

STATE OF NEW HAMPSHIRE
DEPARTMENT OF EDUCATION
[REDACTED] School District/Student
(IDPH-FY-25-07-000)

Father and Mother, parents of Student, submit the following proposed findings of fact, rulings of law, and legal argument.

PROPOSED FINDINGS OF FACT

BACKGROUND

1. Student is a qualified student with a disability, with functional abilities in the moderately low to low range. [REDACTED] [REDACTED] [REDACTED], described Student as full of life and joy, concerned and caring, helpful around the house, and possessing wonderful sense of humor. [REDACTED]'s Test.]
2. Student was born in [REDACTED] and adopted by another couple when [REDACTED] was five years old. Parents obtained power of attorney for Student in 2017, became [REDACTED] legal guardians in May 2023, and recently became [REDACTED] parents when Student's adoption became final on May 24, 2024. [A-1265]
3. Student has been educated in [REDACTED] since third grade (2018-2019). During that time, [REDACTED] has qualified for special education and related services under the category of intellectual disability. [REDACTED] had 1:1 adult support in grades three and four and 1:2 adult support (shared with [REDACTED] only school friend, [REDACTED]) in grade five. [REDACTED]'s Test.]
4. Beginning in sixth grade (2020-2021), during which Student received remote VLACS services with remote related services, [REDACTED] educational delays in comparison to [REDACTED] age peers began to appear more substantial. Academic testing in March 2021 indicated that [REDACTED] had significant delays in writing, math, reading, daily living skills, communication, and motor skills. [A-276, A-281; A-293]

5. During seventh grade (2022-2023) and eighth grade (2023-2024), Student attended ██████ Elementary School with an IEP that called for a “shared” paraprofessional, which was less support than before. [█████’s Test.]
6. Although Parents granted consent for ██████ to deliver the meager IEP services it offered in seventh grade, Parents have never agreed that this IEP or █████ placement in mostly mainstream classes at BES was appropriate. [█████’s Test.]

SEVENTH GRADE (2022-2023)

7. During seventh grade, beginning in the fall of 2022, it became clear to Parents that ██████ was not meeting Student’s educational needs and was not implementing all of the services and supports called for in █████ IEP. [█████ Test.]
8. Student began to exhibit highly unusual behaviors at school as █████ attempted to get the attention █████ needed. █████ received an email from a special educator in mid-November 2022. [V-111] It read in pertinent part:

█████
I am checking in regarding Student . . . I am not █████ current case manager although I have been trying to assist where I can. We have seen some regressive behaviors trying to obtain the para in the room’s attention which we met on and Student has been better . . . issues being under the table, kicking, etc. I told █████ this is not acceptable.

9. In January 2023, █████ wrote to the District’s Director of Special Education, █████, as well as Superintendent █████, to request an IEP Team meeting. [A-892] Parents requested out-of-district placement of Student, so █████ could receive appropriate services to address █████ disability-related needs. █████ has consistently denied this request and continued Student’s inappropriate placement in mostly mainstream classes with “push-in” special education services through seventh and eighth grades. [█████ Test.]

10. At the January 2023 IEP Team meeting, ██████ tried to explain, saying, “We are flying the plane as we are building it, we are doing the best we can.” ██████ also acknowledged in an email that the District had no notes or reports of any kind from anyone who had served as Student’s case manager. Meanwhile, in February 2023 Student’s teachers confirmed to ██████ that there had been little or no paraprofessional involvement in Student’s education for the entire 2022-2023 school year. ██████ Test.]
11. Parents emailed ██████ after the IEP Team meeting about the “plane” remark: “[W]e did not in good faith buy a ticket to be on such a plane and flying on such a ‘plane’ as this is truly not in the best interest of our special needs child, and it certainly is NOT Free or Appropriate, nor is it a Least Restrictive Environment.” [V-240]
12. Student’s situation at school did not improve significantly after the January 2023 IEP Team meeting. ██████ Test.] Parents therefore applied for Student to attend the ██████ in March 2023. [A-689]
13. On May 18, 2023, the District canceled Student’s IEP team meeting when Parents invited an educational advocate to accompany them. [A-536] Their statement of parental concerns for that meeting stated: “The team is already aware that we feel the current program and placement for ██████ is inappropriate and we are requesting an out-of-district placement at the ██████ School for Student.” [A-539]
14. ██████ responded by having its counsel filing pleadings in Parents’ guardianship proceedings, in an attempt to terminate their guardianship of Student so as to avoid responsibility for ██████ out-of-district placement. [A-540]
15. ██████ proffered its draft eighth grade IEP in connection with the May 2023 IEP Team meeting. [A-547] Its service grid called for all Student’s special education services to be provided in mainstream settings and for ██████ to have access to a shared paraprofessional for four hours per day. [A-562-563] The updated draft, dated June 6, 2023, contained the same features. [A-573; A-589] On June 20, 2023, ██████ presented this IEP to Parents. [A-599; A-614 (service grid); A-621]

