

STATE OF NEW HAMPSHIRE
STATE DEPARTMENT OF EDUCATION

██████████ School District / ██████████

IDPH-FY-24-05-051

SCHOOL DISTRICT’S POST-HEARING MEMORANDUM

██████████ School District (the “District”) files this post-hearing memorandum consistent with the Order issued by the Hearing Officer on June 10, 2024. Set forth below are proposed findings of fact, conclusions of law, and the District’s argument for why the Hearing Officer should rule fully in favor of the District on all issues in this case.

I. Introduction

This case involves ██████████ ██████████ (“the Student” or “██████████” a 9-year-old student (d.o.b. 12/25/2014) entering the third grade. ██████████ resides with ██████████ ██████████ ██████████ legal guardian, in ██████████ New Hampshire, and is the educational responsibility of ██████████ School District (the “District”). ██████████ last-agreed-upon IEP placement is in ██████████ Elementary School’s (PES’s) behavioral skills program, the Learning and Adjustment (“L&A”) program. ██████████ is currently identified as eligible for special education, falling within the purview of the Individuals with Disabilities Education Act and state special education law, under the disability categories of Specific Learning Disability and Developmental Delay.

██████████ has a long history of physical aggression, violence, threats, inappropriate language, property destruction, and eloping, all in the school setting. ██████████ suffered from prenatal methadone exposure which is believed to continue to impact ██████████ academic, motor, emotional and

behavioral functioning. [REDACTED] has poor coping skills, an increasingly negative attitude toward authority, and near-complete opposition to doing schoolwork.

Despite the IEP team's addition of supports and services to the Student's school day, and [REDACTED] movement along the LRE continuum from a regular education classroom in the fall of 2021, to the L&A classroom at [REDACTED] in the spring semester of 2022, [REDACTED] still is not receiving a meaningful benefit – if any benefit – from [REDACTED] education.

II. Procedural History

In a prior due process hearing involving the same parties and hearing officer, the District prevailed in seeking a 45-day removal of [REDACTED] to an Interim Alternative Education Setting (IAES) on the basis that [REDACTED] presented a substantial likelihood of injury to himself or others if returned to [REDACTED] last agreed-upon placement in the L&A classroom at [REDACTED]. This placement expired on the last day of the 2023-2024 school year.

On May 24, 2024, the District filed for due process in the present matter, seeking a ruling from the hearing officer that [REDACTED] requires placement at a therapeutic day school in order to receive a free and appropriate public education (FAPE) in [REDACTED] least restrictive environment.

At hearing, the District called two witnesses. First, [REDACTED] who has been a Special Education Director for over 30 years, and served as a special educator and special education case manager prior to entering special education administration. *Test. of* [REDACTED]. The District then called [REDACTED] a certified special educator who ran the L&A Program while the Student attended it. *Test. of* [REDACTED].

III. Factual Background

Set forth in this section is an overview of the key events that reflect the underpinnings of this case, followed by a more detailed consideration of facts in the discussion of each legal issue presented in this case.

The last time the parties agreed upon a placement for ██████ was January 2023, over a year ago. Of particular concern in this case, ██████ January 25, 2023 agreed-upon IEP places ██████ in ██████ Elementary in the general education setting for 2 hours per day and in the L&A special education setting for 4.5 hours per day. SD-104.

The record of is replete with uncontradicted evidence of ██████ unsafe and violent behavior, as well as ██████ access to and use of weapons (“weapon” both as that term is used in special education law, and in the sense that ██████ has weaponized objects regularly found in schools). There was a sharp increase in intensity, frequency, physicality, and aggression since late winter 2023; ██████ SWIS records contain descriptions of 100 major incidents (“major” meaning that building administration was called to support classroom staff) between January 25, 2023 and October 24, 2023. SD-366 to SD-390. Of those incidents, 60 occurred between January 25, 2023 and May 31, 2023, and 40 occurred between August 30, 2023 and October 24, 2023. ██████ was especially physical with ██████ 1:1 paraprofessional support staff throughout this time but, as ██████ behavior deteriorated, ██████ even became physical with ██████ “preferred” staff in the latter half of the 2022-2023 school year and into the 2023-2024 school year. This Memorandum will not reiterate the details of behavioral incidents for which findings were made in the previous due process hearing decision, and which formed the basis for the finding that the Student posed a substantial likelihood of injury to himself or others if returned to ██████ Elementary School. SD-604 to SD-622.

