

New Hampshire Department of Education

Student / [REDACTED] School District

IDPH-FY-24-05-051

Due Process Decision

I. Procedural Background and Issues

This decision is issued pursuant to the provisions of the Individuals with Disabilities Education Act (20 USC, Section 1401 *et seq.*), NH RSA 186-C, and the regulations promulgated under those statutes.

The School District filed for a due process hearing on May 24, 2024. A prehearing conference via Zoom was held on June 7, 2024. Issues for hearing were clarified as follows:

1. Whether a full-day placement in a state-approved special education school that offers a therapeutic milieu is the least restrictive environment in which Student can receive a Free Appropriate Public Education (“FAPE”)?
2. If that is the case, whether the Parties should be ordered to identify such a placement and place Student there?

The prehearing conference and order documented the following: “The parties and hearing officer have all participated in the prior, related case (IDPH-E-FY-24-02-041). Since the fact base for both hearings is expected to be similar, the hearing officer will incorporate the Findings of Fact from the prior case. However, exhibits from the prior case will not be incorporated – any necessary exhibit should be submitted or resubmitted as a fresh exhibit in the instant case.”

A due process hearing was conducted via Zoom on June 18, 2024. The hearing was scheduled to start at 9:00 AM, but at 8:59 AM, the Guardian sent an email to the School District and Hearing Officer stating, “I have had something come up and I am going to be about 30 minutes late to the hearing today.” At 9:02 AM, the Hearing Officer notified the School District on Zoom that the start of the hearing should be delayed until 9:30 AM to allow the Guardian to participate. However, when the Zoom session restarted at 9:30 AM, the Guardian still was not present. The Hearing Officer delayed the start of the hearing an additional fifteen minutes and attempted unsuccessfully to contact the Guardian by phone. By 9:48 AM, the Guardian was still not present, so the Hearing Officer started the hearing without the Guardian. At 10:30 AM, the Guardian emailed the School District and Hearing Officer, stating, “My apologies, I did not realize the hearing

was being held up on my account. I am ready to connect to the hearing now.” The Guardian joined the hearing by Zoom at 10:33 AM.

The School District had two witnesses: the district’s Director of Special Education (“Director”) and the Student’s teacher in the Learning and Adjustment Program (“L&A Program” or “L&A”). The Guardian had one witness: the Guardian. Because the Findings of Fact from the prior expedited case are incorporated into the current case’s Findings of Fact, testimony from the prior hearing is referenced in this case’s Findings of Fact, and is identified with the prior hearing’s docket number.

The official record of the current hearing consists of 153 exhibits submitted by the School District, plus an appendix of IEP Progress Reports from 2021 through 2023; one exhibit submitted by the Guardian; and the voice and video recordings created by Zoom.

The School District’s appendix was submitted after the “5-day rule.” The Hearing Officer allowed the appendix to be added to the record, due to the likely importance of the Progress Reports in deciding the hearing issues. The Guardian did not object to any of the School District’s exhibits.

The Guardian’s one exhibit was an email exchange between the Guardian and School District related to disagreement over implementation of the decision in the prior expedited due process case. The School District objected to the Guardian’s exhibit as not being relevant, but the exhibit was allowed.

The School District submitted a post-hearing memorandum with Proposed Findings of Fact and Proposed Rulings of Law. The Guardian did not submit a post-hearing memorandum.

The School District was represented by counsel. The Guardian was pro se.

II. Findings of Fact

1. The instant case (IDPH-FY-24-05-051) and a prior case dealing with the School District’s request for an interim alternative educational placement (IDPH-E-FY-24-02-041) share the same corpus of facts. Where necessary, facts from testimony in the prior case are incorporated and properly identified as being from the prior case.
2. [REDACTED] is the Local Education Agency (“LEA”) responsible for educating the Student.
3. Student is nine-years-old and in the second grade.
4. Student’s close relative serves as the legal Guardian, and was appointed to that role on March 4, 2018. Student resides with the Guardian in a municipality served by the School District. Prior to living with current Guardian, Student lived with grandparent

for two years until grandparent died of cancer. Prior to that, Student had lived in four different homes during the first three years of their life.

5. Student qualifies as a student with a disability under state and federal special education laws. Student is eligible for special education and related services under the categories of Developmental Delay (“DD”) and Specific Learning Disability (“SLD”).
6. Student was homeschooled for most of the first Kindergarten year, 2020 – 2021. Student started at the local elementary school for the first grade year, 2021 – 2022. However, early that school year, the Guardian and School District (“the Parties”) agreed that Student was not yet ready for first grade. Student therefore repeated Kindergarten for most of the 2021 – 2022 school year.
7. In October 2021, a Behavior Intervention Plan (“BIP”) was created to address noncompliance, elopement, disruptive behavior, verbal aggression and physical aggression. The plan listed behavior and escape as the hypothesized functions of behavior. SE-1.
8. In the fall of 2021, the School District conducted a special education evaluation. SE-2.
 - A. On the Psychoeducational evaluation, one of the tools was the Kaufman Test of Educational Achievement (KTEA-3). Student tested at the 1st percentile for Reading Composite, 0.2 percentile for Math Composite, and <0.1 percentile for Written Language Composite.
 - B. The Occupational Therapy evaluation showed Student testing Below Average in Fine Motor skills and Visual-Motor Integration.
 - C. A 45-minute Behavioral Observation documented 10 occurrences of non-compliance with directives, 42 occurrences of inappropriate vocal disruptions and 1 occurrence of physical aggression (against another student).
9. The December 2021 IEP documented removal from the regular education setting to receive Occupational Therapy (30 sessions per school year of 30 minutes) and Reading instruction (120 sessions per school year of 30 minutes). Placement was 6.5 hours per day in the Regular Classroom of the local elementary school. This IEP was accepted by the Guardian. SE-3.
10. In February 2022, the School District’s BCBA developed a new Behavior Support Plan. The Plan called for use of the following on a daily basis: Visual Schedule, Behavior Data Sheet, ABC Data Sheet, Timer (to time behaviors), Token Board. Therapy schedule and recommendations were listed as TBD. SE-6.

