

**NH DEPARTMENT OF EDUCATION  
SPECIAL EDUCATION DUE PROCESS HEARING  
HEARING DECISION AND ORDER**

**Cover Sheet and Index of Names**

In the Matter of	)	IDPH-FY-25-07-001
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Student	)	
	)	
&	)	
	)	
Nashua School District	)	

Hearing Date: October 1 and 2, 2024

Guardian: 

Advocate for Guardian: Kristen Mansharamani

Counsel for School District: Stephen Bennett, Esq.

Hearing Officer: James Baron, Esq.

**INDEX OF NAMES**

**[REDACTED] / Nashua School District – IDPH-FY-25-07-001**

Guardian	[REDACTED]
[REDACTED]	[REDACTED]
DHHS COO	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
Principal	Patricia Beaulieu
[REDACTED] Teacher	Kendra Stephens
OOD Coordinator	Kerry Curtis
Sped Director	Daniel Alexander

**New Hampshire Department of Education  
Student / Nashua District  
IDPH-FY-25-07-001**

**Due Process Decision**

**I. Procedural Background and Issues**

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

Guardian filed for due process on July 22, 2024. The Nashua District (“Nashua” or “District”) did not file a response, but stated via email on August 20, 2024 that its position is explained in the Written Prior Notice dated 09/26/2027 (sic). Also on August 20, 2024, Nashua, through counsel, submitted a “Motion to Continue and Reschedule Pre-Hearing.” Nashua sought to continue the prehearing conference “until a date after the scheduled mediation in this matter (August 29, 2024).” Guardian did not object to the rescheduling. However, each party documented issues with the other party. Based on (1) the disagreements documented by both sides, (2) the failure of the parties to propose specific dates for a rescheduled prehearing conference and (3) limited scheduling availability for a prehearing conference between August 30, 2024 and the date by which exhibits and witness lists were due (September 9, 2024), the Motion to Continue was denied.

A prehearing conference was held on August 21, 2024. Hearing dates were set for September 16 and 17, 2024.

On September 12, 2024, the District submitted a “Motion to Continue” the due process hearing due to the District’s attorney being ill. The District explained through its Motion, “Counsel has been unable to meet with witnesses and complete preparation for hearing due to [attorney’s] illness...” Alternative dates for hearing and decision due date were not provided in the Motion to Continue.

The Hearing Officer granted the Motion to Continue, and scheduled a prehearing conference for September 16, 2024 for the purpose of setting new dates for hearing and related matters. The hearing was rescheduled for October 1 and 2, 2024.

There were three issues for hearing:

1. Whether a year-round, residential placement is the least restrictive environment that is reasonably calculated to allow Student to receive FAPE;

2. If the Student does require a year-round, residential placement, whether New England Center for Children (“██████████” is an appropriate placement;
3. If ██████████ is an appropriate placement, and if Guardian has paid tuition to ██████████ for a unilateral placement, whether Nashua should reimburse Guardian for tuition paid by Guardian.

A due process hearing was conducted via Zoom on October 1 and 2, 2024, starting at 9:00 A.M. each day. The Guardian was represented by the New Hampshire state Advocate for Special Education. Nashua was represented by counsel.

The Guardian called five witnesses:

- The Guardian;
- The Behavior Analyst from ██████████ ██████████
- The Chief Operating Officer of the Division of Long Term Supports and Services at the New Hampshire Department of Health and Human Services (“DHHS COO”);
- The BCBA and Program Director from the ██████████ (“██████████ BCBA”);
- The Senior Director of Participant Directed Services at ██████████ (“██████████ Director”).

The District called four witnesses:

- The District’s Elementary School Principal (“Principal”);
- Student’s teacher from ██████████ ██████████ (“██████████ Teacher”);
- The District’s Out-of-District Coordinator (“OOD Coordinator”);
- The District’s Director of Special Education (“Sped Director”).

Also attending the hearing during the testimony of the ██████████ BCBA were ██████████’s attorney and ██████████’s Director of Compliance.

The official record of the hearing consists of eight exhibits submitted by the District, totaling 110 pages; thirty-two exhibits submitted by the Guardian, totaling 186 pages; and the Zoom voice and video recordings. Neither party labeled exhibit numbers, so this decision will only reference page numbers rather than exhibit numbers.

Both parties submitted post-hearing memoranda with Proposed Findings of Fact and Proposed Rulings of Law.

## II. Findings of Fact

1. I note at the outset the failure of both parties to submit as evidence what should be very basic and important information for a due process case that concerns issues of a Free Appropriate Public Education (“FAPE”), Least Restrictive Environment (“LRE”) and placement. Other than one draft IEP written by [REDACTED] in [REDACTED] IEP format, neither party submitted an IEP as an exhibit. Other than one IEP Progress Report written while Student was hospitalized at [REDACTED] in September 2023, there are no IEP Progress Reports from the 1<sup>st</sup> or 2<sup>nd</sup> grade. There is one IEP response – a January 2022 rejection of an IEP that I have not seen. There are no Functional Behavioral Assessment (“FBA”) reports, report cards, or incident reports. I also note the absence of testimony from any District teacher, BCBA, RBT, School Psychologist, or service provider who worked with Student while Student attended the local public elementary school. I also note that if there is an Interagency Agreement pursuant to RSA 186-C:7-a, that also was not provided.
2. The Nashua School District is the Local Education Agency (“LEA”) responsible for educating the Student.
3. Student is nine-years-old and in the third grade. Student’s grandparent has served as the legal Guardian since 2017.
4. Student is currently enrolled in the residential program of [REDACTED].
5. Student qualifies as a student with a disability under state and federal special education laws. Student is diagnosed with autism.
6. As an infant, Student did not respond when spoken to or respond to loud noises, but Student’s hearing did not show any issues when tested. Student displayed abnormal behaviors, such as crawling oddly and flapping arms like a bird (Guardian).
7. In 2016, while still living with parents in [REDACTED], Student was diagnosed with moderate to severe autism by Tufts Medical Center. Student then started with Early Intervention in Lowell, MA. Student also participated in a feeding program at Lowell General Hospital, but that program was not successful (Guardian).
8. Once Guardian obtained guardianship in 2017, Student received services through [REDACTED] in New Hampshire. Services included ABA programming, physical therapy, occupational therapy and speech. Student received these services from 8:30

A.M. through 4:00 PM, Monday through Friday. Services were provided by [REDACTED] at [REDACTED]'s location, as well as in the home by [REDACTED], until Student started to attend the District schools as a 1<sup>st</sup> grader in March or April 2022 (Guardian; [REDACTED]).

9. [REDACTED] is one of ten area agencies in New Hampshire that provide services to people with developmental disabilities. These ten agencies are contracted by the Bureau of Developmental Services (“BDS”), a division of the Department of Health and Human Services (“DHHS”), to provide in-home support services through an in-home support waiver (DHHS COO; [REDACTED] Director).