Of primary concern in the present hearing is the fact that the Student has made minimal progress in ■■■ IEP goals, or general ability to participate in school since enrolling in the District. Largely this is due to the Student's inability to remain regulated long enough to receive instruction, and ■■■ resistance to academic demands which leads ■■■ to engage in dangerous and disruptive behavior. The Guardian has obstructed various efforts to gain additional information about the Student's needs, such as by refusing to fill out Parent rating scales for a social-emotional assessment, and by refusing to consent for a recent proposal for an independent FBA. The Guardian has further declined to participate meaningfully in efforts to provide additional supports services for the Student, including new placements that might better serve ■■■ needs at this critical moment in the Student's development.

Proposed Findings of Fact

1. The Student is diagnosed with pre-natal methadone exposure syndrome, as reported by the Parent. *Test.* ■■■■■ Despite the Student's history of aggressive, violent, and refusal behavior in the school setting, the Guardian has not sought additional medical assessment of the Student. *Test. of B.* ■■■■■

2. The Student was found eligible for special education in 2020, shortly before the Covid-19 shutdowns in the spring of 2020. *Test.* ■■■■■ Initially, the Guardian declined to send the Student to the District's Pre-K special education program. *Id.* However, the District was eventually able to convince the Guardian to send the Student to the District to receive Occupational Therapy services only. *Id.* The Student began making progress in OT, however, the Guardian stopped sending the Student after 4-5 sessions, after the District proposed increasing the Student's OT services. *Id.*

3. The Student's first Kindergarten year was in the 2020-2021 school year, during the continued shutdowns due to Covid-19. *Test. of* [REDACTED] Like many parents and caregivers during that time, the Guardian decided to homeschool the Student for the 2020-2021 school year, instead of opting for a remote Kindergarten program. *Test. of* [REDACTED]

4. The following school year, 2021-2022, the Student was enrolled in [REDACTED] neighborhood school of [REDACTED] Elementary School, entering the first grade. However, it became clear early on that the Student did not have the Kindergarten or Pre-Kindergarten skills necessary to be successful in first grade. *Test. of* [REDACTED] Academically, [REDACTED] was still working on identifying numbers, as well as the letters of the alphabet, and the sounds that the letters make. *Id.* Neither was [REDACTED] showing age-appropriate social or behavioral skills. As a result, the school team at [REDACTED] Elementary recommended to the Guardian that the Student be placed in Kindergarten for the 2021-2022 school year, in order to gain the skills [REDACTED] had not yet developed. *Id.*

5. An Academic Evaluation conducted in the fall of 2021 showed that the Student's achievement fell into the "Low" range in the areas of Reading and Math, and "Very Low" in the area of Writing. (SD-0046).¹

6. After moving to the Kindergarten class, the Student was able to receive instruction at the Kindergarten level. *Test.* [REDACTED] The team also added a 1:1 paraprofessional for 6.5 hours per day, a behavior specialist to consult with staff, and counseling services with the school counselor. *Test. of* [REDACTED] SD-0035. The team implemented a "First, Then" system, a visual schedule, and a behavior plan. SD-0038. Breaks were built into [REDACTED] schedule. *Test. of* [REDACTED]

¹ The Student's score on the Reading Composite fell into the 1st percentile. [REDACTED] Math Composite score was in the .2nd percentile, and [REDACTED] Writing Composite score was in the <.1st percentile range.

7. However, the Student continued to struggle with behavior, and continued to avoid academic tasks. [REDACTED] struggled to follow classroom instructions, and was not successful participating in group learning. *Test. of [REDACTED]*

8. As the school year progressed, the Student's behavior escalated to include routine elopement, as well as physical and verbal aggression. These behaviors were beginning to be seen on a daily basis. *Test. [REDACTED]*

9. Because the Student was not able to participate in group learning in the Kindergarten classroom, the Student regularly received [REDACTED] instruction individually from [REDACTED] teacher, a setting with fewer distractions. *Test. of [REDACTED]* Even so, the Student was often unable to maintain regulation and would elope or otherwise engage in behavior to avoid the instruction. *Id.*