16. The written prior notice accompanying the June 2023 IEP provided: “The school district proposed placement for Student in the general education classroom at ██████ Elementary School. ██████ will receive specialized instruction in the general education classroom.” [A-625]
17. Parents signed this IEP refusing consent. [A-631] The IEP Team then met on July 5, 2023. [A-642] At this meeting, Parents requested an independent neuropsychological evaluation at district expense. [A-647] They wanted to obtain a “deeper dive” into Student’s issues. [█████ Test.]
18. At Parents’ request, ██████ agreed to advance the date of Student’s triennial, but explained that the testing could not happen until mid-autumn 2023 because the District was bringing on a new school psychologist. [█████ Test.] In the meantime, Parents obtained an independent evaluation from Dr. ██████ in August 2023. [P-01; A-702]
19. ██████ diagnosed Student with autism spectrum disorder [P-29] and measured ██████ full-scale IQ at a standard score of only 51 (0.1 percentile). [P-06] Dr. ██████’s academic testing revealed index scores on the Woodcock-Johnson Test of Achievement of 64 in reading (1st percentile) [P-14]; 78 in written language (7th percentile) [P-17]; and below 40 in mathematics (<0.1 percentile). [P-19] Student’s oral reading quotient on the GORT-5 was a standard score of 76 (5th percentile). [P-16]
20. Dr. ██████ concluded that Student “is not an independent learner and information needs to be broken down into very small, discrete steps [and ██████ requires ongoing support in small, structured classrooms that are geared to working with students with ██████ cognitive and academic abilities.” [P-27] Dr. ██████ also opined that the proffered eighth grade IEP “did not meet ██████ complex learning needs” and that Student’s placement in mainstream regular education classes was not appropriate. [P-28] Dr. ██████ recommended placement for Student in an intensive separate special education classroom with no more than 6-8 students and paraprofessional support, with a focus on helping ██████ attain functional and daily living skills. [P-29]

EIGHTH GRADE (2023-2024)

21. For eighth grade, [REDACTED] implemented the last signed “stay-put” IEP created in May 2022, utilizing a new case manager, [REDACTED]. [A-745; A-1036] Student’s direct instruction during eighth grade came from [REDACTED], who boasts an MBA from [REDACTED] College with recent experience as a restaurant assistant manager and bank teller; [REDACTED] has yet to complete [REDACTED] special education certificate online through [REDACTED] College. [J-2; J-3]
22. At an IEP Team meeting held on September 27, 2023, [REDACTED] proposed its triennial testing of Student. [A-761; A-764] Parents consented to the District’s proposed evaluation. [A-777].
23. This testing in November 2023 confirmed that Student’s cognitive abilities fall in the extremely low range and that [REDACTED] has disorders in receptive language skills, expressive language skills, and social pragmatic skills. [REDACTED] conducted an OT assessment [A-750]; a speech-language assessment by [REDACTED], SLP [A-786]; an academic assessment by [REDACTED] using only the WIAT-4 [A-808]; and a psycho-educational assessment by the new school psychologist, [REDACTED], who was starting [REDACTED] first post-internship job. [A-817; J-8]
24. [REDACTED] measured Student’s cognitive ability on the Reynolds Intellectual Assessment Scales-2, obtaining a composite score of 40, which was lower than the score [REDACTED] had obtained 2½ years prior. [A-819; A-878] Student’s scores on the BASC-3 were clinically significant for Atypicality and Withdrawal. [A-831] [REDACTED] scores on the Vineland indicated that [REDACTED] overall adaptive skills are in “moderately low” range. [A-831] While [REDACTED] opined that Student should not be diagnosed on the autism spectrum, [REDACTED] wrote that “Student presents as a student developing with splintered skills. [REDACTED] inconsistent strengths in the academic setting appear to be compensating for [REDACTED] vulnerabilities. It is important to take into consideration that a student with a large variety of strengths and weaknesses could appear to have more developed skills than they have truly mastered.” [A-831]

25. On ██████'s speech-language assessment, which was conducted remotely, Student scored lower on the CELF-5 social-pragmatic language testing than ██████ had at ██████ prior triennial. On the Understanding Spoken Paragraphs test, ██████ results came in at the 0.1 percentile. [A-793; A-794; Riley Test.]
26. Dr. ██████ followed up ██████ testing by conducting an observation of Student at ██████ Elementary School on November 20, 2023, ██████ observation report states: "The ██████ Elementary School Program cannot meet Student's educational and social emotional needs. They do not offer classes at ██████ academic level, and they do not offer the social pragmatic skills that ██████ requires on a daily basis." [P-39]
27. At the IEP Team meeting held on January 10, 2024 [A-878], ██████ refused to consider Dr. ██████'s reports and refused to find Student eligible under the IDEA category of Autism, instead categorizing ██████ as eligible under Intellectual Disability and Speech-Language Impairment. [A-903]
28. Student's academic Star testing in January 2024 yielded lower scores than ██████ had obtained in September 2023 in both reading [A-882] and in math [A-886], although all of ██████ academic scores for eighth grade fell in the first percentile. Although ██████ has attempted to downplay these results because Student did not have adult assistance, they indicated ██████ inability to perform grade level academic tests independently.
29. Although Parents had requested placement at the ██████ School, correspondence from the ██████ director indicated that ██████ had filled its only opening and expected there to be no availability for new applicants for several months. [A-938]
30. At a follow-up IEP Team meeting held on February 6, 2024, ██████ indicated that ██████ had "grave concerns about high school" for Student. [A-951] ██████ however, issued a written prior notice indicating that Student's IEP would continue to involve "placement in regular education at ██████ Elementary School" [A-955; A-1109]
31. Parents continued to deny consent for implementation of ██████ proposed eighth grade IEP. [A-957; A-1110]

