New Hampshire Department of Education

Student/[redacted] School District

IDPH FY 24-11-016

Expedited Due Process Decision

The parties painted two very different pictures of the student in this matter. The school district contends that the student is the most aggressive student they have ever seen and is "highly likely" to cause injury to themselves or others if allowed to return to the school district. School district witnesses testified that they have tried everything they could, but they have been unable to address the student's behavior. They also testified that the student's aggressive behavior was getting worse because the student was getting older and bigger.

The family presented evidence of a loving, friendly student who was not aggressive with them at home or in the community. In addition, the family contends that the student's FBA is insufficient and the student's IEP and behavior plan were not followed, which has contributed to some of the behavioral issues.

I. Findings of fact

1. There was a prior decision in a related matter with these same parties, IDPH-FY-24-10-010, where the hearing officer determined that the student caused serious bodily harm to a school staff member, and that 34 CFR § 300.530 permitted school officials to remove the student to an interim alternative placement for not more than 45 school days.

2. The prior decision determined that the behavior at issue was a manifestation of the student's disability.

3. The prior decision determined that the interim alternative placement was not providing the student with FAPE.

4. The school district requested due process in this matter to extend the 45-day interim placement under 20 USC § 1415(K) and 34 CFR § 300.532 on the grounds that the student posed a substantial threat of injury if they returned to their prior placement at the elementary school.

5. During the pre-hearing process, the school district added a request that the hearing officer resolve a dispute between the parties regarding a long-term out-of-district placement at [redacted] School.

6. The hearing officer's findings of fact and rulings of law from the IDPH-FY-24-10-010 prior decision are adopted in this case.

7. As noted in the IDPH-FY-24-10-010 decision, the student has a history of some aggressive behavior at school that includes spitting, biting, pushing, and hitting.

8. In February 2023, the student hit a paraprofessional with a snow shovel.

9. In September 2023, the student caused serious bodily harm to a special education teacher, as noted in IDPH-FY-24-10-010.

10. A school district witness testified that the student pulled their hair. Another witness testified that the student bit an RBT in a way that broke the skin.

11. The family presented evidence that the shovel incident in February 2023 and the serious bodily harm incident in September 21, 2023, were at least partly the result of the student's behavior plan and IEP not being followed and the actions of school staff.

12. With the shovel incident, the paraprofessional pushed the student slightly to move them away from a door to open it for the student. The family stated that the student reacted to the push, and in the student's mind, they were likely trying to protect themselves.

13. With the serious bodily harm incident on September 21, 2023, the special education teacher was playing a game with the student that involved squatting in front of the student with their back to them while the student was lying on the ground, which led to the student jumping on the teacher's back. The student's RBT stated in the hearing for the prior IDPH-FY-24-10-010 case that the special education teacher's actions were something they would never do with the student. Another parent witness in the previous case testified that the teacher's actions could have led to the student becoming dysregulated.

14. The school district did not call the student's RBT to testify in this case. At the hearing in the prior IDPH-FY-24-10-010 case, the RBT testified that they were able to manage the student's behavior at school.

15. The student's family pointed out that the incident with the special education teacher would not have happened if the RBT had been at school on September 21, 2023.

16. The student's RBT testified in the prior IDPH-FY-24-10-010 case that they believed the student should not be left alone with staff and that having two people with the student would help address their behavior.

17. The school district adopted a policy in September 2023 requiring two staff members to be present with students with behavior plans. The policy applies to this student since they have a behavior plan.

18. The school district states that they previously tried 2-on-1 assistance for the student, which did not reduce aggressive behavior.

19. School district witnesses who testified in this matter used the same exact phrase that the student was "highly likely" to injure themselves or others if they returned to the public school because "prior behavior is the best predictor of future behavior."

20. The family stated that the student is not aggressive at home or in the community when the student is with them.

21. The family wants the student to remain in their local community because the student loves being in the community and has siblings in the school district.

22. The family stated that the student needs to be integrated into the local community as that is where the student spends their time outside of school and where the student will live when the student is no longer eligible for special education services.

23. The family opposes placement at [redacted] School because it takes the student away from their local community and is almost an hour away.

24. The family stated that the student would not do well if taken away from their local community in a vehicle for two hours every school day, which could lead to behavioral issues during transportation.

25. The school district stated that they would provide private transportation to and from [redacted] School but did not provide specific details on how any behavioral issues would be addressed during transportation other than stating that the plan was to have a paraprofessional ride with the student.

