicole Yates" (hereinafter "Yates site"), *id.* at ¶ 5, Exh. A, which provided a forum for other classmates to post cruel attacks aimed at Student K., including[5]:

[redacted] Yo K[redacted] stfu or I'll make you shut up I never said anythin to you except called you a fag cuz you obviously made a fake girl facebook to have dudes hit on you cuz your gay and idk why your startin with people who can kick the shit out if you
Tuesday at 4:43pm · 3 people

[4] While reliance upon evidentiary affidavits technically is not necessary to oppose a motion to dismiss, *see State v. North Atlantic Refining Ltd.*, 160 N.H. 275, 281 (2010) ("the court must construe the plaintiff's evidentiary proffers 'in the light most congenial to the plaintiff's jurisdictional claim'"), the Parents submit such evidentiary support in order to aid this Board in making a complete determination as to their jurisdictional right to a hearing before this Board on the merits of their action.

[5] The posts are reproduced here with all their spelling and grammatical errors. The abbreviation "idk" means "I don't know."



These comments and many others were posted throughout September and into October. *Id.* at ¶ 5.

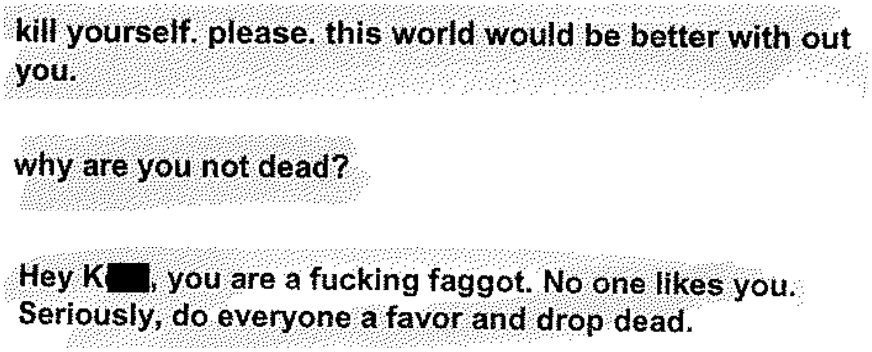
On October 12, 2010, one classmate, T.T., created a posting on Facebook.com (hereinafter "T.T. posting") that stated: "Okay so [Student K.] says only 20 people hate him, and I'm sure there's more than that, so like this if you do." M.K. Aff., at ¶ 6, Exh. B. Almost 50 individuals, mostly students from Student K.'s high school, "liked" the post. *Id.*, Exh. B. Many posted hateful comments about Student K., including: "the relevance is that you're a faggot, and you've been one for a long time, so stop acting like your tough shit &/or not a raging homosexual". *Id.*, Exh. B. In total, there were 47 separate comments to this posting apart from Student K.'s responses trying to defend himself.[6] *Id.*, Exh B.

On or about October 13 or 14, 2010, yet another fake Facebook profile was created by someone pretending to be Student K., under a name similar to Student K. (hereinafter "fake Student K. site"). *Id.*, at ¶ 9, Exh. D. Under the "Activities" of this fake profile, the bullier listed: "Being a Tool, "Being an Asshole." Under the "Interests," the individual listed: "Wieners, Cocks, Dick, Penis". *Id.*, Exh. D.

Finally, on the Formspring.com website, beginning as early as September 10 and continuing through early October, numerous classmates posted around 30 hateful and

[6] On Facebook, the "Like" option allows a viewer to click a button to indicate that they like a posting. Viewers also may write their own comment in response to a posting.

sometimes violent comments about Student K. on his own profile page (hereinafter "Formspring site"), *Id.* at ¶ 10, Exh. E, including:



Every day that Student K. was cyberbullied, he had to go to school and face each of his bulliers in person. Every day that Student K. was cyberbullied, he had to return home from school and confront his bulliers online, spending sometimes hours each evening monitoring and responding to each and every hateful and harassing posting about him instead of being able to focus on his schoolwork. Collectively, these acts by Student K.'s own classmates were organized, intentional, targeted and vicious. This campaign of bullying emotionally scarred Student K., created a hostile educational environment, and interfered with his educational opportunity.