32. That same day, ██████ sent an email concerning Student's level of upset in ██████ math class. [A-1160] Unbeknownst to Parents, the paraeducator in Student's classroom, ██████, had been keeping a journal of Student's behaviors. [E-1 through E-36, "Series E Paraeducator Notebook"] These notes detail Student's behaviors in class throughout the year, including several incidents during which Student pushed back against academic instruction and the paraeducator's direction, using vocalizations, verbal behaviors, and physical aggression in response to the paraeducator. None of this critical information was shared with Parents, with school staff reporting instead that Student was socially appropriate and displaying strong academic skills in ██████ classes, despite being unable to grasp any of the eighth-grade curriculum. In reality, Student was becoming more and more frustrated at school and was demonstrating ██████ stress and frustrations through meltdowns when arriving home. [█████'s Test.]
33. For the April 2024 IEP Team meeting, Parents submitted a set of written parental concerns, dated April 18, 2024. [P-43; A-1035] Their concerns included ██████'s failure to acknowledge Student's autism diagnosis or any of Dr. ██████'s other conclusions [P-43; A-1062]; Student's complete lack of friends in ██████ mainstream classroom settings [P-43]; and Student's substantial need to work on functional and community skills as well as transitional programming. [P-45]
34. At the IEP Team meeting held on April 19, 2024, ██████ proposed a new IEP. [A-1006; A-1173] Discussing the status of the testing to determine whether Student qualified as a student with Autism, Attorney Zelin told the IEP Team that the ADOS-2 "is the gold standard for diagnosing autism." [A--1176].
35. School psychologist ██████ offered to do administer the ADOS-2. [A-1179; A-1181] On April 30, 2024, Parents signed consent for the ADOS and an observation by ██████ from ██████ High School. [A-1185] The IEP Team also agreed that Student will likely remain eligible for special education until ██████ ages ou on ██████ 22nd birthday, receiving only a certificate of completion instead of a regular high school diploma, and that the next draft IEP would reflect this consensus. [A-1078]

36. ██████████, Student's remote case manager at ██████████ during Student's seventh grade year (December 2022-June 2023), later worked at ██████████ ██████████ High School as an "Intervention Class" teacher during 2023-2024. ██████████ warned ██████████ that Student would, at a minimum, require a dedicated 1:1 aide at the high school; ██████████ also indicated that the intervention classes at ██████████ were "ZOOs," that the classes ██████████ had taught had eleven students (not six as indicated by ██████████), and that the Intervention Classes have no paraeducator support. [P-78]
37. Parents continued to refuse to consent ██████████'s eighth grade IEP offers, which called for placement in a general education setting with "push-in" special education services and related services. [██████████'s Test.]
38. In May 2024, ██████████ from ██████████ observed Student at ██████████ Elementary School. [A-1224] Based on an observation of Student supposedly doing exercises involving the Pythagorean Theorem, he opined that "[h]██████████ math fluency skills will allow ██████████ to perform high school math assignments with assistance and direct instruction. The skills ██████████ demonstrated did not reflect the scores on ██████████ most recent evaluation. Without a calculator or multiplication chart Student was able to multiply in ██████████ head." [A-1224] ██████████ testified that ██████████ believed the ██████████ observation report to be fraudulent, as Student has no idea about the meaning of the Pythagorean Theorem, how to use it, or even the multiplication facts needed to employ it. [██████████ Test.]
39. At the IEP Team meeting held on May 28, 2024, ██████████ presented Parents with a draft IEP. [A-1232] It provided for ██████████ specialized instruction to be delivered in regular education classes. [A-1251; A-1265] At this meeting, there continued to be discussion about changing Student's IEP to reflect a certificate of completion and aging out of services, rather than an expectation that ██████████ would earn a regular high school diploma. ██████████ explained that "earning a regular high school diploma has never been out goal," with their target being to prepare Student with vocational and community-based skills. [A-1266] Attorney Zelin agreed ██████████ would likely remain in special education until ██████████ ages out at age 22. [A-1266]

40. Father explained to the IEP Team that Student had not known the answer to “2+1” the day before, and ██████ indicated that ██████ could not perform even simple math problems: “Student has a difficult time retrieving information that ██████ may have done successfully even the day before.” [A-1268] ██████ stressed that “Student has never been able to do multiplication at home. ██████ knows the Pythagorean theorem but has no concept of how to solve it.” [A-1269]
41. Despite the IEP Team’s consensus, ██████ proved unable to administer the ADOS-2 because ██████ would not be able to become trained and certified in the use of that instrument until at least July (assuming ██████ employer were willing to send ██████ to the training). [A-1270] ██████ indicated that ██████ would be completing an independent neuropsychological evaluation. [A-1270] The NESCA evaluation was necessary because the District would not consider any of Dr. Engelman’s test results or recommendations. [████████ Test.]
42. ██████ described to the IEP Team that ██████ provided pull-out special education services through its so-called “intervention classes.” [A-1271] He falsely claimed that these classes consist of about six students per class, who share a paraprofessional. ██████ designed Student’s IEP to align with the “intervention class” model at ██████ Student would have three different teachers (reading, writing, and math) for ██████ intervention block classes. [A-1271] ██████ responded to the information about ██████ by stating that at the next meeting it “would be great to see a vocational program rather than [an academic] program.” [A-1273]
43. On June 7, 2024, Student came home from field day hysterically crying, following a bullying incident at school that drew no reaction from the teacher, who was on ██████ phone. ██████ played a recording of Student’s intense meltdown for the IEP Team at its next meeting. [████████’s Test.]
44. The next IEP Team meeting occurred on June 10, 2024. At that meeting, ██████ presented a new draft IEP. [A-1299; A-1329] ██████ took issue with the District’s observation reports, explaining to the Team that they were “questionable in terms of how I know Student. I live with ██████ and help ██████ with all of ██████ different school projects. And also this observation of the Pythagorean Theorem. ██████ can’t say what it is, not to mention figuring out one side of a hypotenuse. I would like that to be noted.” [A-1332]