#### 1<sup>st</sup> and 2<sup>nd</sup> Grade (Public Elementary School)

10. Student was 7-years-old when Student started to attend 1<sup>st</sup> grade at the local elementary school in March or April 2022. At that point, Student attended [REDACTED] for one-half of each school day and the local public elementary school for one-half of each school day. This split in time was at the recommendation of the District. Student took bus from [REDACTED] to the local public school each day around noontime (Guardian).
11. The local public school classroom was a K – 1 intensive needs special education classroom with six to eight other students (Guardian; Principal).
12. The [REDACTED] BCBA recommended to the District that Student should be provided with an RBT provided by [REDACTED] in school. In the alternative, the [REDACTED] BCBA recommended that the District provide Student with a 1-to-1 paraprofessional. The District rejected both recommendations and provided Student with a shared paraprofessional until October 2022 ([REDACTED]; Principal).
13. Guardian testified that the Extended School Year (“ESY”) service during the summer of 2022 was what she considered a “disaster.” Student cried during the commute and injured some people at school. Guardian was often called to pick Student up from school early (Guardian).
14. The District’s Assistant Director of Special Education promised the Guardian on July 28, 2022, “We have a 1:1 allotted for [Student] for the first day of school.” However, the District only provided a shared paraprofessional until October 2022 (P-3; Guardian; Principal).
15. In August 2022, the [REDACTED] wrote to the District, “It is imperative that [Student] receive 1:1 support to ensure [Student’s] safety as [Student] has a history of

- dangerous behaviors in [Student's] repertoire such as self-injury (head and chin hitting), aggression, and elopement.” (P5).
16. During Student's 2<sup>nd</sup> grade school year, Student was only able to take the bus to school once or twice at the start, but Student then refused to get on the bus, so Guardian needed to handle transportation both ways (Guardian).
  17. Guardian testified that reports from the school to the Guardian during 2<sup>nd</sup> grade were “not good.” Student damaged school property, and scratched and hit others. One day, Student engaged in head-banging hundreds of times. Student had to be placed in “that special room.” Student refused to go out during fire drills. Student refused to go to speech, OT or lunch (Guardian).
  18. Principal confirmed that Student's behaviors got significantly worse during 2<sup>nd</sup> grade. Student started to become unsafe even with Guardian in the car. Student would attack Guardian in the car going to or from school, forcing Guardian to pull over. Student started to engage in head-banging and other self-injurious behavior that school personnel had not seen before. The District, which previously only provided a shared paraprofessional, agreed to implement a 1-to-1 paraprofessional in October 2022, and there would often be two adults assigned to Student. Student had a designated, padded area that was referred to as Student's “office.” Principal testified that she saw injuries to Guardian caused by Student, including scratches and bruises. In October, Principal informed Guardian that Principal was going to call DCYF to see what other supports could be provided at home. Principal was concerned for the safety of both the Guardian and Student. DCYF did not step in. Student used to be able to go into the community, but was no longer able to do that. The Special Education office brought in outside supports, including a BCBA to try to meet Student's needs. Principal testified that Student's behaviors were overwhelming for school staff, and drove the decision to reduce Student's hours in school. Principal recalled that the Team sought an outside day placement because Student “needed more dedicated time, more specialty (sic). We felt like the program that we have was not meeting [Student's] educational needs.” Once Student started at [REDACTED] the only interaction Principal had with Guardian was when Guardian called to discuss a problem Student was having on the bus (Principal).
  19. Behaviors at home during 2<sup>nd</sup> grade also escalated. When Student had a hard day at school, Student also had a hard day at home (Guardian).
  20. The District's BCBA provided only consulting services, not direct services to the Student. There were two types of consultations. One type was a general weekly consultation to the staff not specific to the Student. The other type was an IEP consultation that occurred ten times per year specific to the Student. The Sped Director did not know for how long each IEP consultation occurred. At some point

- during the fall of 2023, the District also brought in an outside agency – Applied ABC from Manchester – to provide BCBA consultations, when the District saw more escalation of behavior. The outside BCBA provided support for bus transportation two to three times per week. The outside BCBA worked directly with the Student, but the Sped Director did not know for how much time, nor was this documented in any exhibit (Sped Director).
21. Despite all of the documented behavioral issues during 2<sup>nd</sup> grade, the District issued a Written Prior Notice (“WPN”) on December 2, 2022, documenting its refusal to seek a residential placement or a Functional Behavioral Assessment (“FBA”). The WPN stated, “At this time, [Student] is accessing [Student’s] education in [Student’s] current educational placement and is making progress. The team does not recommend a change in placement based on educational needs as this is least restrictive, appropriate environment and is reasonably calculated to confer meaningful educational progress in light of [Student’s] current circumstances.” (P-16).
  22. Student had home services from 4:00 – 6:00 PM each day from [REDACTED]. However, Student’s behaviors got so severe that [REDACTED] recommended 2-on-1 support for the [REDACTED] services, which both [REDACTED] and [REDACTED] had trouble obtaining. Guardian also tried unsuccessfully to hire additional support at home. By May 2023, Student’s behaviors at home got so severe that [REDACTED] needed to stop the home services altogether out of fear that their providers were going to be injured. Student was “constantly bashing [Student’s] head in the wall.” Student’s head-banging was so severe that neighbors reported glassware in their own houses would shake. A repair person counted thirty holes in the walls of Guardian’s home that needed to be fixed. Student scratched, hit, and bit the Guardian. Police and ambulance were sometimes called and Student would be brought to the emergency room. Neighbors called the police because they were concerned for Guardian’s safety when they saw the Guardian’s injuries. Doctors in the ER told Guardian that Student needed a residential placement. Guardian would relay that to the school, but District denied residential placement. Guardian testified that school office staff saw the injuries to the Guardian, which included scratches, bruises and bites. Guardian testified that Guardian looked like a “cat mauled me half the time.” (Guardian; [REDACTED]).
  23. The [REDACTED] believes that Student required a higher level of services than were being provided after school. The [REDACTED] also believes that Student’s behaviors were getting worse because Student did not have consistency across the day, resulting in adults in different settings responding differently to how Student was behaving ([REDACTED]).
  24. In November 2022, the [REDACTED] wrote a letter in which she documented that the Student’s behaviors were getting significantly worse, that Student requires



consistency in the Student's schedule and consistency in how adults respond to the Student's behaviors. She also documented her belief that Student requires 24/7 services ( [REDACTED] ; P5 – P11).<sup>1</sup>