B. The District's Failure To Investigate Or Address The Bullying, Or To Respond To The Parents' Requests And Grievances.

Student K.'s Parents first learned about the T.T. posting and the Yates site the morning of Wednesday, October 13. M.K. Aff., at ¶ 4. They immediately notified Gregg Brighenti, the assistant principal for Pembroke Academy, by email and numerous voice messages. *Id.*, at ¶ 7. Mr. Brighenti finally responded by email 5 hours after the Parents' first communication and reported that he had spoken with T.T. and that the T.T. posting had been deleted. *Id.*, Exh. C. Mr. Brighenti did not specify whether he addressed the Yates site. *Id.*, Exh. C.

The next morning, Thursday, October 14, Student K.'s father ("Mr. K.") discovered further evidence of cyberbullying, including the Formspring site and the fake Student K. site, which was being "friended" by students throughout the school day. M.K. Aff., at ¶ 9. In addition, T.T. created a new posting referencing Student K. on Facebook: "Thanks to everyone who liked my status and helped me prove my point. But unfortunately someone had to go cry to daddy and the school made me delete the status" (hereinafter "T.T. second posting"). *Id.*, at ¶ 11, Exh. F. Mr. K. again emailed Mr. Brighenti and left multiple voice messages throughout the day to inform him that he had found more evidence of cyberbullying, but did not receive a response until 5:20 pm, when Mr. Brighenti emailed to say that he and the headmaster, Michael Reardon, would be "tackling this first thing in the morning." *Id.*, at ¶ 12, Exh. G.

Friday morning, October 15, Mr. K. met with Assistant Principal Brighenti and Headmaster Reardon to discuss the incidents and review the websites together. M.K. Aff., at ¶ 13. At the conclusion of the meeting, Mr. Brighenti and Mr. Reardon promised that they would investigate and address the situation. *Id.*, at ¶ 13. Instead, Mr. Brighenti pulled both Student K. and T.T. out of class later that day, and then left Student K. alone in a closed room with T.T. for 30-45 minutes to allow them to resolve the situation on their own. *Id.*, at ¶ 14.

The next school day, October 18, Mr. K. emailed Mr. Reardon a letter, again detailing every instance of cyberbullying that Student K. had suffered. M.K. Aff., at ¶ 15, Exh. H. Mr. K's letter also asked Mr. Reardon to inform him of the school's "plan to protect [Student K.] from further attacks and retaliation for reporting this and your plan for ensuring that [Student K.'s] educational environment is no longer interfered with."

Id., Exh. H. Mr. K.'s letter also strongly objected to the fact that Student K. was left in a room alone with his bullier, T.T., unsupervised, and asked for the school's "assurance that [K] will not be left alone with any of the bullying students." *Id.*, at ¶ 15, Exh. H. In response, Mr. Reardon called Mr. K. the next day, asking, "What's up with the letter?" and refusing to respond in writing. *Id.*, at ¶ 16. Mr. Reardon never responded to Mr. K's letter or the requests contained in his letter. *Id.*, at ¶ 17.

Mr. K. also forwarded the letter to Peter Warburton, the superintendent for the school district, that same day. M.K. Aff., at ¶ 18. The next day, Superintendent Warburton responded in an email, asking, 6 days after the initial report of cyberbullying, "Where are you with Mike [Reardon] in developing a plan to resolve the issues?" *Id.*, at ¶ 18, Exh. I. Mr. K. responded by email, informing Superintendent Warburton of Mr. Reardon's refusal to respond in writing to Mr. K.'s request for a plan going forward. *Id.*, at ¶ 18, Exh. I. Superintendent Warburton never responded to this email. *Id.*, at ¶ 19.

Having received no response from Headmaster Reardon to his October 18 letter, Mr. K. emailed Mr. Reardon on October 29 asking again for a response. M.K. Aff., at ¶ 20, Exh. J. Mr. Reardon responded that he had spoken with "the young woman who was particularly aggressive in her remarks about" Student K., and that she had defended her actions by accusing Student K. of making similarly harassing statements about her on Facebook first. *Id.*, Exh. J. When she offered to show Mr. Reardon the "pages that she was referring" to, Mr. Reardon actually "declined" to view them. *Id.*, at ¶ 20, Exh. J. Inexplicably, in a subsequent email that same day, Mr. Reardon still claimed: "We took the steps we felt were needed to get control of the situation, which, as far as I know, we did." *Id.*, Exh. J. No one from Pembroke Academy or the school district followed up

with Mr. K. further with regard to any of his unanswered questions or requests, including his request for a plan to protect Student K. from further attacks and for assurances that Student K. would not have to be put in the situation of facing his bulliers alone again.