45. ██████ told the IEP Team on June 10 that Student “has a fairly good memory. That’s different than cognition. And being able to retrieve that information for helpful use in ██████ upcoming school life.” [A-1332]
46. At the final IEP Team meeting, held on June 17, 2024, the Team reviewed a new draft IEP. [A-1356] Parents complained about the District having called DCYF to register a complaint against them. [A-1395] They also challenged the proposed IEP, with ██████ noting: “I don’t feel like the services are at all adequate. . . . I’m not seeing anything related to community services, vocational, life skills. That’s the focus and priority for Student.” [A-1396] Their advocate stressed that their desire for Student was “a vocational/ community service track” rather than an academic track during high school. [A-1397] ██████ explained that “[t]he true art of the vocational piece would be aligning whatever it is with ██████ strengths.” [A-1397] When questioned about the potential benefit of being educated in the general education environment, ██████ stated that ██████ had no mainstream friends and that ██████ non-disabled peers would ask ██████ why ██████ has no phone and why ██████ doesn’t swear like them. [A-1398] ██████ also explained, for the IEP’s transition plan, that Student wants to work at a Hannaford store, not be a police officer. [A-1403]
47. Although there was discussion of the ██████ life skills program, [A-1408] Student’s case manager, ██████, made clear that the District was offering “4 x 50 service grids” (four days per week for 50-minutes) in the high school’s intervention classes. [A-1409] ██████, the incoming special education director, reinforced that the placement offer was ██████ [A-1411]

PROPOSAL FOR NINTH GRADE (2024-2025)

48. While the written prior notice proposed an IEP for Student with 50-minute intervention classes in math, reading, and writing for four days per week, plus two electives, it also stated that “[t]he rest of the school day to be spent in the Life Skills Program to work on functional life skills” [A-1412] The resulting IEP proposal, however, contained no reference to life skills goals or services, nor did it contain any transition services at all. [A-1415; A-1434] The proposed IEP does reference four hours per day of “Shared Para Support for Academics” in the regular education setting but provides no other detail. [P-1434]

49. Parents rejected the 2024-2025 IEP and placement proposal on July 3, 2024, due to its inappropriateness for Student. [A-1471; A-1471] They based their decision on Student’s requirement of a comprehensive life skills program, with vocational and community services, in a placement as described in [REDACTED] independent evaluation.

DR. CURRIE’S INDEPENDENT EVALUATION

50. Dr. [REDACTED] of [REDACTED] completed [REDACTED] report of Student’s test results on July 31, 2024. [P-080]
51. Dr. [REDACTED] is an experienced pediatric neuropsychologist who has been in practice with [REDACTED] since obtaining [REDACTED] Ph.D. from Suffolk University in 2011. [REDACTED] is currently the Director of Clinical Training and New Hampshire Operations for [REDACTED]. [REDACTED] evaluates approximately 66 children per year with a wide range of diagnoses. [REDACTED] has special expertise in both autism and developmental trauma, both of which are relevant to this case. Nearly 5% of [REDACTED] evaluation work has focused directly in the narrow area involving the intersection of autism and developmental trauma. [REDACTED] met with and tested Student in July 2024. [REDACTED] Test.]
52. Dr. [REDACTED] wrote of Student’s test behavior that [REDACTED] “was over-animated in [REDACTED] expression, using dramatic nonverbal gestures, slightly loud volume, and slightly atypical prosody and intonation in [REDACTED] speech,” and that [REDACTED] “handwriting was rather underdeveloped, at times difficult to read.” [P-87]
53. Dr. [REDACTED] measured Student’s cognition using the Stanford-Binet-5 Abbreviated, on which [REDACTED] obtained a standard score of 58, consistent with past IQ testing. [P-88] Student struggled with abstraction and both inductive and deductive reasoning on this test. [REDACTED] Test.]
54. On the KTEA-3 academic testing administered by Dr. [REDACTED] scored using grade norms that produce higher scores for students older than most in their grade—Student obtained standard scores of 50 in Written Expression [P-88], 73 in Letter & Word Recognition, 62 in Reading Comprehension, 52 in Math Concepts & Applications, 40 in Math Computation, and 62 in Listening Comprehension. [P-89]

55. Dr. ██████ administered the ADOS-2, which resulted in a conclusion that Student is in the “High” range for autism spectrum disorder, and the CARS-2, which revealed that Student has “Mild to Moderate” symptoms of autism spectrum disorder.” [P-91] Dr. ██████’s testimony explained that the ADOS-2 is a structured, interactive, 1:1 assessment. In this case, Student’s score of 21 on the ADOS-2 (well above the cut-off score of 9) with a severity rating of 10 (the highest score available) revealed Student’s underlying patterns of atypicality—including restricted and repetitive behaviors and sensory-seeking behaviors—that are relevant to an autism diagnosis. Dr. ██████ further described, having reviewed the Paraeducator’s Notebook (Series E) after completing ██████ report, that the anecdotal behavioral data recorded during eighth grade documenting Student’s avoidance, pseudo-aggression, and emotional responses to instruction, buttressed the conclusions ██████ reached from the ADOS-2 and CARS-2 (on which Student’s score of 31 was at the midpoint of the “mild to moderate” range). [██████ Test.]
56. Dr. ██████ diagnosed Student with a moderate intellectual disability and ADHD-combined type, as well as Autism Spectrum Disorder, level 2. [P-92] ██████ report indicates that “[w]hile there may be times when Student can memorize and attempt some higher-level content, with a significant degree of support, prompting, and accommodation, there is little functional benefit.” [P-093] As Dr. ██████ explained, Student’s rote memorization skill gives ██████ a “splintered” profile, but this relative strength “doesn’t really get ██████ anywhere” because ██████ lacks the underlying contextualization and ability to use what ██████ has memorized functionally. ██████ rote memory approach to academic tasks also leaves Student at a high risk for regression. [██████ Test.]
57. Dr. ██████ further noted that “[e]xpressive and receptive language impairments remain noteworthy challenges for Student.” [P-94]
58. Dr. ██████’s report recommended: “Given Student’s cognitive profile, limited academic proficiency, lower processing speed and executive functionin, low oral comprehension, variable and weak memory skills, and social impairment and immaturity, among other concerns, ██████ is not an individual who should be educated within a general education setting.” [P-93] Rather, ██████ “requires placement in a substantially separate year-round special education program for all classes and portions of ██████ school day. ██████ should not be within a general education setting for any portion of ██████ day.” [P-95]