25. Also during 2<sup>nd</sup> grade, Student tortured the family's dog at home, including grabbing the dog and throwing things at the dog. The dog was unable to find a safe place. Student's family needed to board the dog for two months for the dog's own safety (Guardian).
26. Guardian testified that the District reported to Guardian that Student engaged in self-injurious head-hitting 700 times in a single day (Guardian).
27. Guardian had a conversation with the Sped Director in which Guardian asked, "What if this were your child," to which the Sped Director answered, "Well, [Student] is not." (Guardian).
28. Student's doctors recommended residential placement. Guardian testified that Guardian provided District with letters from Student's Primary Care Physician ("PCP"), Neurologist, GI Doctor, Occupational Therapist, Speech and Language Therapist and [REDACTED] in which each recommended a residential placement for Student (Guardian; P-23 – P-25; P-28).
29. At the PCP office, Student fought with the nursing assistant, would fight with staff, would go to the floor and make it impossible to even examine Student. Guardian testified that because of Student's behaviors, they had to stop going to the doctor's office altogether (Guardian).
30. The District cut down Student's hours at school to four hours per day, and then eventually to two hours per day, because Student was engaging in self-injurious behavior and it was not safe for Student to be at school (Guardian; Sped Director).
31. DHHS had concerns that Student was not receiving a full day of schooling, which in turn created hardships for the caregivers at home (DHHS COO).
32. The DHHS COO testified that at a meeting with the District regarding the Student, the DHHS COO expressed concern about Student not receiving a full day of school and the hardship that was creating for the family. The DHHS COO inquired about residential services on behalf of the Student. The School Psychologist responded (as recalled in testimony by the DHHS COO), "I 100% support what you are saying for

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<sup>1</sup> P-5 – P11 is a letter written by the [REDACTED] with dated notes of Student's behaviors. However, the pages within the submitted exhibit are out of order.

- residential services, but unfortunately the administration does not agree.” (DHHS COO).
33. In similar testimony, the [REDACTED] Director recalled that in a regularly scheduled monthly meeting with state representatives, the School Psychologist, who attended on behalf of the District, stated that the IEP Team agrees that Student requires a residential placement, but that District administration disagrees ([REDACTED] Director).
  34. Guardian testified that Guardian “never stopped” requesting a residential placement (Guardian).
  35. The Principal called DCYF and also advised Guardian to call DCYF. DCYF investigated and tried to obtain help, including helping Guardian to apply for a Child in Need of Services (“CHINS”). DCYF told Guardian there were no services they could provide. There was no indication of any abuse or neglect. The CHINS petition was not approved, though there is conflicting evidence regarding the reason. On the one hand, a DCYF form provided as an exhibit indicates DCYF, “on behalf of [DHHS], has determined... DHHS does not consent to the filing of a CHINS petition...” On the other hand, the DHHS COO testified that a CHINS petition was explored but not pursued. When asked why a CHINS petition was not pursued, the DHHS COO testified, “I cannot speak for another department.” The [REDACTED] Director testified that DHHS denied the CHINS petition because children are required “to be able to engage by statute... in the CHINS process, court proceedings and goal work... and [Student]... would not be able to engage in that way given [Student’s] limitations related to [Student’s] autism spectrum disorder and [Student’s] communication challenges.” (Guardian; DHHS COO; [REDACTED] Director; P-48).
  36. District continually denied Guardian’s requests for residential placement, but by December 2022, did agree to pursue an out-of-district day placement (Guardian).
  37. By January 2023, Student was refusing to go to private providers, such as Speech and OT. The speech therapist tried to provide services in the car, but that did not work. Eventually, all outside services were stopped (Guardian).
  38. Guardian testified that prior to 2<sup>nd</sup> grade, Student was able to go out with Guardian to stores, restaurants, play areas, doctor and service providers’ offices, and to visit family. As 2<sup>nd</sup> grade progressed, Student’s behaviors worsened to the point that Student was no longer able to do any of those outside activities (Guardian).

- ██████████ ██████████
39. The only day placement that accepted Student was ██████████ in ██████████, NH. However, this resulted in a one-hour commute each way. Student attended ██████████ from May 1, 2023 until mid-June 2023 (approximately six weeks). Student's behavior on the van got progressively worse. Student was initially accompanied by an RBT on the van, but that was then supplemented with a BCBA. There were commutes when the Student would scratch the RBT, or try to get out of the car seat, or try to disrobe. There were also commutes when the van had to stop several times because of the Student. There were times when the Student's behaviors resulted in the van being an hour late getting Student home. There was one commute when the van had to stop in Concord, call an ambulance, and the Student was brought to Concord Hospital. Guardian believes the one-hour commute was too long (Guardian; P-46).
40. At ██████████, Student was restrained many times with multiple people needed for each restraint (Guardian; ██████████ Teacher; OOD Coordinator). Restraints requiring two adults occurred, on average, daily. Restraints sometimes required three adults (██████████ Teacher).
41. Student's only nutrition while at ██████████ was licking salt off of pretzels. Student had a bottle available but did not use it (Guardian; ██████████ Teacher; D-17).
42. Guardian testified that Student went outside to play only once at ██████████ (Guardian). ██████████ Teacher believes that progress was made in getting Student to transition outside without a tantrum, but Student did not play with peers once outside (██████████ Teacher). No exhibits were provided to show progress in transitioning outside or playing outside.
43. Guardian received updates from ██████████ only through a daily notebook (Guardian).
44. ██████████ Teacher testified that Student presented as an 18 to 36 month old in terms of social and emotional skills. Goals were getting Student comfortable with environment, understanding word "no," transitioning, and tolerating other people's choices. ██████████ Teacher believes slow and methodical progress was made with transitioning, but no data was provided to prove level of progress (██████████ Teacher).
45. When asked whether IEP Goals and Objectives were addressed with Student, the ██████████ Teacher responded, "We were working on building a relationship and getting [Student] to the classroom... those were not something I could actively work on." [Student] was too dysregulated (██████████ Teacher).

46. [REDACTED] Teacher claims to have drafted an IEP. However, when asked two times by the Hearing Officer whether the Guardian signed the IEP, instead of answering the question, the [REDACTED] Teacher responded that there was a meeting to discuss the updated IEP ([REDACTED] Teacher).
47. [REDACTED] Teacher testified that Student had similar behaviors at home as at school. Based on reports from Guardian while Student was at [REDACTED], Student's behaviors at home were not improving. [REDACTED] Teacher also testified that there were no goals in the IEP for generalizing skills across environments ([REDACTED] Teacher).
48. [REDACTED] Teacher testified that data was tracked to show progress. However, no such tracked data from [REDACTED] was presented as an exhibit at hearing. [REDACTED] Teacher did show a graph via Zoom that purported to show data on tantrums. However, on cross examination, [REDACTED] Teacher agreed that the graph was up and down and did not show a downward trend. Similarly, [REDACTED] Teacher agreed that there was no data that showed a downward trend in self-injurious behaviors ([REDACTED] Teacher).
49. Once summer vacation started in mid-June 2023, Student's behaviors got even worse. [REDACTED] stopped providing services in mid-June. [REDACTED] could not find anyone else to help in the home, and Guardian was not able to hire anyone else, either. Police, fire and ambulance services responded several times to the Guardian's home due to Student's behaviors (Guardian).
50. On July 2, 2023, there were at least three major behavioral episodes at home, two of which required calling 911. In the final episode, Guardian was unable to get Student off of Guardian, other than by pulling Student's hair and hitting Student's hand with a phone. Guardian ran upstairs, and Student followed. They engaged physically and almost fell down stairs. Student was brought to emergency room at Southern Medical. Doctor in emergency room recommended that Student not be brought back home because it was not safe for Guardian or Student. Student spent four days in the ER at Southern Medical. Guardian updated District. ER at Southern Medical had to use mechanical restraints (leather straps) five different times to tie down and restrain Student. Neurologist was able to arrange for a team of doctors at Mass General to admit Student (Guardian).
51. Medical team at [REDACTED] did not accept Student for residential placement at [REDACTED] due to fear that Student would aspirate (Guardian).