Still concerned for his son's safety after the school district's less than reassuring responses, Mr. K. began to work with the local police department to address the bullying incidents against his son. M.K. Aff., at ¶ 21. Mr. K. was right to be concerned. In January 2011, the Yates site was reposted, with all of the old postings still visible. *Id.*, at ¶ 22. Mr. K. informed Mr. Brighenti over the phone, who promised that he would look into it. *Id.*, at ¶ 22. He never did, and the Yates site still exists today. *Id.*, at ¶ 22.

Finally, in early April 2011, Mr. K. reached out again to Superintendent Warburton to discuss his concerns about the manner in which the school district handled the investigation of his son's bullying. M.K. Aff., at ¶ 23. They met twice in April, and Superintendent Warburton finally agreed to ask Headmaster Reardon for a written response to certain questions related to the October bullying incidents. *Id.*, at ¶ 24. In his written response, Mr. Reardon admitted that:

- he had told Mr. Keeler that there would be "no written report as that was not part of our procedure."
- Mr. Brighenti asked Student K. to speak with T.T. alone in a closed room, which they did for 30-45 minutes, and accepted both students' representation afterwards that "all was good between them," without asking Student K. separately and privately, and without further investigation.
- it was his understanding that nothing was posted "directly about [Student K.]" in T.T.'s second posting and therefore the school determined that T.T. "did not violate our request to not post inappropriate comments about [K.]". (Again, T.T.'s second posting stated: "Thanks to everyone who liked my status and helped me prove my point. But unfortunately someone had to go cry to daddy and the school made me delete the status").

Id., at ¶ 25, Exh. K. What was missing from this response to Superintendent Warburton's request that Mr. Reardon "[d]etail the school investigation into this matter" was alarming. Mr. Reardon did not identify any investigation into the Yates site, the fake Student K. site, or the Formspring site, nor did he identify any investigation or actions taken to address the numerous postings by students other than T.T. on those sites targeting Student K. *Id.*, at ¶ 26.

Unsatisfied with this response, Mr. K. asked again in an April 26, 2011 email to Superintendent Warburton whether the school investigated who was responsible for the Yates site and the fake Student K. site and, if so, what actions were taken to address those incidents of bullying. M.K. Aff., at ¶ 28, Exh. L. Superintendent Warburton did not respond substantively for over 7 weeks, and when he finally did, it was only to suggest that they have another meeting. *Id.*, Exh. L.

Mr. K. finally appealed to the chair of the school board, Tammy Boucher, and requested that his complaints regarding the school's handling of the investigation be heard at the June school board meeting. M.K. Aff., at ¶ 29. At that school board meeting, Mr. K. was allowed to present oral arguments and submit documents as to why he felt that the school had failed to properly investigate and address the October bullying incidences, in accordance both with state law and the school's own bullying policy. *Id.*, at ¶ 31. After he presented his argument, Mr. K. was required to leave the hearing while the school board heard arguments from the school administration, thereby denying Mr. K. the opportunity to question anyone from the school administration or respond to its arguments. *Id.*, at ¶ 31. The next day, Mr. K. sent a letter to the school board chairperson, summarizing his grievances and arguments. *Id.*, at ¶ 32, Exh. M.

On June 8, Superintendent Warburton emailed Mr. K. to inform him that the school board had asked him to respond to Mr. K.'s presentation by letter, which would be coming shortly. M.K. Aff., at ¶ 33, Exh. N. Mr. K. received that letter from Superintendent Warburton, on behalf of the school board, on June 24, 2011. *Id.*, at ¶ 34, Exh. O. In that decision, the school district again failed to identify any investigation relating to the Yates site, the fake Student K. site, or the Formspring site. *Id.*, at ¶ 34, Exh. O. The decision also contradicted Mr. Reardon's written "report," by representing that T.T.'s second posting had been removed, which according to Mr. Reardon it was not. *Id.*, Exhs. K & O. In addition, the school and school district for the first time in this letter informed Mr. K. that they did not consider the October incidents to constitute bullying under state law, although they did not provide any reasoning or explanation as to how that determination was made. *Id.*, at ¶ 34, Exh. O.