59. Dr. [REDACTED] explained in [REDACTED] testimony that Student needs to be part of a group process, with a cohort of real peers with similar profiles, to build the vocational, community, social-pragmatic, and life skills [REDACTED] will need to have an opportunity to transition to work and adult life. [REDACTED] made it clear that [REDACTED] opinion concerning Student's educational needs and how to address them does not turn on whether Student is diagnosed with autism, [REDACTED] Test.]
60. Dr. [REDACTED] criticized [REDACTED]'s June 2024 IEP and placement proposal as inappropriate for Student based on (1) its overreliance on accommodation, modification, and constant adult support (which make it difficult to assess what Student can really do on [REDACTED] own because "we don't know the real Student"); (2) its failure to provide [REDACTED] with the social-pragmatic, life skill, and community-based transitional skill-building [REDACTED] requires; and (3) its focus on having Student learn modified material nearby typically developing peers, while not really being included in those settings. [REDACTED] described the least restrictive environment appropriate for Student as one that is year-round and features small class sizes; a staff highly specialized in working with student's with Student's disability profile; lack of reliance on modification, accommodation, and paraeducator support; a peer cohort with similar cognitive and language abilities to allow [REDACTED] to learn how to function in a group and build relationships; instruction focusing on functional academics and transitional skills (including community engagement and life skills); explicit instruction in sex, health, and relationships at [REDACTED] functional level; direct speech-language and occupational therapy; and productive use of [REDACTED] splinter skills to improve [REDACTED] level of overall functioning. [REDACTED] Test.]

PLACEMENT CONSIDERATIONS FOR 2024-2025

61. [REDACTED] testified that Dr. [REDACTED]'s portrayal of Student 's needs and [REDACTED] recommendations were "right on the mark," explaining that "programming at the high school is not appropriate for [REDACTED] and that "the high school will not be able to prepare [REDACTED] for productive living" as an adult. With regard to [REDACTED]'s argument about the high school being the least restrictive environment appropriate for Student, [REDACTED] confirmed that Student has nothing in common with [REDACTED] non-disabled peers, has no positive social connections at all, and "cannot keep up with them." [REDACTED]'s Test.]

62. █████ continued to search for potentially appropriate placements consistent with Dr. █████'s and Dr. █████'s recommendations. █████ emailed █████ about █████ on August 5, 2024, explaining what the District would need to do for Student to be considered for one of the two open slots at that potential placement. [A-1498] As █████ explained, Student has no issue with being transported by car, so █████ would be a viable placement option for █████ [█████ Test.]
63. Parents seek an order determining that █████'s 2024-2025 IEP and placement offer is inappropriate, that Student is entitled to an out-of-district placement with the programming and features described in █████ independent evaluation, and that Student should be categorized as qualifying under the IDEA with autism. [█████'s Test.]

ARGUMENT

I. █████ HAS NOT MET ITS BURDEN TO PROVE THAT ITS JUNE 17, 2024 IEP AND PLACEMENT OFFER WAS APPROPRIATE FOR STUDENT.

The first issue to be determined in this hearing is whether █████ met its burden of proving that its June 2024 IEP and placement offer is appropriate for Student. Under New Hampshire law, N.H. RSA 186-C: 16-b, III-a, █████ bears the burden of proving “the appropriateness of [Student’s] program or placement . . . proposed by the public agency. This burden shall be met by a preponderance of the evidence.” For the reasons explained below, the hearing officer should rule that █████ has not met this burden and, instead, has denied Student a free appropriate public education (“FAPE”) in violation of the IDEA.

A. The *Andrew F.* Test for Substantive Appropriateness of IEPs and Placements under the IDEA.

The Supreme Court has described the IEP as “the centerpiece of the [IDEA]’s education delivery system for disabled children.” *Honig v. Doe*, 484 U.S. 305, 311 (1988). The First Circuit has explained that an appropriate educational program, at a minimum, must be directed toward “the achievement of effective results—demonstrable improvement in the educational and personal skills identified as special needs—as a consequence of implementing the proposed IEP.” *Town of Burlington v. Dep’t of Educ., Massachusetts*, 736 F.2d 773, 788 (1st Cir. 1984). An appropriate IEP must address the student’s needs both with regard to academic achievement and functional performance. *See* 20 U.S.C. § 1414(d)(1)(A).

In addition to developing an appropriate IEP, school districts also must offer each student with disabilities an appropriate placement in which the IEP can be successfully implemented. The placement must be capable of fully delivering the services set forth in the IEP in an effective manner; if a student’s placement interferes with implementation of appropriate programming, this would amount to a violation of the child’s substantive right to a FAPE. *See Sudbury Pub. Sch. v. Mass. Dep’t of Elem. & Secondary Educ.*, 762 F. Supp. 2d 254 (D. Mass. 2010) (FAPE violation because placement included large classes that failed to meet student’s “unique . . . need to be in a small class setting for all classes.”).

In *Bd. of Educ. v. Rowley*, 458 U.S. 176, 207 (1982), the U.S. Supreme Court first held that the IDEA “establishes a substantive right to a ‘free appropriate public education’” *Andrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988

(2017). The *Rowley* Court, however, did not attempt “to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act.” *Id.* at 202. In 2017, the Court finally addressed the “more difficult problem” left open in *Rowley* by establishing a legal test for the appropriateness of IEPs. *Endrew F.*, 137 S. Ct. at 993, 998 (*Rowley* “was not concerned with precisely articulating a governing standard for closer cases”).