## Mass General Hospital

52. Student spent eighty-four days at Mass General Hospital. During this time, Student was intubated for four days. Medical staff had trouble keeping Student calm enough to do basic procedures like x-rays or blood tests (Guardian).
53. Student was often naked in the Mass General hospital room. Student was on a medical floor, not a floor for children with autism. Student was unable to go into the playroom with other children (Guardian).
54. While at Mass General, Student broke a thick glass window pane by head banging (Guardian).
55. The Guardian kept the District's OOD Coordinator updated regarding Student's situation at Mass General (Guardian; [REDACTED] Director).
56. Medicaid alone paid for the Mass General stay ([REDACTED] Director).
57. There were monthly meetings specific to the Student. Participants included representatives from several state agencies. Mass General told participants that Student was being harmed by remaining at Mass General, because Student's need was not medical; instead, it was related to Student's autism (Guardian; [REDACTED] Director).
58. The monthly meetings resulted in temporary funding being approved for Student to leave Mass General and enter a residential program. The temporary funding is called a Director's Level Approval, and needs to be approved on a monthly basis. It has been approved monthly since Student entered [REDACTED] but there is no guarantee it will continue. The Director's Level Approval was initially approved as a response to Mass General's position that Student was being harmed by remaining at Mass General, combined with the state's requirement to do no harm, the District's refusal to fund a residential placement and the Student's presentation ([REDACTED] Director).
59. According to the [REDACTED] Director, the monthly meetings include "a whole cast of characters" including the [REDACTED] Director, the state Medicaid Director, the Bureau of Developmental Services, DCYF, and sometimes the Commissioner of Education. These monthly meetings still occur. Approximately fifteen to twenty people are invited. They discuss the Student's status, presentation, progress and status of the request for residential placement. The District attended two meetings ([REDACTED] Director).
60. DCYF, [REDACTED] District and Mass General were all involved with sending packets out to schools to place Student (Guardian). The DHHS COO testified "BDS is not a

child placement agency so we did not have a role” in the [REDACTED] placement (DHHS COO).

61. Student was toilet-trained when Student started school with the District in spring 2022. However, toileting issues occurred when Student started at the local elementary school and got worse during Student’s hospitalization at Mass General. At Mass General, Student would urinate on floor during the day or in bed at night. Toileting has improved since Student started at [REDACTED] (Guardian).

[REDACTED] ([REDACTED])

62. When [REDACTED] considered Student for admission, [REDACTED] considered Student’s case to be complex due to Student’s challenges with feeding, self-injurious behaviors, bathing, toileting, refusal to wear clothes and refusal to cooperate in day-to-day activities ([REDACTED] BCBA).
63. [REDACTED] eventually agreed to accept Student from Mass General (Guardian).
64. [REDACTED] provides a consistent program with consistent staffing between school and residence 24x7x365. Staffing is 1-to-1 or small groups (2-1 or 3-1). The same teaching staff works in both school and residence, which provides beneficial continuity for residential students. The same clinical and educational programming occurs in both day and residential settings. Qualifications of staff do not differ between school and residence. Someone stays awake with the students all night. Clinicians are available to provide support for teachers at all times in both school and residence ([REDACTED] BCBA).
65. [REDACTED] has both day and residential placements. [REDACTED] considered Student for admission only into the residential program, not the day program ([REDACTED] BCBA).
66. Guardian has not paid any tuition, room or board for the [REDACTED] placement (Guardian).
67. The District has been paying for the educational portion of the [REDACTED] placement, and the state of New Hampshire has been paying for the residential portion (Guardian).
68. Regarding the residential portion of the [REDACTED] placement, [REDACTED] sends invoices to [REDACTED] pays the invoice and then invoices the State of New Hampshire, which has reimbursed [REDACTED] monthly through the Director’s Level Approval. The Director’s Level Approval is not documented in a written contract ([REDACTED] Director).

69. According to the [REDACTED] Director, the Director's Level Approval was made with an expectation that after six weeks of placement at [REDACTED] there would be a Functional Behavioral Assessment ("FBA") and there would be a review meeting to discuss residential placement ([REDACTED] Director).
70. The review meeting did occur around November 2023 and continued in December 2023. The meetings discussed the draft IEP, which documented the need for consistent instruction during all waking hours in order to make any type of progress. The District communicated its belief that Student could make progress in a six-hour day, and did make progress at [REDACTED]. The non-District people disagreed. There was discussion about the data that showed Student was hitting Student's own head 400 times per day, 100 or more incidents of aggression toward others as well as property destruction, and tantrums / dysregulation lasting for up to two hours per episode. An FBA (which was not submitted as an exhibit) was discussed at that meeting ([REDACTED]).
71. The DHHS COO testified that BDS is not involved with paying for [REDACTED] (DHHS COO).

The draft IEP submitted as an exhibit by the Guardian documents significant educational services, including direct special education services that total twelve hours per day, seven days per week. Specifically, the Service Delivery grid in the draft IEP, dated November 15, 2023, is as follows (P149):

School District Cycle:  5 day cycle  6 day cycle  10 day cycle  other: 7 day cycle