Mr. K. timely filed this appeal with the Department of Education on July 19, 2011, and the District moved to dismiss on August 11, 2011.[7]

III. ARGUMENT

In its Motion to Dismiss, the District argued that: (1) there is no right to appeal this dispute to this Board, (2) even if such a right exists, the District did not issue a decision in the matter, and therefore, there is no decision of the school board to appeal, and (3) the request for a hearing did not meet the minimum complaints standards set forth in Ed 203-05(b) or Ed 206-01. District's Memo. in Support of Mot. to Dismiss

[7] Unfortunately, the bullying of Student K. has not ended with these incidents from October 2010. Most recently, Student K. was harassed by three bulliers, and physically attacked by one of them on school property on October 13, 2011, after having been harassed and threatened by them for several weeks before. Again, the District denied that this incident constituted bullying. And then, on October 19, 2011, the same bulliers posted a video on Youtube.com threatening to kill Student K. M.K. Aff., at ¶¶ 38-39.

("District's MTD"), at 2. On August 31, 2011, the Hearing Officer recommended that this Board grant the District's Motion to Dismiss based upon its first argument that no right of appeal exists, and therefore this Board has no jurisdiction to hear this matter. Hearing Officer's Recommendation ("Recommendation"), at 2. For the reasons set out below, all three of the District's bases for dismissing this case must fail.

A. The Parents Have A Right Of Appeal To This Board.

By concluding that the Parents have no right of appeal to challenge a local school board's indifference to bullying – simply because that right is not expressly referenced in the bullying statute itself – the Hearing Officer's recommendation not only renders § 193-F toothless and unenforceable, but it also contradicts the plain meaning of the statutes providing a right of appeal to the Parents. Even were the statutory language not crystal clear, which it is, the legislative history of § 193-F makes abundantly obvious that this Board has jurisdiction to hear disputes arising under § 193-F. Finally, the Hearing Officer's interpretation of the law would effectively eviscerate students' right to attend "safe, secure, and peaceful" schools, N.H. R.S.A. § 193-F:2, I, and thus render § 193-F unenforceable, in violation of the New Hampshire and Federal constitutions.

1. This Board has jurisdiction to hear appeals "of any dispute between individuals and school systems," including any disputes arising under New Hampshire's anti-bullying law.

This Board "*shall* . . . hear appeal and issue decisions . . . *of any dispute* between individuals and school systems." N.H. R.S.A. § 21-N:11, III (emphasis added). In interpreting Section 21-N:11, III, the Board first must look to the "plain and ordinary meaning" of the "language of the statute itself." *In re Athena D.*, 27 A.3d 744, 747 (N.H. 2011). In this case, the statutory language could not be clearer. Section 21-N:11, III, expressly grants the Board broad jurisdiction to hear appeals "of any dispute," which at a

minimum must include any dispute arising under § 193-F. Moreover, nothing in § 193-F takes away this right of appeal under § 21-N. In fact, § 193-F expressly preserves a party's right of appeal to the Board under § 21-N:11, III. *See* N.H. R.S.A. § 193-F:9 ("Nothing in this chapter shall supersede or replace existing rights or remedies under any other general or special law . . . .").

The Hearing Officer's recommendation, adopting the District's arguments, rests on the proposition that this Board lacks jurisdiction over this matter simply because the most recent version of § 193-F enacted in 2010 no longer expressly refers to a party's right of appeal to the Board, while the prior version of § 193-F enacted in 2004 did explicitly refer to such right. That proposition is simply incorrect, because it wrongly assumes that there is no right to appeal a local-level bullying investigation to this Board unless such a right is expressly provided in the bullying statute itself. As noted above, New Hampshire law already provides a broad and general right to appeal disputes to the Board under § 21-N:11.