11. In February 2022, Student was moved from the Regular Classroom at the local elementary school to the Learning and Adjustment Program (“L&A Program”) within a different elementary school. The L&A Program is staffed by a full-time special education teacher, a full-time classroom assistant and a full-time counselor. In addition, nearly all students in the L&A program have a 1:1 paraprofessional. All staff are trained in Crisis Prevention Intervention. Testimony of Director.¹
12. An Accident Report dated March 27, 2022 documents that a pencil was thrown at the eye of a staff member in the L&A classroom. However, it does not document who threw the pencil, whether the pencil hit the eye, or the extent of injury, if any. SE-7.
13. In September 2022, the School District’s BCBA developed a new Behavior Support Plan. Behaviors to be decreased were verbal aggression, refusal, property destruction, eloping and physical aggression. This plan called for daily use of a device with the Catalyst app for collection of ABC data, a visual schedule, and token board.
14. School district exhibits show that during the 2022 – 2023 school year, there were sixteen Staff Accident Reports, seven Incident Letters and three Notices of Intervention. Some of the Staff Accident Reports identify Student as the student causing an accident, while others do not. Similarly, some indicate injury occurred, while others do not. I will not give any weight to reports that do not identify the Student or cannot be connected to the Student through related reports or witness testimony. Among the more concerning reports where the Student can be identified and either caused injury or engaged in behavior that could easily lead to injury, are the following:
 - A. On September 28, 2022, Student “eloped from class and began running around the first grade wing. [Student] went into two different first grade classrooms and started throwing items, emptying materials around the room, resulting in the complete upheaval of both classrooms. As a result, students in both rooms were evacuated.” Student was given a two-day suspension. SE-12.
 - B. On October 31, 2022 and again on November 2, 2022, Student hit teacher’s arms multiple times. SE-13.
 - C. On November 10, 2022, “[Student] punched... paraprofessional in the chest two times. When another adult went in to intervene, [Student] began whipping [other adult] with a body sock... recently used during a sensory break. Administration was called to support. [Student] continued to be physically aggressive with administration and kicked me [Principal] on three occasions. [Student] was also

¹ Some of this testimony was in case IDPH-E-FY-24-02-041.

yelling obscenities under the door causing the wing of the building to be closed for a period of time.” SE-16.

- D. On December 6, 2022, Student eloped from the building. After returning and reentering the classroom, Student charged at other students and then started to remove items from the teacher’s desk. SE-18.
- E. On December 7, 2022, Student spit in the face of a staff member several times. SE-19.
- F. On January 10, 2023, Student “punched a support staff member in the stomach... [and] shoved a chair into [their] legs injuring [their] knee.” SE-30.
- G. On February 22, 2023, Student whipped a staff member in the chest with a yoga mat. SE-34.
- H. On March 20, 2023, Student “repeatedly” spit in the face of the L&A teacher. SE-35.
- I. On March 20, 2023, Student hit the L&A teacher in “my stomach & chest twice... [and then] threw beads in my face.” SE-36.
- J. On March 29, 2023, Student “smacked [staff member] across the face, pushing my glasses into the bridge of my nose. [Student] also hit my left cheek.” SE-38.
- K. On March 31, 2023, Student engaged in a multi-incident event. Student ran from the classroom with a pair of scissors and then ran into the boys bathroom with two staff members. Student locked the stall door, climbed on top of the toilet paper holder, grabbed the metal bar above the stalls and swung. Student came down, started to leave, but then returned, climbed on top of a urinal, held down the flusher and flooded the bathroom floor. Student then left the bathroom and ran to a recycling bin, where Student used the scissors to cut paper. Student eventually ran outside, lifted a rock and threw it inside. Student returned to the recycling bin and cut up more paper. SE-29.
- L. On April 4, 2023, after completing an evaluation, Student became very dysregulated. Student drove a scooter into the bathroom, left and returned with a wooden bench that [they] repeatedly banged on the floor. [Student] then banged a stall door repeatedly until it snapped and the door fell to the floor, almost hitting Student. Student then fled the building. [Student] pulled a wooden section from a flower bed with nails protruding and ran with it. [Student] eventually returned to the L&A classroom, but then eloped again. Student was given a five day suspension. SE-39.