10. The Student was not making appropriate progress in the Kindergarten classroom. As a result, the IEP team met and determined that the Student needed a different, more restrictive setting to be successful, and receive a FAPE. *Test. [REDACTED] [REDACTED] Elementary School* does not have a behavior program, so the team placed the Student at [REDACTED] Elementary School's Learning and Adjustment (L&A) Program early in the Spring semester of the 2021-2022 school year. *Id.*

11. The L&A Program is an approved special education program designed to provide an array of behavioral supports to students, while allowing them as much access to their regular education peers and general education classes as they are able to manage, given those supports. *Test. of [REDACTED]* The goal of the program is to teach students how to replace their maladaptive behaviors with different, more appropriate strategies for getting their needs met, known as "replacement behaviors." *Test. of [REDACTED]* The Program is run by certified special

educator [REDACTED] and has multiple support staff. *Test. of [REDACTED] test. of [REDACTED]*
[REDACTED]

12. When the Student started in the L&A classroom, the staff were able to learn more about [REDACTED] behaviors, and the needs that they were serving for the Student. *Id.* In particular, it became apparent that the reason, or “function,” of the Student’s behavior was avoiding work, and gaining adult attention. *Id.* Using that information, the L&A program staff built opportunities for positive adult attention into [REDACTED] schedule. *Id.* For a time, this was successful, and the Student was even able to spend short periods of time in the general 1st grade classroom. *Id.* As was typical for L&A students, if the Student did have an escalation in the general education classroom, [REDACTED] would be able to return to the L&A room to process with staff, and understand, “what does my body need right now.” *Id.* This is consistent with the L&A approach of helping students learn to identify when one’s body needs something, and then teaching students strategies for how to meet that need. *Id.*

13. The Student showed a slight decrease in the behaviors [REDACTED] had shown in [REDACTED] Elementary School for the first couple of weeks in the L&A Program. *Id.* However, the Student resumed similar types and rates of behavior after a short “honeymoon period” in L&A. *Id.* The Student increasingly began targeting other students, and engaging in behaviors such as tearing up their work, aggressing on them, and causing the classroom to be evacuated. *Test. of [REDACTED] SD-0059; SD-0062; SD-0066; SD-0076-77.*

14. In the fall of 2022, the District’s BCBA created a new Behavior Support Plan for the Student. SD-0055. However, the Student continued to demonstrate high levels of aggressive behavior, elopement, property destruction, and work refusal. *Test. of [REDACTED]*

15. Despite the additional supports and programming changes afforded by the L&A Program, the Student continued to deteriorate, and ■ again did not make appropriate progress in the fall of 2022. *Test. of* ■ *Test. of* ■ SD-643-49.

16. The IEP team met on November 29, 2022 to discuss the concerns with the Student's behavior, and the Student's ability to access ■ education. The team discussed concerns about the Student's academic skills, which were still at the "emerging" level, despite being eligible (by age) for the second grade. SD-0069. ■ was well below grade level in *all* academic areas. At this meeting, the team discussed that ■ trauma history could be impacting ■ ability to maintain regulation, and access ■ education. *Id.* The team discussed the possibility that a more therapeutic school setting might be beneficial to the Student, and more specialized behavioral supports.

17. At the end of the final Reporting Period for the Student's IEP, in December of 2022, the Student had only demonstrated mastery of the first benchmark associated with ■ School Participation goal, and had not made any progress on the next two benchmarks. SD-643-44. The Student was only able to attend to a non-preferred, small group activity for 5 minutes. In fact, the Progress Report indicates that ■ was only able to attend to *preferred* activities for 5 minutes by December of 2022.

18. On this same December 2022 Progress Report, the Student had only Mastered up to the second benchmark for math, and was marked "Attempted Only" for the final benchmark, which was to be able to count the correct number of items (manipulatives), up to 15. At the end of ■ IEP, the Student could only count up to 10 items. SD-645-46; *Test. of* ■ The Progress Report indicates that ■ struggled with both counting and writing numbers 12-15. SD-

645. Math is a relative strength, and an area of interest, for the Student. *Test. of* ██████████ SD-643-49.

19. In the area of Reading, the Student's December 2022 Progress Report indicates that ██████ was able to consistently identify 16 letters of the alphabet, in both lower and upper case formation. However, ██████ was only able to consistently identify the correct *sounds* for 9 letters. SD-647. Accordingly, ██████ did not meet ██████ annual reading goal, which was to master labelling all 26 letters of the alphabet, and all sounds they make. *Id.*