In *Endrew F.*, the Court explained that the IDEA’s mandates “require careful consideration of the child’s individual circumstances.” *Id.* at 994. Generally, the IDEA requires “an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Id.* at 999. Under *Endrew F.*, therefore, individualization is critical: “The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created.” *Id.* at 1001; *see also O.V. v. Durham Pub. Sch. Bd. of Educ.*, 2021 WL 1430768, at *15 (M.D.N.C. Apr. 15, 2021) (“A focus on the particular child is at the core of the IDEA. The instruction offered must be ‘*pecially designed*’ to meet a child’s ‘*unique needs*’ through an ‘*individualized*’ education program.’ §§ 1401(29), (14) (emphasis added). An IEP is not a form document. It is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth. §§ 1414(d)(1)(A)(i)(I)-(IV), (d)(3)(A)(i)-(iv).”). *Id.* at 1001.

Consistent with *Endrew F.*, the standard of appropriateness in this case must turn on Student’s unique needs and the type and intensity of specialized instruction and related services ■■■ requires to have ■■■ disability-related issues effectively

addressed.¹ *See also C.D. v. Natick Pub. Sch.*, 924 F.3d 621, 629 (1st Cir. 2019) (IEP must be “reasonably calculated to confer a meaningful educational benefit in light of the child’s circumstances”); *Johnson v. Boston Pub. Sch.*, 906 F.3d 182, 194 (1st Cir. 2018) (the IDEA’s FAPE standard “requires consideration of the individual child’s circumstances”). Accordingly, ██████████ must demonstrate that its IEP and placement offering satisfies this robust and highly individualized standard based on Student’s presentation and needs.

In addressing this question, the hearing officer must judge ██████████ IEP offer based on its actual documented provisions, not descriptions of what the IEP could or should have contained based on team discussions or the intent of ██████████ administrators or staff. In other words, the District bears the burden of showing that its IEP passes muster as written, not as it wishes it had been written. The First Circuit has made it abundantly clear that parents can enforce only those program and placement elements that are explicitly described in a student’s IEP. Mentions of potential programming (even if agreed upon by members of the IEP Team at a meeting) that are recorded only in written prior notice documents or meeting minutes do not suffice; only the resulting written IEP is enforceable as a matter of law. *Ms. M. v. Falmouth Sch. Dep’t*, 847 F.3d 19, 29 (1st Cir. 2017).²

¹ The Supreme Court has explained that the “prospective judgment” required to develop an appropriate IEP is a “fact-intensive exercise” to be “informed not only by the expertise of school officials, but also by the input of the child’s parents or guardians.” *Endrew F.*, 137 S. Ct. at 999.

² In its *Ms. M.* decision, the First Circuit relied on 20 U.S.C. § 1414(d)(1)(A)(i), which provides that an “IEP means a written statement,” and 34 C.F.R. § 300.324(a)(4)(i), which requires “any change or modification to a child's IEP [] be made via a

B. ██████████ IEP for Student Does Not Meet The *Andrew F.* Standard.

██████████ June 2024 IEP falls well short of meeting the IDEA’s standard of appropriateness as established in *Andrew F.* because it is not reasonably calculated to provide Student with a meaningful educational benefit in view of █████ unique circumstances. Student has an intellectual disability that limits █████ ability to advance academically, but █████ has many splinter skills and the potential to be a productive citizen and contribute to society if provided with appropriate instruction. Both Dr. █████ and █████ explained that Student requires a robust program that provides instruction in life and community skills, including transition, social pragmatic, and vocational services. This is consistent with the Congressional purposes that form the bedrock for the IDEA’s FAPE mandate for children with disabilities. The chief purpose of this mandate is “to meet their unique needs and prepare them for further education, employment, and independent living.”

20 U.S.C. § 1400(d)(1)(A).

Dr. █████ was clear in both █████ report and █████ testimony that, due to “Student’s cognitive profile, limited academic proficiency, lower processing speed and executive functioning, low oral comprehension, variable and weak memory skills, and social impairment and immaturity, among other concerns, █████ is not an

‘written document.’” *Id.* at 28. The Court concluded that other evidence of an agreement on services does not fall within the statutory definition of an IEP; as a result, parents can rely upon and enforce only those services expressly provided for in the IEP document issued by the school district. *Id.* at 28-29.

individual who should be educated within a general education setting.” [P-93] Yet ██████’s IEP continues to propose minimal pull-out special education (just three 50-minute periods on four days each week, for reading, writing, and math), thereby requiring ██████ to be instructed in mainstream high school classes with a paraprofessional for the remainder of ██████ school week.[A-1434] The eighth grade paraprofessional’s notebook provides an excellent window into how poorly this instructional approach has worked for Student. [E-1 through E-36] As Dr. ██████ explained, the Series E documents (which ██████ saw only after composing ██████ independent evaluation report) have reinforced ██████ opinion that mainstream education with active adult assistance and overreliance on modification is completely inappropriate for Student.

It is noteworthy that ██████, despite having the burden of proof on this issue, generated not one standardized test that supported the academic benefit of this instructional model. All of Student’s academic testing—whether administered by school district or independent evaluators—continues to show Student performing at the very lowest end of the bell curve, and ██████ Star testing results for reading and math both declined during the 2023-2024 school year. The point could not be clearer: while Student has some splinter skills, including the ability to engage in some rote memorization of facts and procedures, ██████ is incapable of profiting from grade level academic instruction, even if heavily modified and delivered with a healthy dose of adult assistance. Such instruction provides ██████ with zero functional benefit.

What Student requires to progress toward an adult life that could include employment and a level of independent living—as intended and desired by Congress—was well-described by Dr. ██████. ██████ “requires placement in a substantially separate year-round special education program for all classes and portions of ██████ school day. ██████ should not be within a general education setting for any portion of ██████ day.” [P-95] ██████ needs to be part of a group process, with a cohort of real peers with similar profiles, to build the vocational, community, social-pragmatic, and life skills ██████ will need to have an opportunity to transition to work and adult life. [████████ Test.] The proposed June 2024 IEP is miles from meeting this mark. It includes no specialized instruction designed to develop Student’s functional life skills, community-based skills, social-pragmatic skills, or vocational skills.