- M. On May 2, 2023, Student ran out of Math class, out of the building, into woods and then into an area with power lines. Once back in the building, Student spit in a staff member's face. Student repeatedly kicked the Principal's chair, causing the Principal's legs to hit the door jamb. Student also hit the hand of a teacher who was trying to stop Student from opening and slamming a microwave door. Student was given a three day suspension. SE-48.
- N. On May 18, 2023, Student eloped from the classroom and building, ran to a dumpster and tried to climb into the dumpster. The Principal physically removed Student from the dumpster. Once back inside the building, Student moved beads from Student's pocket to mouth, and spit beads and saliva at a staff member and at the Principal. Student was placed in seclusion for one minute. This multi-incident event required both physical restraint and seclusion. SE-51.
- O. On May 23, 2023, Student allegedly brought an undocumented medication to school and attempted to get other students on the bus to ingest the medication. This incident did not have a separate Incident Report, but was referenced in the May 31, 2023 Incident Report.
- P. On May 24, 2023, Student attempted to whip staff with Student's belt and buckle. This event required seclusion for safety and de-escalation. SE-52.
- Q. On May 31, 2023, Student brought a knife, approximately three inches long, to school. Student refused to relinquish the knife, which resulted in the class being evacuated. Student was told the police would have to be called, at which point Student relinquished the knife. Student was given a ten day suspension. Principal also expressed in the Incident Report an intention to request a Superintendent's Hearing to request an additional seven days of suspension to correlate with the end of the school year. SE-55.
15. The 2022 – 2023 Report Card shows student being absent for 8 days in the first trimester, 8 days in the second trimester, and 28 days in the third trimester, totaling 44 days. The Report Card shows the majority of Student's grades being very low: primarily "1" (Limited Proficiency) and "R" (Rarely). SE-28.
16. On January 25, 2023, the School District proposed a new IEP. This was accepted by the Guardian on February 3, 2023. This remains the stay put IEP. Placement is the elementary school that houses the L&A Program, with 2 hours per day in the general education setting and 4.5 hours per day in the L&A special education classroom. Services include Specially Designed Instruction in Math with a Special Educator, 120 sessions per year of 30 minutes each; Special Designed Instruction in Reading with a Special Educator, 120 sessions per year of 30 minutes each; Behavior Consultation with a Behavior Consultant 9 times per school year; Group OT with an Occupational

- Therapist 30 sessions per school year of 30 minutes each; Individual Counseling, 30 sessions per school year of 30 minutes each; Behavior Support with a Paraeducator, 4.5 hours per day in the Special Education setting and 2 hours per day in the Regular Education setting. All services are listed as occurring in the Special Education setting, other than the Paraeducator for 2 hours per day in the Regular Education setting. SE-33.
17. On March 31 and April 3, 2023, School District conducted a Psycho-Educational evaluation of Student, using the WISC-V and KTEA-3. The KTEA-3 was also administered in 2021. The 2023 results were very similar – 1st percentile in Reading, 3rd percentile in Math and 0.1 percentile in Written Expression. On the WISC-V, results were at the 2nd percentile for Working Memory, 8th percentile for Fluid Reasoning, 13th percentile for Processing Speed, 18th percentile for Visual Spatial and 45th percentile for Verbal Comprehension.² SE-42.
 18. On April 13, 2023, the School District made a referral for Student to Spaulding Academy and Family Services, without identifying the Student. At hearing, the Director referred to this as a “blind referral.” SE-40; Testimony of Director. (IDPH-E-FY-24-02-041).
 19. The Guardian testified that Guardian visited Spaulding, and found the Student’s potential peer group to be inappropriate for Student, with very different and severe disabilities. Testimony of Guardian (IDPH-E-FY-24-02-041).
 20. On April 17, 2023, Student was found to have a Specific Learning Disability (“SLD”), with weaknesses in Writing, Reading and Math. School district changed Student’s listed disabilities to be Developmental Delay as the primary and SLD as the secondary. SE-32; SE-45; Testimony of Director.
 21. In May 2023, the BCBA amended the Behavior Support Plan. SE-47.
 22. On July 25, 2023, a new IEP was drafted but not signed by either party. SE-56.
 23. Student’s 2023 ESY program was in-home tutoring for eleven days, between August 14, 2023 and August 25, 2023. A paraprofessional or behavior consultant was also present on most days. The tutor documented behaviors such as hissing, throwing items or escaping to the door. SE-56.
 24. In August 2023, the BCBA conducted an FBA. Primary behaviors are listed as Eloping and Multiple Behavior Episodes. Secondary behaviors are listed as Aggression, Stealing, Property Destruction and Inappropriate Vocalizations.

² It was on March 31, 2023 that Student also had a significant multi-incident behavioral episode following the evaluation, described supra.

Hypothesized reasons for behaviors were listed as escape and attention. The BCBA summarized:

In the public school setting, [Student] lacks the intrinsic motivation to comply with the environmental norms making it difficult to make progress with the limitations of a public school setting... While it can be predicted that [Student's] behavior is primarily attention maintained, it does not account for why [Student] needs such high rates of attention nor does it explain why simple, ordinary age-appropriate demands can be so aversive. For this reason, it can be understood why interventions have not been able to maintain appropriate levels of behavior or why the school setting cannot compete with [Student's] current motivation(s). SE-58.