<b>A. Consultation (Indirect Services to School Personnel and Parents)</b>					
Focus on Goal #	Type of Service	Type of Personnel	Frequency and Duration/Per Cycle	Start Date	End Date
3	Speech and Language	Speech and Language Pathologist	180 min/month	11/15/2023	11/14/2024
6	Occupational Therapy	Occupational Therapist	30 min/month	11/15/2023	11/14/2024
6	Physical Therapy	Physical Therapist	15 min/month	11/15/2023	11/14/2024
1-6	Case Management	Case manager and other staff	480 min/week	11/15/2023	11/14/2024
1-6	Supervising/Program Monitoring	Program Specialist and Director/LABA, Day Coordinator, Residential Coordinator, Special Education Teacher	270 min/week	11/15/2023	11/14/2024
<b>B. Special Education and Related Services in General Education Classroom (Direct Service)</b>					
Focus on Goal #	Type of Service	Type of Personnel	Frequency and Duration/Per Cycle	Start Date	End Date
<b>C. Special Education and Related Services in Other Settings (Direct Service)</b>					
Focus on Goal #	Type of Service	Type of Personnel	Frequency and Duration/Per Cycle	Start Date	End Date
1, 3	English Language Arts, Communication & Social Behavior	Special Education Teacher & Staff	180 min/day x 7 days/wk	11/15/2023	11/14/2024
1, 2, 3	Mathematics, Communication & Social Behavior	Special Education Teacher & Staff	120 min/day x 7 days/wk	11/15/2023	11/14/2024
1, 3, 4	Self-Help, Communication & Social Behavior	Special Education Teacher & Staff	200 min/day x 7 days/wk	11/15/2023	11/14/2024
1, 3, 5	Community/Leisure, Communication & Social Behavior	Special Education Teacher & Staff	80 min/day x 7 days/wk	11/15/2023	11/14/2024
1, 3, 6	Physical Education & Motor, Communication & Social Behavior	Special Education Teacher & Staff	140 min/day x 7 days/wk	11/15/2023	11/14/2024

72. The draft IEP stated, “[Student’s] program is 24 hours/day, 365 days per year. [Student] requires structured programming and supervision by staff familiar with autism and trained in the techniques of ABA during all waking hours in order to progress on goals and objectives, as well as to maintain previously learned skills. The program specialist, education coordinator, day coordinator, residential coordinator and case manager will coordinate activities and programs across both the school and residential setting.” (P-150).
73. The draft IEP contained six goals in the following areas: English Language Arts; Mathematics; Social Behavior; Self-Help; Community & Leisure / Recreation; Physical Education and Leisure Skills (P-140 – P-148).
- A. The Current Performance Level of the English Language Arts goal states, inter alia, “[Student] is a functionally nonverbal student. [Student] communicates with facial expressions, gestures, some word approximations (e.g., “bah” for bottle, no, space, iPad, move, sit) and with a static communication board with picture symbols and actual photos of objects, actions, and locations. Historically, [Student] has used an AAC device (Accent 1000) to communicate, however, due



to challenging behavior this device or a different device will need to be re-introduced systematically during the upcoming IEP year.”

- B. The Current Performance Level within the Mathematics goal states, inter alia, “[Student’s] specific skills in the area of mathematics have not been observed, however, due to interfering challenging behaviors that pose a safety risk to [Self] and others. In the upcoming year, [Student] would benefit from pre-academic skills, such as choice making, to increase [Student’s] opportunities to participate....”
- C. The Current Performance Level within the Social Behavior goal states, inter alia, “The most interfering behaviors at this time are selected for decrease over the upcoming IEP year. These include head-directed self-injury, body-directed self-injury and urinary and bowel movement accidents. Additionally, increasing consumption of purees and solid foods is a skill that [Student] does not currently demonstrate and will be targeted for increase.”
- D. The Current Performance Level within the Self-Help goals states, inter alia, “[Student] currently presents with difficulties tolerating a variety of self-help procedures and accessories and in the upcoming year would benefit from regular desensitization sessions to increase [Student’s] participation, as well as skill acquisition. [Student] presently does not tolerate toothbrushing, hair washing, showering, regular toileting, nail clipping, weather appropriate clothing or shoes, medical procedures, and items in [Student’s] environment. When presented with these procedures and items, [Student] has engaged in self-injury, aggression, environmental destruction, screaming, and crying....”
- E. The Current Performance Level within the Community & Leisure/Recreation goal states, inter alia, “Additionally, to expand [Student’s] leisure repertoire, as well as to continue to increase [Student’s] tolerance of moderately preferred activities, in the upcoming year [Student] will enter different environments. [Student] currently does not tolerate being out of [Student’s] bedroom at the residence outside of transitioning to and from the van and for brief periods during visits. At school, outside of a few contexts (nursing, transitioning to/from the van, bath), [Student] is noncompliant to enter other areas or walk in different hallways. During a fire drill at school, [Student] entered the playground successfully, but following the drill would not tolerate remaining on the playground and returned to his classroom (10/26/23). In order to access additional possible reinforcers, in the upcoming year [Student] should increase [Student’s] tolerance of exposure to novel and less familiar environments.”

74. An IEP Team meeting was conducted on December 6, 2023. The District objected to the IEP requiring a residential placement. The Sped Director requested that the IEP

- focus only on “school time” and the Treatment Plan focus on residential treatment. [REDACTED] was capable of making that split, but did not recommend it. [REDACTED] asked the [REDACTED] BCBA if Student requires a longer day to make educational progress. The Sped Director interrupted before the [REDACTED] BCBA could answer. At hearing, when asked that same question, the [REDACTED] BCBA expressed the opinion that Student does require a longer day and wrap-around services ([REDACTED] BCBA; P-159 – P-166).
75. A Written Prior Notice dated December 6, 2023, submitted as an exhibit by the District, documents, “The team is in agreement with the proposed services and goals as contained within the proposed IEP. The team believes the continued support and services as proposed afford [Student] an individual educational plan which is calculated to allow [Student] to make reasonable progress and gains.” (D88).
  76. Even though the Team agreed with the proposed IEP, the District rejected it and would only agree to 6.5 hours per day of services. As support for that position, the District stated, “the district noted that while at [REDACTED] [Student] was making progress and expected educational gains in [Student’s] programming.” The WPN does not document any sort of cost share with the state of New Hampshire (D88).
  77. An IEP Team meeting was scheduled for December 8, 2023, but according to the WPN, “[t]he district elected not to hold this meeting as planned as the district believes it has sufficient information to propose the IEP as outlined... above.” (D88).
  78. The draft IEP states, “[Student] requires instruction that is consistent and delivered by the same teachers across settings and time (school, residence, evenings and weekends).” Repetition, practice and consistency in the delivery of programming and reinforcers is very important for Student ([REDACTED] BCBA; P-139).
  79. The Sped Director requested that the draft IEP be split into two separate documents – an IEP for the day portion and a Treatment Plan document for the residential portion ([REDACTED] BCBA).
  80. The Sped Director admitted in testimony that an IEP, but not a Treatment Plan, is required under the law for a qualified student (Sped Director).
  81. A progress report dated July 25, 2024 indicates that out of fourteen goals, Student has met six, made progress in three, remained stable in four, and showed insufficient progress in one (P-168 – P-174).
  82. An email from a [REDACTED] Counselor, dated September 7, 2024, indicates that Student “has been positive for the whole week... continues to do great on activities of daily living skills... has been super positive when going to the bathroom and brushing [Student’s] teeth... continues to love to hang out on the playground... enjoy[s]

hanging out with [Student's] teachers in the classroom... enjoyed coloring... averaged 8.92 hours of sleep.” (P-175 – P-176).