This Board must avoid interpreting § 193-F to have somehow implicitly repealed the general right of appeal that has always existed under § 21-N:11. *See, e.g.*, *Appeal of Campaign for Ratepayers Rights*, 706 A.2d 675, 677 (N.H. 1998) ("If any reasonable construction of the two statutes taken together can be found, this court will not find that there has been an implied repeal.") (quoting *Board of Selectmen v. Planning Bd.*, 383 A.2d 1122, 1124 (N.H. 1978)); *State v. DeMatteo*, 591 A.2d 1323, 1325 (N.H. 1991) ("We will not deem a statute repealed by implication unless the statutory framework reveals no other alternative."). If the legislature had intended to specifically exclude bullying cases from the Board's jurisdiction, it could have done so explicitly in § 193-F,

as it did with regard to an individual's private right of action to bring a lawsuit. *See* N.H. R.S.A. § 193-F:9 ("Nothing in this chapter shall . . . create a private right of action for enforcement of this chapter against any school district or chartered public school, or the state."). In other words, "[h]ad the legislature intended to limit [the Board's] authority . . . it could have so stated." *In re Pennichuck Water Works, Inc.*, 992 A.2d 740, 754 (N.H. 2010). It did not, and this Board should not "imply a limitation when the legislature has not expressly created one." *Id. See also In re Boucher*, 808 A.2d 537, 539 (N.H. 2002) ("It is not for us to put words into the statute . . . where the legislature has chosen not to do so[.]"). Instead, this Board should find that under the plain and ordinary meaning of § 21-N:11, the Board's jurisdiction to hear appeals extends to "any dispute" between individuals and school systems, including those arising under § 193-F.

2. The legislative history of the 2004 and 2010 versions of § 193-F confirms that § 21-N:11 provides this Board jurisdiction to hear the Parents' appeal.

Even were the plain language of both § 21-N and § 193-F not unambiguous, which it is, the legislative history fully supports the Parents' interpretation of these statutes. *See In re State Employees' Ass'n of N.H.*, 20 A.3d 269, 271 (N.H. 2011) ("If a statute is ambiguous, however, we consider legislative history to aid our analysis. Our goal is to apply statutes in light of the legislature's intent in enacting them, and in light of the policy sought to be advanced by the entire statutory scheme."). As an initial matter, nothing from the legislative history of § 193-F suggests that the legislature specifically intended to take away the right of appeal under § 21-N. To the contrary, the 2010 revisions were intended *to strengthen* the anti-bullying statute as a mechanism for protecting the right to attend a safe and peaceful school. *An Act Revising the Pupil Safety*

and Violence Prevention Act, *Report of House Committee on Education* (Feb. 16, 2010) (statement of intent), Attach. 1, at 51.

Both the District and the Hearing Officer focus on the fact that the 2004 version of § 193-F expressly referred to an aggrieved party's right to appeal the decision of a local school board to the Board, while the 2010 version did not include that express reference. District's MTD, at 5; Recommendation, at 2. However, reviewing the full legislative history of both versions reveals a different story. In fact, the legislative history surrounding the 2004 version of § 193-F confirms that the right of appeal *already existed* independent of § 193-F, and that the purpose of the section referencing the right to appeal was simply to notify parents of this *pre-existing right*. As Representative McRae, the main sponsor of the 2004 version of § 193-F, explained at the time, that explicit reference was designed to make parents aware of their existing due process rights:

> That's the reason I brought the bill in. It was just to make parents aware of their routes in the system. I . . . found out that there already is a procedure, with the Department of Education, how parents can have a hearing. That's already in place. It's a very well kept secret. That's the reason for the bill. To let parents be informed.

An Act Relative to School District Policies on Bullying: Hearing on H.B. 1162 Before the Senate Committee on Education (Apr. 14, 2004) (statement of Representative Karen McRae), Attach. 1, at 11.

The Senate committee also heard testimony from Sarah Browning, special assistant to the Commissioner of the Department of Education, who explained that the Department initially opposed the 2004 version of § 193-F because a right of appeal already existed pursuant to §21-N:11:

> Originally, as this bill was drafted and presented to the House, the Department opposed the bill. The reason for that was the bill would have created a right for parents to appeal decisions from the local school board

> to the State Board of Education. We opposed it simply because *that right already exists in law*.

An Act Relative to School District Policies on Bullying: Hearing on H.B. 1162 Before the Senate Committee on Education (Apr. 14, 2004) (statement of Sarah Browning) (emphasis added), Attach. 1, at 39. Indeed, in her testimony before the House Committee on Education, Ms. Browning had previously elaborated on the basis of the Department's opposition to the 2004 version:

> The DOE is opposed because we believe the bill is unnecessary. [RSA § 21-N:11, III] gives the State Board the power to hear complaints. They hear all disputes except those dealing with Special Education . . . . The problem lies with notification. There is no requirement [in the current bullying statute] to inform parents of their rights. That might be the solution here.