25. In September 2023, the Behavior Support Plan was updated again. SE-60.
26. In September 2023, the School District conducted another Psycho-Educational evaluation. This was the second Psycho-Educational evaluation conducted in just five months, and the third conducted within two years. The primary tool in this administration was the BASC-3. Rating scales were completed by Student's L&A teacher. The teacher rated Student At Risk in Adaptive Skills, and Clinically Significant in Externalizing Problems, Internalizing Problems, Behavioral Symptoms and School Problems Index. Executive Functioning was rated as Extremely Elevated. The Guardian did not complete the BASC-3 questionnaire because Guardian was uncomfortable with the format of the questions. At hearing, the Guardian testified being uncomfortable with the types of yes / no questions that the rating scales were asking. The Guardian felt the questions being asked on the rating scales could not be answered with simple yes / no responses. The Director testified that such restrictions limit the ability of the School District to understand and address the full scope of issues that the Student is dealing with, and limits the School District to only address the very limited aspect of the Student that they see in school. SE-63; SE-64; Testimony of Director.; Testimony of Guardian.
27. The Team met on September 8, 2023 and again on September 11, 2023 to review the Psycho-Educational evaluation, the FBA, and to develop placement recommendations. The Guardian did not attend either meeting. The School District recommended school-based counseling through Riverbend. The School District also recommended a therapeutic day setting as a placement. In the interim, the School District recommended increasing Student's time in the L&A classroom from 4.5 to 6.5 hours per day. The meeting notes also highlight that Student cannot maintain regulation in the classroom for more than one minute. SE-64; SE-71; SE-72

28. The School District reissued the IEP on September 11, 2023, maintaining the primary disability identification of Developmental Delay and the secondary identification of Specific Learning Disability. The School District Director of Special Education signed the IEP, but the Guardian did not. SE-66; SE-69 – SE-72.
29. Between September 14, 2023 and October 24, 2023, the exhibits submitted by the School District show several behavioral incidents of significant intensity, disruption, and threat of or actual injury. Among the more concerning behaviors from the standpoint of injury or threat of injury are the following:³
- A. September 15, 2023: Throwing items from the teacher’s desk, such as pencils, a metal stapler, binder clips, and keys. Throwing chairs across the room. Taking off shoes and attempting to hit staff by swinging them by the shoelaces. Student required a 32-second seclusion. A staff accident report was completed. SE-74; SE-75.
 - B. September 18, 2023: Striking a staff member in the arm. Spraying a spray bottle in the OT Room. Punching a staff member who attempted to take the spray bottle. Student was given a 4.5 hour out-of-school suspension. SE-76; SE-77.
 - C. September 26, 2023: Banging desk on ground repeatedly, causing desk to move uncontrollably around the room. Hitting a paraprofessional and an administrator on the arm. Whipping and striking a paraprofessional with a plastic chain, and also striking an administrator in the shoulder with the plastic chain. Student was given a one-day out-of-school suspension. SE-79; SE-80.
 - D. October 3, 2023: Traveling down hallway on a scooter with other students in the hallway. Kicking L&A teacher to the point that teacher had visible markings on [their] leg. Breaking a wooden drawer from an outdoor mud kitchen and using one of the broken pieces to strike the L&A teacher in the arm and leg, leaving red, raised welts still visible hours after the incident. Jumping into a dumpster and using the jagged edges of open cans to cut cardboard in the direction of Student’s body. Student was given a two-day suspension. SE-84; SE-85; SE-87.
 - E. October 17, 2023: Riding a bike down hallway uncontrollably in direction of preschoolers and staff. Climbing a steep metal staircase leading to the attic. Striking two staff members with a hard plastic hula hoop. Repeatedly hitting hula hoop on table in L&A classroom, resulting in classroom having to be evacuated. SE-92.

³ Only exhibits that identify the student directly or by reference from another report or through witness testimony are included.

- F. October 20, 2023. Swinging headphones around the room. Repeatedly hitting headphones on desk near another student, resulting in headphones breaking into several pieces and the classroom having to be evacuated. Running with a rolling chair, jumping on it and hitting staff members. Spilling soapy water, beans and beads on the floor. Throwing liquid at staff members. Breaking a broom by repeatedly banging it on the table. Bending the metal handle of the broom causing it to break in half, exposing sharp edges, and then continuing to break that into smaller pieces. Student required a five-minute seclusion. SE-93; SE-94.
- G. October 24, 2023. Running around room taking items that were not [Student's]. Kicking teacher in shin leaving a purple bruise. Kicking paraprofessional in knee. Climbing metal stairs to attic. Student was given a three-day suspension, but has not been allowed to return to school since. SE-96; SE-97.
30. On October 13, 2023, the School District convened a Team meeting to discuss proposals from September 11, 2023, to which the Guardian had not yet responded.
- The School District discussed a possible interim placement at the Washington Street Learning Center program, but the School District documented: “We could look at the Washington Street learning center but the programs there serve middle and high school students and it is not appropriate for [Student].” (emphasis added).
- Instead, the School District proposed a Home-Based Tutorial for two hours a day of general education instruction, thirty minutes of specialized reading instruction, thirty minutes of specialized mathematics instruction, and three hours a day of 1:1 paraprofessional support. At hearing (IDPH-E-FY-24-02-041), the Director testified that the three hours of paraprofessional support was intended to coincide with, not be in addition to, the general education, reading and math instruction, so that the total Home-Based Tutorial time for all services would be three hours with two people. SE-91.
31. On October 24, 2023, the Principal emailed the Guardian that Student would be suspended for three days, and that a Manifestation Meeting was necessary since Student was approaching 10 days of suspension. On October 27, 2023, the Director emailed the Guardian with an outline of home services. The School District has not allowed Student to return to school since the October 24 incident. The Manifestation Meeting did not occur until November 17, 2023. SE-Appendix-24 – 25; Testimony of Director. (IDPH-E-FY-24-02-041).
32. Also on October 24, 2023, the School District proposed a new IEP, listing the location of all services as “Homebound / Hospital Based.” The following special education, related and supplementary services would be provided under this IEP:

- A. Specially Designed Instruction in Math with a Special Education Teacher for 30 minutes per day;
- B. Reading Instruction with a Special Education Teacher for 30 minutes per day;
- C. General Education Instruction in Science and Social Studies with a General Education Teacher for 2 hours per day;
- D. Individual Counseling with a Counselor twice a week for 30 minutes each session;
- E. Occupational Therapy with an Occupational Therapist once a week for 30 minutes;
- F. Behavior Support with a Paraeducator daily for 3 hours;
- G. BCBA consultation for 60 minutes per week.