26. The family stated that the student's FBA was based on year-old data.

27. While the family contends the middle school would be an appropriate placement for the student, both teachers who implement that program testified that it would not be able to meet the student's needs and is not any different than the elementary school. The family's evidence that the placement worked well for another student is insufficient to find that it would be appropriate for the student in this proceeding.

28. The current interim placement is not appropriate for the student. The school district has not provided the student with all of the services required in their IEP since September 21, 2023.

29. [redacted] School may be appropriate for the student in terms of programming and being able to address the student's behavior at [redacted], but behavioral issues during transportation and being away from the community were not sufficiently addressed in this proceeding to make a determination about it as a long-term placement.

II. Rulings of law

1. 20 USC §1415(k)(3) states:

   (A) In general
   The parent of a child with a disability who disagrees with any decision regarding placement, or the manifestation determination under this subsection, or a local educational agency that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or to others, may request a hearing.

   (B) Authority of hearing officer
   (i) In general
   A hearing officer shall hear, and make a determination regarding, an appeal requested under subparagraph (A).

   (ii)Change of placement order
   In making the determination under clause (i), the hearing officer may order a change in placement of a child with a disability. In such situations, the hearing officer may—

   (a) return a child with a disability to the placement from which the child was removed; or
   (b) order a change in placement of a child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of such child is substantially likely to result in injury to the child or to others.

2. 34 CFR § 300.532 states:
   a. General. The parent of a child with a disability who disagrees with any decision regarding placement under §§ 300.530 and 300.531, or the manifestation determination under § 300.530(e), or an LEA that believes that maintaining the current placement of the child is substantially likely to result in injury to the child

or others, may appeal the decision by requesting a hearing. The hearing is requested by filing a complaint pursuant to §§ 300.507 and 300.508(a) and (b).

b. Authority of hearing officer.

(1) A hearing officer under § 300.511 hears, and makes a determination regarding an appeal under paragraph (a) of this section.

(2) In making the determination under paragraph (b)(1) of this section, the hearing officer may—

i. Return the child with a disability to the placement from which the child was removed if the hearing officer determines that the removal was a violation of § 300.530 or that the child's behavior was a manifestation of the child's disability; or
ii. Order a change of placement of the child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of the child is substantially likely to result in injury to the child or to others.

(3) The procedures under paragraphs (a) and (b)(1) and (2) of this section may be repeated, if the LEA believes that returning the child to the original placement is substantially likely to result in injury to the child or to others.

3. In order to continue the alternative interim placement, the school district has the burden to establish that the student is substantially likely to injure themselves or others if they return to their original placement at the elementary school. The school district has not met its burden.

4. 34 CFR § 300.502(d) allows hearing officers to order independent evaluations. An independent evaluation is required in this case to provide the parties with objective information about the student’s needs. The school district is ordered to fund an independent evaluation by CORE.

III. Discussion

Interim alternative placement

The evidence leaves uncertainty about the likelihood that the student would injure themselves or others if they returned to their original placement. School district witnesses' testified that the student was very aggressive on a regular basis, and because “past behavior was the best

predictor of future behavior," the student was "highly likely" to injure themselves or others if they returned.

Several factors must be considered when evaluating that testimony. One is that while there was a fair amount of testimony about the student's aggressive behavior, the testimony did not address how or why that behavior was substantially likely to cause injury in the future. Rather, the witnesses just concluded that the past aggressive behavior made it "highly likely" that injury would occur in the future because past behavior was the best predictor of future behavior. However, the student's past behavior has generally not caused injury, so the past behavior just shows that the student is likely to have more aggressive behavior in the future, not necessarily aggressive behavior that causes injury.

While aggressive behavior certainly could cause injury in general, the legal standard for an interim alternative placement is that it must be "substantially likely to result in injury to the child or others." 34 CFR § 300.532. The school has the burden to meet this standard. While the school district is not required to wait for injuries to occur before meeting this requirement, it does have to show that injuries from aggressive behavior are substantially likely to occur instead of just showing that aggressive behavior is substantially likely to occur. Here, the evidence showing the substantial likelihood of injury in the future was lacking.

The school district did not provide any legal analysis regarding the definition of injury under 20 USC § 1415(k) and 34 CFR § 300.532, or any hearing officer or court decisions finding that aggressive behavior similar to the student's aggressive behavior in this case was sufficient to show a substantial likelihood of injury to the child or others.