83. ██████ goal is to get students into the least restrictive placement that is appropriate for them. Although Student has made gains, ██████ still has concerns with feeding and self-injurious behaviors. As a result, Student is not yet ready to step down to a day placement (██████ BCBA).
84. The OOD Coordinator testified that in contrast to the frequent reports of restraint that he received while Student was at ██████ he has only received two or three such reports during the entire year that Student has been at ██████ (OOD Coordinator).
85. Student has made significant gains while placed at ██████ (██████ BCBA):
- When Student arrived, Student had no classroom readiness; behavioral needs were high; tolerance for instruction was minimal; Student would fully disrobe and remain disrobed in both school and residence; Student engaged in significant self-injurious behavior, including striking self forcefully with closed fist (approximately 130 to 140 SIB episodes per day); Student engaged in environmental destruction.
  - Student has made notable progress in classroom readiness, cooperating with staff and activities of daily living; Student now participates in school-wide activities; Student recently went swimming for the first time; Student will now move to the playground and is no longer isolated; Self-injurious behaviors have fallen to below 20 per day, and some days there are close to zero; Student now communicates verbally, but also uses an AAC device to supplement communication when staff cannot understand Student.

#### Miscellaneous

86. The Principal believes that Student requires a residential placement. When asked why, the Principal pointed to several factors: Student does not sleep through the night; Student has explosive behaviors which can happen quickly; Safety issues with transportation (Principal).
87. The District contains just under 10,000 students (Sped Director).
88. In the fourteen years that Principal has been the school principal at the local elementary school, the Principal has never participated in a residential placement of a student (Principal).

89. In the 2.5 years that the OOD Coordinator has served in that role for the District, the District has not residentially placed any student through an IEP Team decision. There have only been two residential placements during that time, neither of which was an IEP Team decision. One was through a court-order<sup>2</sup>, and the other was where a student moved into the district and had already been residentially placed prior to the move. Both residential students are over 18-years-old (OOD Coordinator).
90. The District OOD Coordinator believed that Student was making progress at [REDACTED] and did not need a residential placement when the [REDACTED] placement was first made. The OOD Coordinator now believes that a residential placement is required (OOD Coordinator).
91. The District is committed to funding the educational day portion of Student's placement, but not the residential portion. That has been the District's position since the Student was first placed out-of-district (OOD Coordinator; Sped Director).
92. The Sped Director testified that the District is required to provide FAPE in the Least Restrictive Environment, and that the current seven-days-per-week program at [REDACTED] provides the Student with FAPE in the Least Restrictive Environment. However, the Sped Director believes that 24x7x365 is not necessary for FAPE (Sped Director).
93. In addition to the two residential students whose placement is paid for by the District, there are also eighteen to twenty District students who are in residential placements funded by state agencies rather than the District (Sped Director).

#### Testimony of District's Director of Special Education<sup>3</sup>

94. The District's attorney asked the Sped Director to describe the continuum of placement options. The Sped Director responded with the following: "So you know, we start obviously with the referral process identification and IEP. In every case we work to implement the IEP to collect data to see if the goals and services that are outlined in the IEP and the initial IEP are supportive enough for a child, and then we kind of move through a number of continuums, there, being one-on-one increasing paraprofessional support to one-on-one paraprofessional support, which is also restrictive, to some of our in-district programming that we offer which are self-contained models for students to, if we need to bring in other professional staff, even,

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<sup>2</sup> During subsequent testimony by the Sped Director, counsel for the District clarified that the "court-order" was actually a hearing officer's decision.

<sup>3</sup> I found the Sped Director's testimony to be neither persuasive nor credible. His answers to simple questions from the Guardian's advocate, from the Hearing Officer, and even from the District's own attorney, were often unresponsive to the question asked, not complete, or confusing.

you know, making it, that program, programming, even more restrictive at that point and then we move through, if we're unable to meet needs through that, the out-of-district day placement search and then ultimately if a child is unsuccessful being able to access their education because of, you know, home and school, and we see the child not being able to come to school and access their education that way, then we have to sit down and look at the final continuum for children that are placed hospital basis. I think things have changed a little with our episodes of treatment and some of our court orders placements, because we have directives from the state Department of Education for kids that are placed in episodes of treatment from levels 3, 4, and 5, that those students will remain in a residential ed setting educationally as well, because they are paying for that, and we, as the district change the IEPs to reflect the placement where the child is. So that's kind of outside of the process, but we've had that direction from there as well as when we have kids that are court order placements through DCYF, many of those placements require that the child's placed there educationally, so we kind of get put in a position where that falls a little outside of that Team process, as well, but we try to walk through the benefits of why that child should be there and reflect at least a non the least restrictive environment within a Written Prior Notice that, why the child would be placed there educationally if we didn't necessarily believe that that was the least restrictive environment." (Sped Director, Day 2 Part 4 at 00:05:00).<sup>4</sup>

95. The District's attorney asked the Sped Director why the Sped Director believed a placement at [REDACTED] was appropriate after the Student was hospitalized. The Sped Director responded, "I didn't have direct information on the hospitalization or you know what the outcome was gonna be once upon [REDACTED] discharge. You know, we've had multiple students that are discharged to various entities, or various placements, either through behavioral health, they're the episodes treatment at that point or DCYF or you know, on some circumstances under the CHINS 2 statute, which is, you know, for kids that are gonna harm themselves and others, so there's multiple venues that kids when they come out of the hospital, get placed. We were not sure - I know at one point [OOD Coordinator] had for me that they explored - they meaning the team that was exploring residential for [Student] was, were asking [REDACTED] because [Student] was already there as a day student to see if they would take [Student] residential." (Sped Director, Day 2 Part 4 at 00:11:23).

96. The District attorney asked the Sped Director whether the District looks at residential placements, and when the District would look to see whether a residential placement is appropriate. In response, the Sped Director testified, "Yeah, so yeah, we are

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<sup>4</sup> I take administrative notice of New Hampshire Ed 1111.03(d) Table 1100.3, described infra in the Guiding Law section, which lists the increasing levels of restrictive educational environments. Contrary to the testimony, the Table lists "Residential placement" as the next level of educational environment after "Separate Approved Special Education Program/School."

required to by law, right, to consider those options if it's needed, but, you know, I believe you know when you look at the regulations about the child accessing their education and going through those continuums. Some of the reports that I had would be that [Student] would run out to the bus in the morning, enthusiastic about getting on the bus and going to school, so we didn't see [Student] not being able to access [Student's] education due to [Student's] disabilities and behavior, so it would have to be a pretty significant case where it would prevent, the child's disability prevents them from attending school and able to access, I guess I should say, access their education, which could include home-based education and tutoring, kind of those kind of are on the end of the continuum there, so you'd really be flirting with that if we were unable or unsafe to send someone in the home to provide home-bound instruction, then that would be also a time we might look, because they're not accessing their education, but I see... it interpreted as a very extreme nature of the child's disability, that they're not accessing their education either by school or receiving home-bound type of instruction." (Sped Director, Day 2 Part 4 at 00:28:25).