The IEP describes this as “an interim placement of home based tutoring and special education services due to significant safety concerns...” Even though this is described as “interim,” the dates of services are listed as 10/30/2023 – 07/24/2024. This IEP was signed by the School District, but not signed by the Guardian. SE-101.

- 33. On or around October 27, 2023, the School District filed for an expedited due process hearing. The hearing request was withdrawn on November 29, 2023, after the Parties “reached a tentative agreement regarding [Student’s] tutoring placement...” SE-Appendix-25, 37 (IDPH-E-FY-24-02-041).
- 34. On November 1, 2023, a Team meeting was held. Guardian and School District disagreed about the need for a second School District person being present in the house. Guardian opposed two people being present. School District would like a second person there because the IEP calls for para support, as well as to provide safety and confirmation of reporting. School District recommended changing the counseling session to in-person. SE-104; SE-105; SE-106.
- 35. On November 17, 2023, a Manifestation Determination meeting was conducted. The School District stated at the meeting that Student had been suspended for 9.5 days. Student’s conduct was found to be a manifestation of the disability. The Team believed a new FBA would not be necessary, since one was completed over the summer. The Team also “determined that the IEP is appropriate,” though it is unclear whether that reference was to the stay put or currently proposed IEP. The Director of Special Education stated that the L&A program was not meeting Student’s needs. SE-108; SE-109; SE-110; Testimony of Director.

36. In addition to the specific behavioral incidents described above, the School District submitted approximately eighty pages worth of discipline referrals, showing behavioral issues on a near-daily basis, if not multiple times per day. One of several examples of injury caused by the Student was when Student used a pen to stab the BCBA, leaving a puncture wound through the sweatshirt and undershirt the BCBA was wearing. SE-113; Testimony of BCBA (IDPH-E-FY-24-02-041).
37. Between October 2023 and January 2024, Student participated remotely in the Virtual Learning Academy Charter School (“VLACS”). In January, however, the Guardian received an automated email from the VLACS instructor stating that the course was cancelled because Student was not keeping pace. Testimony of Guardian.
38. On January 17, 2024, the Director, the Associate Director and the Guardian had a remote conversation regarding placement. The School District’s meeting notes, as well as hearing testimony, document the difference of opinion between the School District and Guardian. The School District sought any of several options for an interim or regular placement, including a 45-day interim placement, a more permanent therapeutic day placement, tutoring in the home provided by the district if two people can be present, or tutoring in the home with one tutor if arranged by the Guardian. The Guardian was opposed to all of those options, and was only open to Student returning to the stay put placement of the public elementary school, or having the School District provide one tutor in the home. SE-117; Testimony of Director. (IDPH-E-FY-24-02-041); Testimony of Guardian (IDPH-E-FY-24-02-041).

The same parties talked remotely again on February 2, 2024. The Director suggested the Learning Center which “has programming for older students...”⁴ The Director also documented that “[Student] is not suspended.” SE-120; Testimony of Director. (IDPH-E-FY-24-02-041); Testimony of Guardian (IDPH-E-FY-24-02-041).

39. On February 8, 2024, the School District proposed an interim placement at the Learning Center “which is an off campus setting for students needing emotional and behavioral support for 6th to 12th grade students.” Student would receive three hours per day of academic instruction, listed as thirty minutes of math, thirty minutes of reading, and two hours of general education. Services would be provided by a “tutor or teacher” along with a paraprofessional. Student would also have thirty minutes per week of individual counseling and thirty minutes per week of individual OT.

However, at hearing (IDPH-E-FY-24-02-041), when the Director was asked by the School District’s attorney if the Learning Center interim placement would provide the Student with FAPE, the Director testified, “I don’t think an interim program is FAPE for any student typically, and so no, I would anticipate a full day, all day in that

⁴ This appears to be the same program that was deemed “not appropriate” on October 13, 2023.