An Act Relative to School District Policies on Bullying: Hearing on H.B. 1162 Before the House Committee on Education (Jan. 28, 2004) (statement of Sarah Browning), Attach. 1, at 3.

This legislative history confirms that the language referencing the right of appeal was included in the 2004 version of §193-F *not* because that right did not otherwise exist, but because the legislature determined that the public lacked adequate notice of the pre-existing right of appeal. The reason the Department of Education eventually supported the 2004 amendments – which focused on *notifying* parents of their due process rights – was because it agreed that "nobody knew" about the already-existing right of appeal to the State Board, and it acknowledged that people "should know about [the right of appeal]." *An Act Relative to School District Policies on Bullying: Hearing on H.B. 1162 Before the Senate Committee on Education* (Apr. 14, 2004) (statement of Sarah Browning), Attach. 1, at 39-40.

Taking the full legislative history into account, it is clear that the Legislature never intended to remove this Board's jurisdiction to hear disputes arising under § 193-F when it passed the most recent version in 2010. If anything, the 2010 amendments merely removed belt-and-suspenders language from § 193-F that was redundant given that the right of appeal already existed under § 21-N:11.[8] *See* Letter from House Representative Donna Schlachman and Senator Nancy Stiles, attached hereto as Attachment 2 (Oct. 31, 2011) (in enacting § 193-F, "it was *never* our intention – and to our knowledge, never the intention of anyone else in the General Court – to take away any prior existing rights, including the right of appeal to the State Board. Indeed, it was our understanding that the express reference to the right of appeal that appeared in the 2004 version of the Act was redundant and unnecessary[.]").

3. Interpreting § 21-N and § 193-F to deny the Parents' right of appeal would raise serious Due Process concerns under the New Hampshire and United States constitutions.

This Board should "interpret statutes to avoid conflict with constitutional rights wherever reasonably possible." *State v. Pierce*, 887 A.2d 132, 134 (N.H. 2005). As discussed above, students in New Hampshire have a "right to attend public schools . . . that are safe, secure, and peaceful." N.H. R.S.A. § 193-F:2, I. By denying the Parents' right to appeal the District's inaction regarding the bullying of their son, the Hearing Officer's recommendation undermines Student K.'s ability to enforce his legal right to a safe school environment, thus raising serious due process concerns under both Part I,

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[8] Indeed, the Hearing Officer's recommendation runs directly counter to the Department of Education's own recent Technical Advisory, which post-dates the 2010 amendments to § 193-F and yet specifically acknowledges an "appeals process" for parties who disagree with the local board's handling of a bullying incident. N.H. Dep't of Educ., *Technical Advisory*, at 5 (Sept. 15, 2010), *available online at* http://www.education.nh.gov/standards/documents/bullying-cyberbulling.pdf .

Article 15 of the New Hampshire Constitution and the Fourteenth Amendment to the United States Constitution. *See, e.g.,* N.H. Const. Part I, Articles 14 (guaranteeing every citizen "a certain remedy, by having recourse to the laws, for all injuries he may receive") & 15 (state due process protections). Without the opportunity for review by this Board, the Parents, and all parents in New Hampshire, effectively would have no legal remedies to hold school districts accountable to their legal obligations under § 193-F, given the absence of a private right of action specifically under § 193-F.[9] The Board should not endorse the Hearing Officer's recommended statutory interpretation when doing so would raise such serious constitutional concerns. *See Bd. Of Trustees of N.H. Judicial Retirement Plan v. Sec'y of State*, 7 A.3d 1166, 1171 (N.H. 2010) ("[A] statute will not be construed to be unconstitutional when it is susceptible to a construction rendering it constitutional.").

4. The District's attempt to limit this Board's jurisdiction to hear only disputes that constitute a "contested case" is a red herring.

Although the Hearing Officer's recommendation did not address it, this Board should reject the District's argument that the Board lacks jurisdiction over this dispute because it does not constitute a "contested case," as defined by N.H. R.S.A. § 541-A:1, IV.[10] According to the District, because the Department of Education's Rules of Practice

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[9] Complainants do not concede that they would not have a cause of action for other claims not arising under § 193-F, including any common law (e.g., torts or contract violations) and constitutional (e.g., equal protection) causes of action.