The evidence of the student's aggressive behavior leading to actual injury to the child or others is primarily the one serious bodily harm incident on September 21, 2023. There was also evidence regarding the student hitting a paraprofessional with a shovel in February 2023, but there was no testimony or evidence about any actual injuries resulting from it. The shovel incident video showed the student hitting the paraprofessional on the side/arm area with the side of the shovel. It was difficult to tell from the video if the impact caused any injuries.

A second factor is that the family provided evidence that both the shovel and serious bodily harm incidents were precipitated at least in part by school staff actions and might have been prevented if school staff had followed the student's IEP and behavior plan and if the student's RBT was there on September 21, 2023, rather than the special education teacher filling that role.

Also, school staff were alone with the student in both incidents, which will not continue going forward because the school's new policy requires two staff members to be present with students with behavior plans.

Given these factors, the February and September 2023 incidents alone do not establish that it is substantially likely that the student will injure others if they return to their original placement and the student's IEP and behavior plan were followed.

There is other evidence of aggressive behavior, which includes spitting, hitting, pushing, throwing items, and destroying property, that must be considered along with those two incidents, but as noted above, details were not provided about how any of that behavior caused or was substantially likely to cause an injury to the student or others in the future. There was a reference to the student biting the RBT and breaking the RBT's skin, but the RBT was not called to testify to provide any details about that incident. There was testimony by the school psychologist about wearing face masks and padded jackets to address spitting and biting, but that seemed to be in prior school years before the current RBT was in place.

A third factor is that the school district did not call the student's RBT to testify. The RBT is the person who worked with the student regularly at school this year and arguably has the best understanding of the student's behavior at school and whether the student is likely to injure themselves or others at school. During the prior IDPH-FY-24-10-010 proceeding, the RBT testified that they were able to manage the student's behavior at school. The RBT recommended that the IEP be amended to add another person to work with the student to help address behavior and to ensure that school staff were not left alone with the student like the special education teacher was during the September 21, 2023 incident. The school district subsequently enacted a policy along those lines that applies to all students with a behavior plan, which includes the student in this proceeding.

The RBT's absence from this hearing and their testimony on some of these issues in the prior proceeding raises questions about whether the RBT agrees with the other school witnesses about the student being likely to injure themselves or others and whether the school could manage the student's behavior with more or different supports.

The family also pointed out that some of the student's behavioral data does not support the school's statements that the student is aggressive on a regular basis. However, the family's private advocate focused on data from specific time periods like September and October 2022 and did not include data from September 2023, which reports that the student displayed aggression on five days between September 11, 2023, and September 20, 2023. SD 131-132. The physical aggression on those days was not always defined or explained.

Family members also testified that they had not been told about aggressive incidents and were frequently told that the student had a good day when they picked the student up from school. However, the school district presented evidence that the student's aggressive behavior had been discussed regularly at monthly IEP meetings.

The family also presented evidence about resources used with other students that raise questions about whether the school district has accessed all available resources to manage this student's behavior and prevent potential harm to the student or others.

Given these factors, the disputed evidence, and the resulting uncertainties, and because the school district has the burden, I must find that the school district has not met its burden to prove that returning the student to the placement from which they were removed is substantially likely to result in injury to the student or others.

The IDEA provides the hearing officer with two options in an expedited hearing. A hearing officer can either return the student to the placement from which they were removed or order a change in placement to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that returning the student to the placement from which they were removed is substantially likely to result in injury to the child or to others. 20 USC § 1415(k)(3); 34 CFR § 300.532.

Since I have determined that the school did not meet its burden to prove that returning the student to the placement from which they were removed was substantially likely to result in injury to the child or to others, I must order that the student be returned to that placement, which is the elementary school. The student will return to that placement when school resumes after the holiday break.

I believe all parties agree that the elementary school is not currently an appropriate placement for the student, but neither is the interim alternative placement. Given the language of the law, and the parties lack of agreement on a different placement, it is the only option available at this time. The holiday break provides the parties with time to meet to determine what changes can be made to ensure the safety of the student and others when the student returns. The parties can continue to meet and work towards an appropriate long-term placement for the student. This decision does not preclude or prevent the parties from coming to another agreement about placement, whether it be short-term or long-term.

If the school district needs a couple of additional days to coordinate with school staff who are unavailable during the break to ensure that staff and services are in place for the student's return to the elementary school, the student's return date can be extended to January 5th.