97. The Sped Director was asked multiple times by the Guardian's advocate whether Student could receive FAPE in a day placement. Each time, the Sped Director responded in very vague, indirect terms. For example, at 1:23:06 of the Zoom recording, the Sped Director answered, "I guess not, not knowing, only knowing the peripheral that I know, I think that's a very hard question to answer." (Sped Director, Day 2 Part 4 at 1:23:06).
98. The Hearing Officer asked, "In your role, based on your knowledge and expertise, do you believe that [Student] can receive a free appropriate public education in a day placement only?" The Sped Director responded, "It's a very hard determination. I think [Student] has, because [Student] has been placed in a residential setting for a year, I do think that any child should be afforded the opportunity to be able to get out of a restrictive setting such as that, to move towards a lesser restrictive environment, and I don't believe based on [Student's], if the educational, if, the [District] was required to pay for [Student's] residential setting, and [Student's] residential treatment, that we do not have the ability to downgrade and step down [Student's] residential programming, and then it's either going to be home or it's going to be residential, and we're going to be then determining what does it look like for [Student] to return home. DCYF and other entities have the ability to access other supports and services for [Student] to either return to [Student's] home, a foster home, or another family member who could support [Student] over the next 9, 13 years of [Student's] life." (Sped Director, Day 2 Part 4 at 1:24:13).

### III. Guiding Law

1. *RSA 186-C:16-b, III-a. Burden of Proof*

The school district has the burden of proof, including the burden of persuasion and production, of the appropriateness of Student’s program or placement, or of the program or placement proposed by the school district. This burden shall be met by a preponderance of the evidence.

2. *Free appropriate public education (“FAPE”)*

Federal and state law guarantees every student with a disability the right to a free appropriate public education (“FAPE”). 20 U.S.C. §1400 (d)(1)(A); Ed 1106.01; Ed 1102.02(r). To constitute a FAPE, a student’s educational program must be “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances”. *Andrew F. ex. rel. Joseph F. v Douglas County Sch. Dist. RE-1*, 137 S.Ct. 988, 999 (2017); FAPE is “special education and related services [consisting of] both ‘instruction’ tailored to meet a child’s ‘unique needs’ and sufficient ‘support services’ to permit the child to benefit from that instruction”. 20 U.S.C. §1401(9), (26), (29); *C.D. v. Natick Public School District, et al.*, 924 F.3d 621, 624 (1st Cir. 2019), quoting *Fry v. Napoleon Community Schools*, 580 U.S. 154, 158 (2017).

Effective progress must be examined in the context of the educational potential of the student. See *Lessard v. Wilton Lyndeborough Coop. Sch. Dist.*, 518 F.3d 18, 29 (1st Cir. 2008). For progress to be “effective,” a student must make “‘demonstrable improvement’ in the various ‘educational and personal skills identified as special needs.’” *Lenn v. Portland Sch. Comm.*, 998 F.2d 1089-90 (1st Cir. 1993).

3. *34 CFR § 300.114(a)(2) - LRE requirements.*

Each public agency must ensure that—

(i) 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 nondisabled; and

(ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

4. *34 CFR § 300.104 – Residential Placement.*

If placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parents of the child.

5. *HE-M 503.03 – Eligibility for Services (Department of Health and Human Services)*

[A]ny person whose state of residence is New Hampshire and who has a developmental disability shall be eligible for services... except those that are the legal responsibility of the local education agency (LEA) pursuant to the Interagency Agreement in accordance with RSA 186-C:7-a, the department's division for children, youth and families (DCYF), or another state agency to provide.

6. *34 CFR 300.115 – Continuum of Alternative Placements*

(a) Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.

(b) The continuum required in paragraph (a) of this section must-

(1) Include the alternative placements listed in the definition of special education under §300.39 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and

(2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

7. *Ed 1111.03(d) – Placement Decisions*

Children age 6-21 may receive their special education program at any of the environments listed in Table 1100.3 as follows:



**Table 1100.3 Continuum of Alternative Learning Environments – Ages 6-21**

<b>Educational Environments</b>	<b>Description</b>
Regular Education Setting	A child with a disability attends regular class with supports and services required in the IEP.
Resource room	A child with a disability attends a regular class and receives assistance at or through the special education resource room for no more than 60% of the child’s school day.
Self-contained Special Education Class	A child with a disability attends a self-contained special class for more than 60% of their school day.
Separate Approved Special Education Program/School	A child with a disability attends a publicly or privately operated special education program/school.
Residential placement	A child with a disability attends a publicly or privately operated residential program.
Home Instruction	A child with a disability receives all or a portion of his or her special education program at home.
Hospital or institution	A child with a disability receives special education while in a hospital or institution.

8. The IDEA does not require that each placement on the continuum be tried before residential placement can be considered. Seattle Sch. Dist., No. 1 v. B.S., 82 F.3d 1493, 1501 (9th Cir. 1996).
  
9. More than forty years ago, the First Circuit addressed the issue of educational residential placements versus non-educational residential placements. Abrahamson v. Hershman, 701 F.2d 223 (1st Cir. 1983). The court in that case questioned whether the student needed “greater continuity and consistency of approach than is available in a day program.” Id. at 227. The First Circuit agreed with the District court “that educational benefits which could only be provided through residential care were essential if Daniel was to make any educational progress at all. Daniel's unique condition was found to demand that he receive round-the-clock training and reinforcement... Where what is being taught is how to pay attention, talk, respond to words of warning, and dress and feed oneself, it is reasonable to find that a suitably staffed and structured residential environment providing continual training and reinforcement in those skills serves an educational purpose. . . .” Id. at 227 – 228.

#### IV. Rulings of Law

1. The District has the burden of proof, including the burden of persuasion and production, of the appropriateness of Student's program or placement, or of the program or placement proposed by the District. This burden shall be met by a preponderance of the evidence. RSA 186-C:16-b, III-a.
2. Student is a child with a disability who qualifies for special education based on Student's Autism Spectrum Disorder.
3. Student failed to make effective progress in light of Student's circumstances while enrolled in the local elementary school.
4. Student failed to make effective progress in light of Student's circumstances while enrolled at [REDACTED] [REDACTED]
5. Student has made effective progress in light of Student's circumstances while enrolled in the year-round, residential program at [REDACTED]
6. The only IEP submitted as an exhibit (P-136 – P-153) is reasonably calculated to allow Student to make effective progress.
7. The District has failed to meet its burden of proof in regard to the first issue: Whether a year-round, residential placement is the least restrictive environment that is reasonably calculated to allow Student to receive FAPE.
8. A year-round, residential placement is the least restrictive environment that is reasonably calculated to allow Student to receive FAPE.
9. The District has failed to meet its burden of proof in regard to the second issue: If the Student does require a year-round, residential placement, whether [REDACTED] is an appropriate placement.
10. The Student's current year-round, residential program at [REDACTED] is an appropriate placement for the Student.
11. Since Guardian has not paid tuition to [REDACTED] for a unilateral placement, the issue of reimbursement from Nashua to Guardian is moot.