20. The IEP team ordered additional evaluations for the Student in the spring of 2023, including a Psychoeducational Evaluation (SD-134), and a Behavior Observation (SD-99). The Psychoeducational Evaluation included a cognitive assessment, using the WISC-V, and an academic assessment, using the KTEA-3. SD-134. The Student's WISC-V scores indicated average abilities in the area of Verbal Comprehension, Low Average Visual Spatial abilities and Processing Speed, and Very Low Fluid Reasoning. SD-136. ██████ score in the area of Working Memory was in the 2nd percentile, which is in the Extremely Low range. *Id.*

21. The Student's KTEA scores were Low in Reading, Low Average in Math, and Very Low in Written Expression. SD-138.

22. From the information obtained through the Psychoeducational Evaluation, the IEP team determined that the Student qualified for an IEP coding of Specific Learning Disability (SLD), in addition to Developmental Delay (DD). *Testimony of* ██████████ SD-144. The information gathered from the evaluations informed the academic instruction that the Student received, as well as activities designed to improve ██████ memory and concentration abilities. *Test. of* ██████████

23. However, the Student's behavior continued to increase in frequency and severity throughout the 2022-2023 school year, impacting [REDACTED] ability to receive and benefit from academic instruction. *Test. of [REDACTED]* *Test. of [REDACTED]* The District's BCBA had made changes to the Student's Behavior Support Plan based on the information obtained throughout the year, and from [REDACTED] Behavior Observation, but the team still had not found an intervention that decreased [REDACTED] need for maladaptive behavior. SD-151; *Test. of [REDACTED]*

24. On May 31, [REDACTED] brought a knife to school with a blade that was about 3 inches long. SD-168. [REDACTED] pulled the knife from [REDACTED] pocket after walking into the L&A classroom. Ms. [REDACTED] asked [REDACTED] to relinquish the knife but [REDACTED] refused to do so. Staff evacuated the L&A classroom and called for administration support. Director [REDACTED] was in the building that morning and responded to the call. SD-168. Director [REDACTED] went into the classroom and asked [REDACTED] to give [REDACTED] the knife. SD-168. In response, [REDACTED] opened the knife. SD-168. Director [REDACTED] told [REDACTED] that if [REDACTED] did not give [REDACTED] the knife, then [REDACTED] would have to call the [REDACTED] Police Department. *Id.* [REDACTED] closed the knife and handed it to Director [REDACTED] SD-168. For this misconduct, [REDACTED] was given a 10-day out-of-school suspension. *Id.*

25. When the Student returned to the L&A room in the fall of 2023, [REDACTED] continued [REDACTED] dangerous, disruptive behavior. Between the first day of school in August 2023, and the Student's last day in attendance at [REDACTED] Elementary School in October, the Student caused the L&A classroom to be closed and evacuated on 16 separate occasions, totaling 776 minutes. SD-471; *Test. of [REDACTED]* This had a negative impact on the other L&A students who needed the room, and relied on it being available to them to meet their own emotional and behavioral needs. *Test. of [REDACTED]* *test. of [REDACTED]* Further, the Student's classmates in L&A would routinely miss their specialized instruction sessions with the L&A staff due to

behavioral outbursts, multiple times per week. *Test. of* This happened multiple times per week. *Id.* The Student's behavior has seriously impacted other students' ability to receive a FAPE. *Test. of test. of*

26. In addition, the Student regularly missed own scheduled sessions of specialized direct instruction due to being in the midst of a behavior episode when the session was scheduled, or the session having to end early because of behavior. *Test. of* It was not necessarily possible to resume the session when the behavior ended due to the length of the Student's behavior episodes, and the fact that the special education teacher needed to provide specialized direct instruction to other students in the L&A room during their scheduled times. *Id.*

27. Since the fall, the Student has been out of the building as a result of two expedited due process hearing request filings, the first of which was filed at the end of October, and then withdrawn on the basis of a tentative agreement between the District and the Parent for the implementation of a home program. *Test. of* The second expedited due process hearing request was filed on February 23, 2024, and was the subject of the due process matter identified by case number IDPH-E-FY-24-02-041. SD-604.