[A-1434]

District witnesses tried to tout PMHS’s so-called “Life skills” program, despite the departure of that program’s teacher, but nothing in the proffered IEP references any such programming for Student. Under *Ms. M. v. Falmouth*, this omission dooms the IEP’s ability to provide ██████ with a FAPE and Parents were correct to deny consent for the proposed program. Regardless of any team discussions or the content of the written prior notice, an IEP can be found appropriate only if the IEP document itself satisfies the *Andrew F.* standard. Further, although the IEP does contain the beginnings of a post-secondary transition plan—which obviously was not updated in June 2024 (it states that “Student will work in law enforcement” despite ██████ expressed change of

preference)—it contains zero transition services. [A-1423 through A-1427]. Student will turn 16 in just a few weeks, but the IEP contains nothing for ■■■ by way of transition services, despite ■■■ critical needs in this area.

The Hearing Officer should rule that the June 2024 IEP is fatally defective because ■■■ failed to meet its burden of proving that its proposed IEP and placement are appropriate to address Student’s unique needs with ambitious goals and effective services. The proposed IEP is, in fact, totally at odds with Student’s disability profile and completely fails to address ■■■ unique needs. Because ■■■ has failed to meet its burden of proof concerning the IEP and placement, it has denied ■■■ a FAPE for 2024-2025.

II. STUDENT REQUIRES AN OUT-OF-DISTRICT PLACEMENT CAPABLE OF PROVIDING A SETTING, PEER GROUP, INSTRUCTORS, AND SERVICES CONSISTENT WITH DR. ■■■’S RECOMMENDATIONS.

The second issue to be determined in this hearing is whether Student requires an out-of-district placement to receive a FAPE, *i.e.*, to implement the special education programming that is necessary and appropriate for meeting ■■■ needs. New Hampshire law continues to assign the burden of proof to the District to demonstrate that it has acted appropriately in determining the “placement . . . proposed by the public agency.” N.H. RSA 186-C: 16-b, III-a. ■■■ has failed to meet this burden with regard to its proposal of placement at ■■■. It seeks to justify its proposal of a public school placement, with access to mainstream classes,

by inaccurately over-generalizing the IDEA's "least restrictive environment" concept.

The IDEA does not require that every student be educated in the least restrictive environment available. Instead, the statute requires, with precise language, that each student with a disability be educated in the least restrictive environment that is appropriate to meet [REDACTED] or [REDACTED] unique needs:

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(a)(5)(A) (emphasis added). [REDACTED] surely will argue that it is a benefit for Student to have contact with non-disabled high school peers, but at the hearing it produced only platitudes from its witnesses on this point. [REDACTED] offered not one piece of actual evidence tending to demonstrate the existence of mainstream benefits for Student. By contrast, [REDACTED] vividly described Student's constant level of stress and frustration, which resulted directly from [REDACTED] being instructed in mainstream classes with a shared paraprofessional. [REDACTED] negative reaction to this instructional approach included intense meltdowns after school and complaints about peers bullying and teasing [REDACTED] because [REDACTED] had no cellphone and was unwilling to swear. Student has no non-disabled school friends. In fact, the only school friend identified by a District witness was a young woman with more

significant disabilities, who formerly shared a paraprofessional with Student during fifth grade. [REDACTED] also produced zero evidence of Student enjoying positive interactions with mainstream peers. What [REDACTED] did produce for evidence was the paraprofessional's notebook [Series E]. That journal of notes—along with Student's consistently poor record of measurable academic growth—plainly documents why “the nature or severity of [Student's] disability . . . is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 20 U.S.C. § 1412(a)(5)(A).

With respect to the proffered placement at [REDACTED], [REDACTED] affirmative evidence was no better. It presented exactly zero witnesses who would be employed at [REDACTED] for 2024-2025, despite claiming that [REDACTED] had a transition coordinator, a new life skills teacher (last year's teacher left), and new intervention class instructors (most of last year's intervention staff also departed). One of the departed intervention class teachers is [REDACTED]. [REDACTED] initially met Student in mid-seventh grade, when [REDACTED] served as Student's remote case manager. [REDACTED] then went on to teach at [REDACTED] for 2023-2024. This past spring [REDACTED] reached out to [REDACTED] to address whether Student should be placed at the high school. Did [REDACTED] encourage Parents to keep Student in-district? No. [REDACTED] revealed that the intervention classes were much larger than claimed by [REDACTED] (who also has left [REDACTED] this year) and described the intervention classrooms as “ZOOs.” [P-079] With no testimony

from any current [REDACTED] staff, [REDACTED] cannot possibly meet its burden of proving the appropriateness of that placement for Student.

Dr. [REDACTED] criticized [REDACTED]'s approach to Student's placement proposal as inappropriate for Student based on its over-the-top reliance on accommodation, modification, and constant adult support. As [REDACTED] explained, the suffocating adult assistance and modifications that Student has received make it difficult to assess what Student can really do on [REDACTED] own. Dr. [REDACTED] also criticized [REDACTED] overall approach of having Student learn modified curriculum material while merely "nearby" typically developing peers. Under this model, Student is not honestly being "included" in such classes, despite [REDACTED] proximate physical presence. When asked to describe the least restrictive learning environment that would be appropriate for Student, Dr. [REDACTED] described a placement that: (a) is year-round; (b) features small class sizes; (c) is staffed by highly specialized instructors experienced in working with student's sharing Student's disability profile; (d) does not rely on modification, accommodation, and paraeducator support; (e) features a cohort of peers with similar cognitive and language abilities, to allow Student to learn how to function in a group and build relationships; (f) focuses its instruction on functional academics and transitional skills (including community engagement and life skills); (g) provides explicit instruction in sex, health, and relationships at Student's learning and developmental level; (h) offers direct speech-language and occupational therapy; and (i) is capable

of making productive use of Student's splinter skills to improve [REDACTED] overall level of functioning. [REDACTED] Test.]