- therapeutic setting as an appropriate placement that would provide [Student] with FAPE.” SE-122 – SE-128; Testimony of Director. (IDPH-E-FY-24-02-041).
40. Approximately in February of 2024, while Student was engaging in remote tutoring with the L&A Teacher, the Teacher became concerned that Student was dressed only in what Teacher believed to be Student’s underwear, without pants. Teacher was also concerned that Student was moving the camera around the room, but the Guardian was not seen. Neither Teacher nor Director attempted to call Guardian, but the Director did contact Social Services. Social Services did not return the Director’s phone call, and a case was not opened. The Guardian testified that trust in the School District was lost as a result of this incident. The Guardian also testified that Student wears shorts at home, but not underwear, so it was not possible for Teacher to identify Student’s dress as underwear. The Guardian also testified that Guardian left the room to see if Student could handle the remote learning independently without the Guardian being present, but that the Guardian remained home and available if needed. Testimony of Director; Testimony of L&A Teacher; Testimony of Guardian.
41. The School District has looked into seven out-of-district day programs, but without Guardian support, most are unwilling to consider or accept Student. SE-130; Testimony of Director. (IDPH-E-FY-24-02-041).
42. Student’s school BCBA testified that the Student’s FBA includes replacement behaviors, which should serve the same hypothesized functions as the maladaptive behaviors targeted for decrease. However, the BCBA testified that it was difficult for Student to consistently use those replacement behaviors because of the immediacy of the maladaptive behaviors. The FBA also includes numerous interventions and strategies to try to improve Student’s behaviors. However, the BCBA and the Director testified that none of those interventions have led to a reduction in the Student’s behaviors. The BCBA testified that it is unknown why the Student requires such high levels of attention. The BCBA also testified to the belief that Student should not be with other students in a classroom – Student should be alone with no other students in a classroom. The BCBA also testified that the FBA did not reveal what the root cause is for why the Student needs such a high level of attention, nor is that the BCBA’s specialty. SE-58; Testimony of BCBA (IDPH-E-FY-24-02-041); Testimony of Director. (IDPH-E-FY-24-02-041).
43. At hearing (IDPH-E-FY-24-02-041), Guardian stated that when Guardian heard Student was hitting teachers, Guardian talked to Student about that. Guardian testified “there is very likely not a good reason for [Student] to hit an adult teacher,” and that there was a consequence for doing so. When asked what the consequence was, Guardian refused to answer, stating that would be kept personal. Testimony of Guardian (IDPH-E-FY-24-02-041).

44. The Guardian testified that “[Student’s] mind changes – [Student]’s in a different place when [Student] goes to school – it’s obvious. I stay consistent with [Student].... [Student’s] behavior works with me. [Student’s] behavior is not an issue with me... I don’t have the problem at home. There is something else going on [at school].” Testimony of Guardian (IDPH-E-FY-24-02-041).
45. The School District has looked into seven different day-schools that it believes might be able to provide the therapeutic supports that Student needs. The School District maintains a chart listing each school, the “Acceptance Status,” and Notes for each program. SE-130; Testimony of Director.
- A. [REDACTED] – Notes state, “Could not accept the student at this time due to the parent not being on board with attending. They did send an email saying the student was a good candidate for their day program.”
 - B. [REDACTED] – Notes state, “Could not accept the student at this time as acceptance is contingent on being able to observe the student which the parent is not on board with.”
 - C. [REDACTED] – Notes state, “Did not have the resources at this time to support the student's needs.”
 - D. [REDACTED] shows an Acceptance Status of Yes. The Notes state, “Would like to move forward with acceptance as the student is a good candidate for their program. Would like to set up a tour with the family.”
 - E. [REDACTED] School Primary also shows an Acceptance Status of Yes. The Notes state, “Thinks the student is a good candidate for their program. Would like to set up an observation and a tour with the family.”
 - F. [REDACTED] shows “Reviewing the application...”
 - G. [REDACTED] shows “Reviewing the application...”
46. Order number five in the IDPH-E-FY-24-02-041 decision was, “Student’s FBA and Behavior Plan are insufficient and must be amended through an independent FBA followed by a Team meeting to amend the Behavior Plan based on the independent FBA.” That has not occurred. The Director testified that the School District did identify an independent provider to conduct the FBA, but that the reason it did not occur was that the Guardian objected to the independent FBA utilizing school

information and data. The Guardian confirmed this objection at hearing.⁵ Testimony of Director; Testimony of Guardian.

47. The Student's L&A teacher testified that the Student struggles attending to any activity, either preferred or non-preferred. Even with preferred activities, Student cannot attend for more than five minutes. Testimony of L&A Teacher.
48. The IEP Progress Reports show Student is not meeting IEP objectives. SE-Supp.; Testimony of L&A Teacher.
49. The School District witnesses do not believe Student is receiving FAPE through the current program, nor do they believe that the School District is capable of meeting the Student's needs. The current program has not been able to decrease the Student's interfering behaviors. Furthermore, the Director testified that the Student's behaviors and disruptions impact other students at school, and limit the ability of the other students to receive their FAPE. Testimony of Director; Testimony of L&A Teacher.
50. The School District witnesses believe Student requires a therapeutic day program with more structured routines, smaller groups and individualized support in order to receive FAPE. In such a program, all staff, even related service providers, only deal with similar students who have similar social emotional needs, rather than being spread out among several types of students and several schools, like in the School District. For example, the BCBA in the School District deals with students throughout the district in all grade levels, whereas the BCBA in a specialized therapeutic day school will be solely dedicated to that one program. Staff in a more specialized therapeutic program will be able to respond much more quickly to issues than staff in the School District. Testimony of Director; Testimony of L&A Teacher.
51. The [REDACTED] K – 8 program currently has fifteen students enrolled for next year. There will be fourteen staff people supporting the fifteen students. Students will be further grouped by age, as required by state law. The [REDACTED] program is capped at twenty-four students. Testimony of Director.
52. The Guardian testified that the Guardian tried to get questions answered about various programs the School District was suggesting, but that the private programs told the Guardian a completed application is needed before questions could be answered. Guardian was fearful that completing an application would obligate Student to attend the private school if accepted. Testimony of Guardian.
53. Guardian is concerned that moving Student to a more specialized therapeutic day school will make the Student's behaviors even worse. When asked what support

⁵ The Guardian's interpretation of the intended extent of the independent FBA ordered in IDPH-E-FY-24-02-041 is incorrect. The order did not include the restrictions, either explicitly or implicitly, that the Guardian seeks to apply.