[10] New Hampshire's Administrative Procedure Act defines "contested case" as "a proceeding in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after notice and an opportunity for hearing." N.H. R.S.A. § 541-A:1, IV. "[T]here are three ways that a hearing can be 'required by law,': (1) a statutory requirement, (2) an agency rule requirement, or (3) a due process constitutional requirement." *In re Support Enforcement Officers I & II,* 147 N.H. 1, 5 (2001) (citation

and Procedure apply to matters that meet the requirements of a "contested case," if a bullying investigation does not meet the definition of a "contested case," it is beyond the scope of the Rules of Practice and Procedure. District's MTD, at 4. However, the Rules of Practice and Procedure are not *limited* to matters that satisfy the definition of a "contested case"; in fact, the Rules set forth "due process procedures *prior* to a party filing a dispute as a contested case" for proceedings at the school board level, and also require local board hearings "if requested" by a party, regardless of whether there is a contested case. *See* N.H. Code Admin. R. Ch. Ed. 204.01 (regarding "Proceedings at the School Board Level to Resolve Disputes Between Individuals and the School System") (emphasis added). Contrary to the District's argument, nothing in the Department of Education's Rules of Practice and Procedure precludes the Board from exercising statutory jurisdiction over this matter. *See In re Keelin B.*, 27 A.3d 689, 692 (N.H. 2011) ("administrative officials do not possess the power to contravene a statute") (citation and quotation marks omitted).

B. The Parents Have Properly Appealed This Action To This Board.

The District argues in the alternative that even if Student K. and his Parents have a right of appeal to the Board, the District never held a formal hearing or issued a decision from which to appeal. District's MTD, at 6. First, it is simply false to say that the school district never held a formal hearing or issued a decision in this matter. However, even were it true, such deficiencies would have been the fault of the District,

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and quotation marks omitted). Although the Board has jurisdiction over this matter even if it is not a "contested case" under its statutory authority under § 21-N:11, the better view of this matter is that it *is* a "contested case" because due process requires a hearing to protect Student K.'s "*right* to attend public schools . . . that are safe, secure, and peaceful environments." N.H. R.S.A. § 193-F:2, I. *See Appeal of Toczko*, 136 N.H. 480, 485 (1992) ("cases affecting private rights . . . require adjudicative hearings").

not the Parents, and the District should not be permitted to block the Parents from following certain procedural steps in order to use that as a basis for dismissing their hearing request. Such reasoning not only defies logic but is unconstitutional at a minimum, if not outright Kafka-esque.

First, it is baffling how the District can argue that there was no formal hearing or written decision by the school board given the facts. Mr. K. personally called the school board chairperson, Tammy Boucher, asking that his dispute with the school administration be heard at the June 2011 board meeting. At that board meeting, he made arguments and submitted evidence in support, including print-outs of the cyberbullying and his correspondence with the school administration regarding their investigation (or lack thereof). The school board then heard from the school administration in a closed hearing, as well as conducted closed deliberations. Finally, the day after the hearing, Mr. K. sent a letter to Ms. Boucher summarizing his arguments to the school board and restating his requests for relief.

The District's contention that there was no written decision is even more suspect, given that Superintendent Warburton emailed Mr. K. two days after the school board meeting to tell him that "the Board has asked [him] to respond to your presentation to them with a letter," which would be reviewed by the school board chairperson Ms. Boucher. And in that letter, Superintendent Warburton wrote that it would "serve as the District's response" to Mr. K.'s June 8 letter to Ms. Boucher. Moreover, Superintendent Warburton's letter, upon determining that the October bullying incidents did not constitute bullying and therefore did not create any obligation on the school district to act, stated that the school district "consider[ed] this matter closed."

Given these facts, the only way the District can evade review by this Board is by purporting that Mr. K.'s arguments to the school board did not constitute a hearing and by arguing that Superintendent Warburton's letter did not constitute a decision from the school board. That simply cannot be right; otherwise, any school could avoid review by this Board simply by either refusing to provide a hearing or decision on a hearing or re-characterizing any hearing or decision as something else. Indeed, it would be a perverse outcome if all a school district had to do to avoid accountability was to deny any complainant his or her due process rights.