Long-term placement

In terms of a long-term placement, neither party provided sufficient evidence to establish that their proposed long-term placements were appropriate for the student. The family's evidence about the middle school was based on a different student, and the school staff in charge of that program testified that the other student's success was due to differences between that student and the student at issue in this case. School staff in charge of that program also testified that the middle school program would not be any different or better than the elementary program for the student in this case. It may be that changes or additions to that program could be made so that it would be appropriate, and the independent evaluation ordered in this case is intended to help address that issue. However, the evidence presented during this due process proceeding is insufficient to conclude that the middle school is an appropriate placement.

The school district's evidence about [redacted] School was based on school district witnesses testimony about what they thought about the proposed placement given their understanding of the [redacted] program with other students, as opposed to any direct evidence from [redacted] School staff or a school district witness about [redacted] being able to implement this student's IEP and behavior plan, manage this particular student's behavior, etc. Some of that is likely because the family has not yet toured [redacted], and I don't believe there is evidence that the student has been formally accepted.

Additionally, while [redacted] School may be appropriate for the student in terms of being able to provide programming and address behavior when the student is at [redacted], the length of travel time, how the school district would address the student's behavior during transport, and the impact of removing the student from their local community are all issues that were not adequately addressed at the hearing. As a result, while [redacted] School may ultimately be an appropriate placement for the student, the evidence presented was insufficient to conclude that it is at this time.

To some extent, the family's arguments about the school district not meeting the student's needs prove the district's point that an out-of-district placement is needed. Given the evidence regarding the student's aggressive behavior, it may be that the school district cannot address it adequately, and the student will require an out-of-district placement. However, I agree with the family that alternatives for in-district placement or a closer out-of-district placement should be explored in more detail before requiring a student to leave their local community.

Overall, objective information is needed regarding how to address the student's behavior and what is required for the student to receive FAPE in an appropriate placement, whether in or out of the district. As a result, I am ordering an independent evaluation pursuant to 34 CFR § 300.502(d) to provide additional information to the parties.

School District's Requested Findings of Fact and Rulings of Law

Granted: 9

Denied: 1-8, 10 -14

Family's Requested Findings of Fact

Granted: 1- 41, 44 – 59, 62, 61 – 68, 77, 83 - 90

Denied: 42, 43, 60, 69 – 76, 78 – 82

Post-hearing evidence

The family's private advocate submitted evidence post-hearing by email. The school district objected. Objection sustained. The evidence needed to be submitted by the deadlines established in this case and/or presented as testimony at the hearing for the hearing officer to be able to consider it.

While well-meaning, the family's private advocate had some issues with knowledge of due process hearing requirements and compliance with them throughout this process. If the private advocate continues to assist this family or others in due process proceedings, they should review the due process rules and procedures and the resources available from the department regarding due process hearings so that they can meet those requirements in the future.

IV. Order

1. The student shall return to their prior placement at the elementary school with any modifications that the parties determine necessary to ensure the safety of the student and others. The return date is no later than January 5th.

2. The school district shall fund an independent behavior evaluation by CORE. The evaluation shall include a file review, gathering any information and conducting any student evaluations deemed necessary by CORE, and providing recommendations for the student's IEP, behavior plan, services, placement, and any other recommendations CORE considers relevant. In particular, the evaluation report should address whether there are any additional actions that the school district could take to manage the student's behavior and allow the student to remain in the district.

3. The independent evaluation shall be scheduled and conducted as soon as possible. The school district shall include the family and/or the family's advocate in communications with CORE about the evaluation. The family and/or the family's advocate are also permitted to communicate with CORE about the evaluation.

4. After receiving the CORE evaluation report, the school district shall conduct a team meeting to discuss the evaluation and potential changes to the student's IEP, behavior plan, and placement.

5. The school district shall provide the family with any prior incident reports and underlying data or documentation for any aggressive student behavior that has not already been provided. Going forward, it shall provide this information regarding new incidents to the family on a regular basis and no less than weekly.

6. The student is awarded compensatory education for the IEP services not provided during the interim alternative placement. The IEP shall meet to determine the amount and type of services to be provided. Either party may request mediation or due process over that issue if the parties cannot agree on the amount and type of services to be provided.

So ordered.

_12/21/23___ __/s/__ *Scott F Johnson*_______________
Date Scott F. Johnson

Appeal and Post-Hearing Enforcement

Any party aggrieved by this may appeal as noted in Ed 1123.20, Ed 1123.25, and 34 CFR § 300.514.

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.