28. The Student was not receiving a FAPE during the fall of 2023, or thereafter while the District and the Guardian disagreed about how to provide services to the Student while the expedited hearings were ongoing. *Test. of test of* In the last two progress reports issued – for reporting periods June and December 2023, the Student was shown to be making minimal progress, if any, on all of goals. SD-656-668.

29. In June 2023, the Student was still only able to label 16 letters of the alphabet and the corresponding sounds with the accuracy specified in the first benchmark of the reading goal. SD-656-57. The Student had at that time “Partially Demonstrated” the ability to go beyond 16

letters and sounds. *Id.* A rating of “Partially Demonstrated” indicates that a student has shown the ability to perform as indicated in the benchmark or goal, but has only done so inconsistently.

Test. of [REDACTED]

30. In December, with an updated reading goal, the Student had “Partially Demonstrated” skills in [REDACTED] first reading goal objective (to “identify consonant and short vowel phonemes and write the letter associated with the phonemes”), and was rated as “Attempted Only” for the next benchmark (to “discriminate consonant and short vowel phonemes when presented auditorily and write the corresponding letter”). SD-663.

31. In the area of Math, the Student did not master [REDACTED] goal for the end-date of June 2023, and was only “Performance Demonstrated” for the first objective/benchmark, and “Partially Demonstrated” for the second. SD-658. The new IEP’s math goal was substantially different from the prior IEP’s math goal, and in December the Student was “Performance Demonstrated” for the December 2023 objective, which involved adding and subtracting double digit equations using manipulatives. SD-665. Math continued to be a relative strength for the Student during this time; however, the Student still struggled to maintain regulation long enough to take in the math lessons, “even when [REDACTED] wanted to continue working.” *Id.*

32. On the School Participation goal ending June 2023, the Student had made no progress, and continued to be “Performance Demonstrated” for the first objective (to “attend to a non-preferred, small-group activity in the general education classroom and remain on task for 5 minutes”) at the end of the IEP period in June 2023.

33. In December of 2023, the Student had *regressed* on [REDACTED] ability to participate in the general education setting. SD-666. At this time, the Student was rated “Attempted Only” on the first objective, which was *still* to simply attend and remain on task for a non-preferred activity in

the gen ed classroom for 5 minutes. The narrative indicates that during the reporting period, the Student was only able to remain on task for 3-5 minutes *in the L&A room*, with 2 or more verbal cues. *Id.*

34. The IEP team, with the exception of the Guardian, believes and has determined that the Student requires the additional supports, specialization, and therapeutic setting that a therapeutic day school can provide. *Test. of* [REDACTED]

35. It is a matter of urgency that the Student receive the necessary therapeutic supports to develop [REDACTED] behavioral regulation skills, cognitive ability, and other developmental milestones that [REDACTED] has not yet met. *Test. of* [REDACTED] Typically, interventions to support children in developing these skills are most effective prior to age 10. *Id.* After a child has passed the age of 10, the ability to reshape or develop those skills, responses, and ways of thinking is greatly reduced. *Id.* With the Student currently at the age of 9 ½, [REDACTED] is currently in the last year in which therapies have a good chance of closing that gap. *Id.*

36. Despite the urgency of the Student's need, [REDACTED] clear lack of progress, and in some instances regression, the Guardian has not shown the level of concern that might be expected of a caregiver. The Guardian has not sought additional medical, mental health, or other professional advice regarding the Student's needs.² *Cross of the Guardian.* [REDACTED] refused to allow the District to send staff into the home to implement the Student's IEP services. *Test. of the Guardian.* [REDACTED] has

² The District made great efforts to ensure that the Student had access to mental health supports at a higher level than what a typical school-based counselor could provide, at no cost to the Guardian, through an agency named Riverbend. SD-242, -610. The Guardian decided not to access this support, testifying in the last due process hearing that [REDACTED] didn't want to fill out the intake paperwork, and speculating that there was no point in having the Student participate because [REDACTED] already "knows how to behave." (Recording of Hearing March 26, 2024, "2024-03-26 - AM1 - IDPH-E-FY-24-02-041.m4a" beginning at 1 hour 41 minutes and 41 seconds.) The Guardian further opined that therapy is a matter of "you sit there and talk about all these things. The therapist just listens, nods their head, does nothing, gets paid for it." Recording of Hearing March 26, 2024, "2024-03-26 - AM1 - IDPH-E-FY-24-02-041.m4a" beginning at 1 hour 44 minutes and 48 seconds.