The Hearing Officer should reject [REDACTED]'s proposed placement at [REDACTED] as being inappropriate for Student and adopt Dr. [REDACTED]'s excellent description of Student's appropriate [REDACTED], given the severity and pervasiveness of [REDACTED] disability profile. As it would be impossible for [REDACTED] to satisfy the placement features described by Dr. [REDACTED], only an out-of-district placement would be capable of meeting [REDACTED] enumerated needs. In attempting to identify an appropriate out-of-district placement for Student, [REDACTED] has done far more than the District. [REDACTED] has conducted a search and recently identified the [REDACTED] and [REDACTED] as potentially appropriate options. Both have either existing or forthcoming openings for new students. Parents communicated these options to [REDACTED]'s special education director [A-1498] but there is no evidence that [REDACTED] has made any attempt to explore such placements as being appropriate for Student. The Hearing Officer should determine that Student requires an out-of-district placement as described by Dr. [REDACTED] and order [REDACTED] to send Student to such a placement capable of implementing [REDACTED] revised IEP, in conformity with Dr. [REDACTED]'s recommendations.

III. STUDENT QUALIFIES UNDER THE IDEA AS A STUDENT WITH A DISABILITY OF AUTISM.

The final question to be resolved by this hearing is whether Student's IEP should be amended to add the identification category of Autism to ■■■ eligibility. It is important to realize, however, that whether Student qualifies as a student with autism—in addition to ■■■ existing categories of intellectual disability and speech-language impairment—does not affect the analysis of either of the first two issues. Dr. ■■■ made clear in ■■■ testimony that Student's "needs are ■■■ needs," regardless of how ■■■ disability is legally categorized.

Under the IDEA, autism is one of the specific categories for special education identification. *See* 20 U.S.C. § 1401(3). The federal regulations provide a definition of autism: "a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences." 34 C.F.R. § 300.8(c)(1)(i).

■■■ rejected Dr. ■■■'s 2023 opinion that Student is autistic.³ Attorney Zelin and others on the IEP Team then insisted that the "gold standard"

³ As referenced on the record at the hearing, Parents object to ■■■'s motion to exclude Dr. ■■■'s reports from the record. This argument, based only on ■■■ purported lack of qualifications to serve as a New Hampshire evaluator, overlooks several factors: (1) the IDEA's "qualified evaluator" standard relates only to independent evaluations for which the parents seek public funding, 34 C.F.R. § 300.502; (2) the ■■■ evaluation was obtained at private expense; the family

for diagnosing a student with autism is the Autism Diagnostic Observation Scale, second edition, more commonly known as the ADOS-2. [A-1176] Thereafter, the IEP Team agreed to have ██████'s new school psychologist administer the ADOS-2. In late April 2024, Parents granted their consent for the ADOS-2 testing to occur through ██████. [A-1185] On May 28, 2024, however, Parents learned that ██████ was not qualified to administer the ADOS-2, at which point they determined to have Dr. ██████ cover this assessment as part of ██████ upcoming neuropsychological evaluation. [A-1270]

Dr. ██████ is well-qualified to administer not only the ADOS-2 but also the Childhood Autism Rating Scale, second edition, more commonly known as the CARS-2. ██████ used both instruments in July to provide Student with a comprehensive diagnostic autism assessment. The ADOS-2 results showed Student as being in the "High" range for autism spectrum disorder, while the CARS-2 revealed that Student has "Mild to Moderate symptoms of autism spectrum disorder." [P-91] Dr. ██████ explained how ██████ ruled out other potential factors, including Student's history of developmental trauma, in arriving at ██████ autism diagnosis. [██████ Test.] ██████ further testified that the anecdotal behavioral data

has not sought public funding under the IDEA; (3) the IDEA permits parents to pursue "an evaluation obtained at private expense," which "may be presented by any party as evidence at a hearing on a due process complaint," which is exactly what has occurred here, and (4) both parties have submitted the ██████ report in evidence, because it has been referenced at numerous IEP Team meetings and by other evaluators. Although Parents are relying on Dr. ██████'s independent evaluation report, there is no basis on which to exclude the ██████ report from the record.

recorded during eighth grade in the Paraeducator's Notebook (Series E), which ■■■ did not have when completing ■■■ report, buttressed the conclusions ■■■ reached from the ADOS-2 and CARS-2. [■■■■ Test.] An expert evaluator has now assessed Student using what ■■■■ acknowledges is the "gold standard" for autism diagnoses, and confirmed those results using another well-respected measure and a review of newly disclosed behavioral data. All the evidence points in one direction: Student should be qualified under the IDEA as a student with autism, along with ■■■ existing categories.

CONCLUSION AND PROPOSED RULINGS

For all the reasons enumerated above, Parents request that the Hearing Officer reach the following conclusions of law:

1. ■■■■ has failed to meet its burden of proving by a preponderance of the evidence that its June 2024 IEP and placement offer for Student was appropriate under the IDEA, per the standard set forth in *Andrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017).
2. An out-of-district placement providing the programmatic and other features described in Dr. ■■■■'s evaluation report is the least restrictive learning environment that would be appropriate for Student.
3. Student qualifies for special education services under the IDEA category of autism.

Parents respectfully request, therefore, that the Hearing Officer issue an order in their favor requiring ■■■■ to (a) develop and issue a new 2024-2025 IEP for

Student that conforms with the recommendations of Dr. [REDACTED]'s evaluation,
(b) engage in identifying an appropriate out-of-district placement that meets the
criteria described by Dr. [REDACTED] and is capable of implementing the revised IEP, and
(c) include Autism as an eligibility category on Student's revised IEP.

Dated: August 22, 2024.

Respectfully submitted,

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