Guardian had for such a concern, Guardian could only point to some family members who had similar issues, and things got worse when they switched programs.
Testimony of Guardian.

54. On cross-examination, when asked what type of school would be appropriate for Student, Guardian said a “regular school” with accommodations. When asked if Student should be in a special education classroom, Guardian said no. Guardian testified that Student would be better off with no school than a therapeutic day school. Guardian also testified on cross-examination that the issue with the Student is that Student is “hyper sensitive” to relationships, and if someone says something to upset Student, Student will go much further than most children, to the point of cutting off the relationship with the person. When asked if mental health counseling would be helpful for Student, Guardian stated no. When asked what benefit Student was getting from the current school, Guardian referred to the interactions with others. The Guardian also testified that when Student hits a teacher, the Guardian rather than the School District should address the issue, because the Guardian could provide immediate consequences, whereas the School District does not. Testimony of Guardian.
55. The Guardian’s one exhibit documents that the School District did not implement the order from the prior hearing requiring 1-1 tutoring in the home as the interim alternative educational placement (as long as Guardian remained at home). Instead, on May 3, 2024, despite the clear order in IDPH-E-FY-24-02-041, the Director emailed the Guardian, “We believe we should have [Student’s] support person as well as the tutor.” The Guardian responded by email, “No, that is not what I want, only a single teacher will tutor [Student]. This is something that was disputed at the hearing and a ruling was made relative to that. It is my understanding that the ruling requires the school to provide a single tutor at the home as long as I am present during the sessions.” The attorney for the School District then responded, “The IEP team met and determined that, for the security of everyone involved, two people are needed to provide the home-based services to the student.”

III. Rulings of Law

1. The School District has the burden of proof, including the burden of persuasion and production, of the appropriateness of Student’s program or placement, or of the program or placement proposed by the School District. This burden shall be met by a preponderance of the evidence. RSA 186-C:16-b, III-a.
2. The School District is responsible for implementing the Student’s agreed upon IEP in an approved placement that represents the least restrict environment (LRE) that is appropriate. 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(ii); N.H. Code Admin. R. Ed 1102.02(r), N.H. Code Admin. R. Ed 1111.01(a).

3. The Student's last agreed upon placement is the L&A program. N.H. Code Admin. R. Ed 1120.04(g).
4. The School District cannot meet its duty to provide FAPE to the Student by implementing Student's IEP in the L&A program.
5. The Student has not benefitted academically, socially or behaviorally in the L&A placement despite the provision of supplementary aids and services. 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(ii); N.H. Code Admin. R. Ed 1111.01(a).
6. An out-of-district special education day program is the next restrictive placement on the continuum of alternative placements, and represents the Student's least restrictive environment. 20 U.S.C. § 1412(a)(5); 34 C.F.R. §§ 300.114, 300.115; N.H. Code Admin. R. Ed 1102, 1100.3(d), 1113.02(c).
7. The School District is obligated to provide a free appropriate public education (FAPE) within a program approved by the State of New Hampshire (or a host state) to provide special education. RSA 186-C:9, 186-C:10; N.H. Code Admin. R. Ed 1113.02.
8. A full-day placement in a state-approved special education school that offers a therapeutic milieu is the least restrictive environment in which Student can receive a Free Appropriate Public Education ("FAPE").
9. The School District met its obligation to offer FAPE to the Student in the least restrictive environment when it proposed to implement the Student's IEP in a state-approved out-of-district special education day school. 20 U.S.C. §§ 1401(9), 1412(a)(5); 34 C.F.R. §§ 300.114, 300.115.
10. Due process hearing decisions must "be implemented immediately," unless a delay is agreed to in writing by both parties, or one party files a timely appeal to a court of competent jurisdiction. N.H. Code Admin. R. Ed 1123.22(a), 1123.20.
11. The School District and the Guardian separately prevented implementation of portions of the due process hearing decision in case IDPH-E-FY-24-02-041.

IV. Discussion

Case IDPH-E-FY-24-02-041 and the instant case (IDPH-FY-24-05-051) are very much related to each other. They both share a common set of underlying facts. In the prior, expedited case, the School District sought an interim alternative educational placement. The hearing decision in the prior case did authorize an interim alternative educational placement. The decision also ordered that an independent FBA be conducted. In the instant case, the School District now seeks to change Student's

educational placement to a more restrictive setting – an out-of-district therapeutic day school.

The status quo, on multiple levels, cannot continue. First, it does not appear that the Student is receiving any education whatsoever, let alone FAPE. That must change. Second, the Guardian and the School District have escalated their long-standing dispute to a new level where each has prevented implementation of a clear order from the prior due process hearing, thereby causing educational harm to the Student.

When the Student attends school, the Student's behaviors quickly escalate to a level that is unmanageable and dangerous, both to self and others. The Student has the potential to cause injury and in fact has done so. The Student's behaviors disrupt the educational process of the school to such a degree that other students have trouble receiving their own FAPE. There have been many instances when the other students in the classroom have had to be evacuated due to the escalating behavior of this one Student. The Student's behaviors have posed a substantial detrimental effect to the welfare of the school.