not tried to enroll the Student in alternative education settings such as charter schools, apart from a brief stint with VLACS in the winter of 2023-24, from which the Student was disenrolled by VLACS due to lack of participation. *Cross of the Guardian*. The Guardian has only agreed to tour one therapeutic day school suggested by the District – in the summer of 2023 – and claims that ■ did not receive adequate answers to ■ questions from that placement, leading the Guardian (who has no training or background in education) to conclude that no therapeutic day placement would be appropriate for the Student.³ *Id.* (■ unanswered questions, based on the Guardian’s testimony, appear to focus on matters that the Guardian is fixated on, such as: are there other students at the placements who “obey at home” but not at school, and specific questions about the other students the Guardian observed in the program.) However, the Guardian objects to sending applications to any therapeutic day schools, even if doing so would lead to ■ questions being answered. *Id.*

37. The Guardian refused to fill out the Parent questionnaire for the BASC-3, part of a social-emotional assessment which the IEP team ordered in the fall of 2023, because ■ didn’t like the questions. *Test. of ■ test. of the Guardian*. The Guardian has refused to consent to a new Functional Behavioral Assessment proposed by the IEP team on May 31 because ■ does not believe it to be sufficiently independent from the District. SD-586; *test. of ■ test. of the Guardian*. The District proposed to use an outside agency for the assessment, and even agreed to contract with an agency that it had not previously worked with, at

³ The Guardian engaged in uninformed speculation about the use of restraint and seclusion at therapeutic day placements, which was not based on any first hand or specialized knowledge of the same. The Student has been secluded and restrained at ■ Elementary School on at least 6 occasions since January of 2022, in accordance with the applicable laws and regulations regarding the use of such interventions. SD-48, -71, -164, -165, -282, -317. The Guardian’s newfound concern regarding the possibility of the Student being restrained or secluded would be heartening, if it led to a similar concern about getting the Student the services and interventions ■ needs to eliminate or reduce the use of such interventions.

the Guardian's request. SD-581, *test. of* [REDACTED]. However, the Guardian said that [REDACTED] would decline to give consent for the FBA unless the District would agree *not* to provide the evaluator with any information about [REDACTED] behavior in school, including former evaluations or behavior data. *Test. of* [REDACTED] *test. of the Guardian*. In fact, the Guardian objected even to a *meeting* involving the private agency and the IEP team, believing it would "skew the results" of the evaluation. SD-581. Since the Student is not currently in an education setting, and the Guardian is not even allowing the Student to engage in educational activities in the home, this would mean conducting an FBA with no relationship to the Student's school-based behavioral needs. It would not be possible to conduct a valid FBA regarding the Student's needs in the educational setting without the evaluator's ability to assess information about the Student's behavior and needs in the educational setting. *Test. of* [REDACTED]. However, it is apparently the Parent's priority to prove that the Student obeys [REDACTED] at home, with [REDACTED] ability to receive education and the supports [REDACTED] needs coming well after. *Test. of the Guardian*.

38. The Guardian has taken a tour of [REDACTED], and otherwise has declined to cooperate with efforts to locate an appropriate therapeutic day placement of the Student. The two private therapeutic day schools which have agreed to accept the Student *without* the need for the Guardian to tour the program are [REDACTED] School and [REDACTED] Primary School, both in [REDACTED], NH. The Guardian has not toured either school, but objects to them nonetheless.

39. The Student did not make meaningful progress in [REDACTED] reading, math, or school participation goals at any point from the Student's entry in the L&A Program, to the present time. When [REDACTED] entered the L&A Program in January 2022, and indeed, when [REDACTED] enrolled in the District in the fall of 2021, [REDACTED] was working on letter identification and sounds. *Test. of* [REDACTED] *test. of* [REDACTED]. When the Guardian stopped allowing the Student to receive

virtual instruction in January 2024, ■ was *still* working on letter identification and sound. *Test. of ■* The Student has not made appropriate gains in ■ social skills with peers, who are afraid of ■ due to ■ behavior. *Test. of ■ test. of ■* The Student has not benefited from ■ education in any meaningful way in recent years, apart from the ability to interact with individuals other than ■ Guardian. *Test. of ■ test of ■* Though again, these interactions are largely negative, due to the Student's inability to engage appropriately with peers, and due to the fact that much of the adult attention ■ receives is related to responding to ■ behavior. *Test. of ■ test of ■* When asked, even the Guardian cites only "interaction" with others as the benefit the Student received from being at ■ Elementary School. *Test. of the Guardian.*