Finally, allowing such procedural evasions by the school district without the possibility of further review would fly in the face of constitutional norms of procedural due process. Mr. K. first raised his concerns about the school's actions to investigate and address the bullying in his October 18, 2010 letter, which he sent to both Mr. Reardon and Superintendent Warburton. He received no substantive response, and was explicitly told by Mr. Reardon that he would receive no written response. Mr. K. again followed up with Mr. Reardon by email on October 29, asking for a plan to ensure Student K.'s safety going forward as well as assurance that Student K. would not be asked by the school again to face his bulliers alone. He received a cursory response from Mr. Reardon and no further response. Mr. K. reached out again to Mr. Brighenti in January 2011 to advise the school that the Yates website had been reposted. He received a promise from Mr. Brigenti that he would "look into it," which he never did. It was not until April, 2011 – 6 months after the initial bullying was reported to the school – that the school administration finally provided Mr. K. with a written report of the extent of its investigation, and this report did not even mention any actions by the school to

investigate or address the Yates site, the fake Student K. site, or the Formspring site. It is difficult to imagine what more the Parents could have done to raise their grievances to the school, and what less the school could have done to respond to these serious concerns. The school district cannot now argue that Mr. K. failed to exhaust his procedural options with the school district, nor can it even argue that it followed its own policies in handling Mr. K.'s grievances.[11] *See In re Keelin B.*, 27 A.3d 689, 695 (N.H. 2011) (holding that school board is bound by its own procedural rules regarding suspension in effect at time suspension was imposed).

C. The Parents' Hearing Request Satisfies The Department Of Education's Rules Of Practice And Procedure.

Although the Hearing Officer did not explicitly consider it, this Board should also reject the District's alternative argument that the Parents' request for a hearing should be dismissed because it does not meet the minimum standards under the Department of Education's Rules of Practice and Procedure. First, because the Parents' request was an appeal of a local decision, the applicable Rule is Ed 206.01 (regarding "Appeal to State Board"), *not* Ed 203.05 (regarding "Pleadings"). All that Ed 206.01 requires is that a party's notice of appeal include: "(1) [t]he name, address and phone number of the person making the appeal; (2) [h]ow the person has been adversely affected by the decision; [and] (3) [a]ny other information the person deems relevant to a speedy resolution of the matter[.]" N.H. Code Admin. R. Ch. Ed. 206.01. The Parents' request for a State Board

[11] For example, at the time of the October incidents, the District's own 2010-11 "Bullying Policy" required, among other things, that "upon receipt of a report of bullying, the principal or designee shall within 24 hours forward a written report to the superintendent of the incident and the principal or designee's response to the incident." The District has since admitted that the principal or a designee "never created" such a report. M.K. Aff., at ¶ 36, Exh. R.

hearing complies with these minimal requirements by identifying the District's "handling of the cyberbullying of my son" as the local decision that adversely affected them.

Second, nothing in the Rules of Practice and Procedure suggests that if a party does not strictly comply with the procedural requirements of a hearing request, the appropriate sanction is wholesale *dismissal*, as opposed to amendment of the request. To the contrary, the Rules provide that the Board may "suspend or waive any procedural requirement" where, among other things, the Board concludes that the waiver or suspension "will not adversely affect the rights of parties and intervenors to a fair resolution of the dispute." N.H. Code Admin. R. Ch. Ed. 201.03. *See also Coan v. New Hampshire Dep't of Envtl. Servs.*, 8 A.3d 109, 117 (N.H. 2010) ("liberal amendment of pleadings is permitted unless the changes would surprise the opposing party, introduce an entirely new cause of action, or call for substantially different evidence"). The District has made no argument and has offered no facts to suggest that its rights would be adversely affected if this Board grants the Parents' request for a hearing on the merits.

IV. CONCLUSION

For the reasons set forth above, the Parents respectfully request that the Board (1) deny the District's motion to dismiss in its entirety, and (2) remand this matter to the Hearing Officer for consideration on the merits.

Dated: November 1, 2011

Respectfully submitted,

PARENTS OF STUDENT K.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent to the following counsel for SAU #53 – Epsom School District by overnight mail:

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Dated: November 1, 2011