At the due process hearing in the instant case, there should have been updated and useful information available resulting from implementation of the prior due process hearing decision. This information should have shed light on whether the Student's program could be changed in any way to better manage the Student's behavior in the current placement, or whether a change to a more restrictive placement is truly necessary. Specifically, there should have been information available about how the Student performed in the interim alternative educational placement that was authorized in the prior hearing. It also would have been useful to have results from the independent FBA that was ordered in the prior hearing. However, neither the interim alternative educational placement nor the independent FBA occurred, each of which has delayed the Student's receipt of FAPE.

In the prior, expedited hearing, the School District sought authorization for an interim alternative educational placement. The School District was granted that authorization, with the clarification that only one School District employee was needed to provide services in the home, as long as the Guardian was present to deal with any behavioral issues that might arise. Specifically, the prior due process hearing decision stated, "The approved interim alternative educational placement is a home-based program consisting of Special Education, Related and Supplementary Services as described in the October 24, 2023 proposed IEP... *Since all services will be provided 1:1, a paraprofessional is not necessary, as long as the guardian is present and remains immediately available to assist with any behavioral issues that might arise.*" N.H. Dep't of Educ. Hearing Decision, IDPH-E-FY-24-02-041 at 18 (2024) (emphasis added).

The lone exhibit submitted by the Guardian and objected to by the School District shows that this order was not implemented. Instead, the School District unilaterally overrode the Hearing Officer's order by making up and imposing a restriction that two school district employees must be present in the Guardian's home in order for services to be provided. This was despite the School District knowing that the Guardian objected to two staff members being present in the home, and despite the clear wording of the order itself. Thus, instead of pursuing appeals that were available, the School District unilaterally superseded the Hearing Officer's order and prevented it from being implemented, which in turn impacted the information that could have and should have been available in the instant hearing. It would have been useful to know what worked and what did not work in the interim setting. More importantly, the Student should have received an education in the interim setting, but did not.

Unfortunately, the evidence presented in the current hearing shows that the parties took turns making up and imposing their own restriction on the prior due process hearing decision. Specifically, the prior decision ordered an independent FBA, but the Guardian made up and imposed a restriction preventing the FBA from being conducted. The prior due process hearing decision stated:

Beyond the failure of the Behavior Plans to improve the Student's behavior, it is also concerning that the School District appears to be at a loss for what else to do. More specifically, the BCBA testified that it is unknown what the root cause is for why the Student requires such high levels of attention. The BCBA even went on to say that this was not [BCBA's] specialty. It was also extremely concerning to hear the BCBA state that Student should not be with other students in a classroom, but should instead be isolated... To help the Parties better understand the root cause of the Student's behaviors and how a school program should address the Student's behavioral needs, I am ordering the District to obtain an independent Functional Behavioral Assessment and an amended or redrafted Behavior Plan, both to be provided by an independent BCBA not associated with the School District. This needs to be completed during the time period of the interim alternative educational placement, so that it can be utilized by whichever placement Student attends after the interim period.

N.H. Dep't of Educ. Hearing Decision, IDPH-E-FY-24-02-041 at 16 – 17 (2024).

Following issuance of the order, the Guardian unilaterally made up and imposed a restriction that the independent FBA should not utilize school information and data. However, there was no such restriction in the prior decision, either explicit or implicit. The independent FBA should have been completed by now, with very useful results available for consideration in this hearing. Instead, the Guardian's restriction resulted in

the independent FBA not occurring. This, in turn, resulted in no data or expert recommendations being available in the current hearing that might have supported changes in the Student's behavior plan or program that might have allowed the Student to remain in the public school setting. If the goal was to keep the Student in the public school, the Guardian's restriction on the independent FBA was self-defeating. Without that data or expert recommendation, I am left with no alternative but to authorize a change to a more restrictive placement.

When a due process hearing decision is issued, the decision must "be implemented immediately." If a party does not agree with the decision, there is no right in the law to ignore the decision and unilaterally implement their own view of a decision that they wish had been issued.⁶ It is the Student who suffers while this gamesmanship plays out. For the good of the Student, this must stop.

V. Order

1. In order for the Student to receive FAPE, the Student requires a full-day placement in an approved therapeutic day school which has an age and grade-appropriate program that is designed to address the Student's behaviors and disabilities. The School District and Guardian are ordered to jointly search for and obtain such a placement.
2. The parties are ordered to obtain an independent FBA at School District expense. The independent FBA shall include, but not be limited to, consideration of data, reports, observations and interviews in school, at home and in the community. The only exception is that HIPAA-protected medical information need not be disclosed without consent of the Guardian.
3. Student is owed compensatory services for the School District's failure to implement the interim alternative educational placement ordered in IDPH-E-FY-24-02-041. The Team shall reconvene to decide on compensatory services.

VI. Proposed Findings of Fact and Rulings of Law

The School District submitted Proposed Findings of Fact and Rulings of Law; the Guardian did not.

1. School district's Proposed Findings of Fact:
 - A. Granted: 2 – 11, 13 – 26, 28 – 34, 37 – 39.
 - B. Denied: 1, 12, 27, 35 – 36, 40.

⁶ Instead, the Parties should utilize their appellate rights as referenced in Section VII of this decision.

2. School District's Proposed Rulings of Law:

A. Granted: 1 – 7.

B. Denied: 8.

VII. Appeal and Post-Hearing Enforcement

Any party aggrieved by this may appeal as noted in Ed 1123.20.

This due process decision shall be implemented by the School District and monitored and enforced by the Department of Education pursuant to Ed 1123.22 and Ed 1125.

So ordered.

/s/ James Baron, Hearing Officer

July 5, 2024