40. For all of Guardian's disagreement and obstruction, it is less clear what the Guardian actually *wants* for the Student's education. There are many things ■ does not want – specialized therapy, valid and up-to-date behavioral and social-emotional assessments, virtual instruction, in-home tutoring, attending tours or sending information to alternative schools – but what is the Guardian's vision for fulfilling the Student's many, complex needs? According to the Guardian: a regular education classroom, with accommodations. *Test. of the Guardian.* Given the facts of the case, and the determination that the Student presented a substantial likelihood of injury to himself or others in a self-contained special education classroom, it is astounding that the Guardian holds this view. Most people in a caretaking role for a student with such severe needs would be advocating for more support, not less, when it is so manifestly evident that their child needs it not only for ■ education, but ■ physical safety. In this instance, the Guardian's efforts to obstruct the District's ability to provide ■ with additional supports are mystifying. While it is the Guardian's legal right to withhold and deny the Student any manner of therapies,

supports, and medical intervention (within limits), the District has a legal duty to offer a free and appropriate education to the Student, even if the Guardian chooses that ■ not receive one.

Proposed Rulings of Law

1. The District is responsible for implementing the Student's agreed upon IEP in an approved placement that represents the least restrictive environment (LRE) that is appropriate. 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(ii); Ed 1102.02(r), Ed 1111.01(a).

2. The Student's last agreed upon placement is the L&A program. Ed 1120.04(g).

3. The School District cannot meet its duty to provide FAPE to the Student by implementing ■ IEP in the L&A program; 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); Ed 1111.01(a); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992-93 (1st Cir. 1990) (citing *Lachman* with approval).

4. 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; Ed 1102, Ed 1100.3 (Table), Ed 1113.02(c); *Lessard v. Wilton-Lyndeborough Cooperative Sch. Dist.*, 592 F.3d 267 (1st Cir. 2010).

5. 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; Ed 1113.02.

6. The schools offered to the Guardian, and who have indicated a willingness to accept the Student without the Guardian participating in a tour (■, ■

School Primary) are approved by the State of New Hampshire to provide special education services.⁴ As such, these approved therapeutic day schools are subject to the same laws and regulations regarding intentional physical contact, and restraint and seclusion as public schools. (RSA 126-U:1, V, defining “school” to include both “a school operated by a school district” and “a private or public provider of any component of a child’s individualized education program pursuant to RSA 186-C,” and “A nonpublic school subject to the approval authority of the state board of education[.]”)

7. The School District met its obligation to offer to provide FAPE to the Student in the least restrictive environment when it proposed to implement the Student’s IEP in a state approved special education day school. 20 U.S.C. §§ 1401(9), 1412(a)(5); 34 C.F.R. §§ 300.114, 300.115.

8. The Guardian’s lay opinions on the appropriateness of the placement issue presented to the hearing officer were insufficient to counter the District’s evidence which was supported by the testimony of education professionals qualified to render their opinions. *Mr. G. v. Timberlane Regional Sch. Dist.*, 2007 DNH 2, 2007 WL 54819, *10 (D.N.H. 2007).

Dated: June 26, 2024

Respectfully submitted,

/s/ Milliana R. Zonarich, Esq.

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⁴ The current list of NH DOE approved private special education programs, including [REDACTED] School and [REDACTED] Primary Schools, can be found at this page on the NH DOE website:
https://www.education.nh.gov/sites/g/files/ehbemt326/files/inline-documents/sonh/private-providers-approved_0.pdf

CERTIFICATE OF SERVICE

I certify that on this 26th day of June 2024 I sent a copy of this pleading to [REDACTED] [REDACTED] legal Guardian of [REDACTED] [REDACTED] by email and first class mail, postage prepaid.

By: s/Milliana Zonarich
Milliana Zonarich