## V. Discussion

Student started to attend the local public elementary school rather late. Student was already seven-years-old, and the 2021 – 2022 school year was more than half over, when Student first enrolled as a 1<sup>st</sup> grader. Prior to enrollment, though, the services provided to the Student by [REDACTED] [REDACTED] and [REDACTED] were very impressive. Student received intensive, 1-to-1 services for thirty-five to forty hours per week. It is unclear what type and level of services the District would have provided during this time, or whether the District even met its Child Find requirements.

The Student was with the District for approximately one year, from the spring of 2022 to the spring of 2023. While it would have been very helpful for me to see basic information associated with this time period, such as an IEP, an IEP Progress Report, an evaluation report, or a report card, no such exhibits were provided. The Guardian did submit an IEP response dated January 18, 2022 (a rejection), but there was no IEP submitted by either party for me to know what it was that the Guardian was rejecting. It also would have been helpful to have heard testimony from the Student’s teachers and service providers who worked with the Student while the Student was enrolled in the District, but no such witnesses testified.

Based on the evidence that was provided, it is clear to me that Student’s behaviors declined precipitously while enrolled in school. Student increasingly engaged in self-injurious behaviors, including head-banging upwards of 700 times per day. Student increasingly refused to engage with service providers. Student was unable to take the bus to and from school. Even the Guardian had significant trouble safely transporting the Student. The Principal was concerned enough by the reports from home and injuries to the Guardian that the Principal called DCYF. Student required a special, padded “office.”

At home, the Student’s behaviors were getting so bad that the [REDACTED] BCBA recommended that the 1-to-1 home support be increased to 2-to-1. Eventually, the service providers were at such risk that [REDACTED] – a company that provides services for students with autism – needed to stop services altogether. Student was no longer even able to go the doctor’s office. Even the family dog had to be boarded for two months to protect it from the Student.

The District’s response to all of this was to reduce the Student’s time in school, not once but twice. The District eventually reduced the Student’s time in school to just two hours per day. Shockingly, the District documented in a December 2022 WPN that the Student was accessing education in the current placement and making progress.

By May 1, 2023, the District did agree to place the Student out-of-district, but it was in a day placement, one hour away from Student’s home ([REDACTED] [REDACTED]). The Student only attended [REDACTED] for approximately six weeks before the school year

ended. The evidence shows that the Student had very difficult commutes. Student needed to be accompanied on the van by an RBT and a BCBA, but still tried to get out of the car seat or disrobe. Student scratched the RBT. The van needed to pull over for safety. The Student eventually needed to be brought to Concord Hospital during one commute.

The [REDACTED] teacher's claim that Student made effective progress in the six weeks that Student was with her is not credible. Again, no IEP or IEP Progress Reports were provided. The teacher admitted that the Student was too dysregulated to work on IEP goals. When asked twice by the Hearing Officer whether the Guardian signed the IEP that the teacher claimed to have drafted (but was not submitted as an exhibit), the teacher responded that there was a meeting to discuss the IEP, which was not the question asked. The Student's only nutrition at school was licking salt off pretzels.

Once school stopped for the year, the Student needed to be brought to the ER, restrained and hospitalized for nearly three months. The Student has not lived at home since. At Mass General, the Student engaged in head banging so severe that they broke a thick pane of glass with their head. If the District is expecting me to rule that the Student made progress and received FAPE in the District or at [REDACTED] I have nothing to work with.

At [REDACTED] things seem to have gotten much better for the Student. At least I have a draft of an IEP from [REDACTED] as well as data to show progress. I find the testimony of the [REDACTED] Director to be credible that Student's behaviors have improved and the Student is able to participate in the educational program. Reports of restraint have declined precipitously. The [REDACTED] program provides the consistency that the [REDACTED] BCBA recommended.

In terms of the need for a residential placement, all of the Guardian's witnesses, and even the Principal and OOD Coordinator testified that they believe the Student requires a residential placement. There were also several letters from medical and educational professionals who had worked with the Student in support of the need for a residential placement. The [REDACTED] Director and DHHS COO both gave very similar and credible testimony that the School Psychologist believed a residential placement was needed, but that "administration" disagreed. The District's Written Closing Statement even admitted, "Due to the circumstances of this case, the Student cannot return home and, therefore, requires a residential component."

When Student was hospitalized at Mass General, it was clear that Student could not safely go home. This had nothing to do with neglect or abuse, though. The Student has autism. At the time of discharge, much like the student in the Abrahamson case from over forty years ago, the Student here needed, and still needs, consistent services working on the same goals 24x7 in order for there to be any hope of making educational progress.

When the District refused to provide the residential program that was needed upon discharge, thankfully the state of New Hampshire stepped in, and through the Directors Level Approval, agreed to provide what the District refused. Neither [REDACTED] nor DHHS nor any other state agency should have to provide what is the responsibility of the District, though.

This case is very much like a recent New Hampshire due process case that also involved the same District (IDPH-FY-22-08-004). In that case, the Hearing Officer wrote:

Student's social, emotional, and other needs are not segregable from the learning process.

Overall, Student has been increasingly unable to meaningfully access [redacted] education due to a host of interfering behaviors, including aggression and refusal. These behaviors were present not only in the home, but in the public school setting, at the [redacted] Program, and with [redacted]. Student has experienced some relatively brief periods of success and progress; but over time, the behaviors have increased in frequency, and intensified in severity across settings...

The District maintains that Student has not yet had the opportunity to attend an out-of-district day program, and that a day placement should be considered before a more restrictive residential placement... [T]he IDEA does not require that each placement on the continuum be tried before residential placement can be considered. Seattle Sch. Dist., No. 1 v. B.S., 82 F.3d 1493, 1501 (9th Cir. 1996).

Most of the description just quoted could apply equally to the current case, with two exceptions. First, unlike in the prior case, the Student in the current case has not "experienced some relatively brief periods of success and progress" in the District or [REDACTED] programs. The only periods of educational success and progress have occurred at [REDACTED]. Also, unlike in the prior case, the Student in the current case did try a day placement, and from the evidence provided, failed to benefit from that day placement. In the prior case, as in the current case, the student ultimately required a residential educational placement.

I also note that the District incorrectly insisted on splitting the IEP drafted by [REDACTED] which called for a residential placement, into two documents – an IEP for what the District considered to be the educational / day portion, and the Treatment Plan for what the District considered to be the non-educational / residential portion. If a student requires a residential educational placement – which is the case here – the IEP needs to reflect that without having to be split up.

I also need to note that even if I believed it to be true that Student made progress at [REDACTED] – which I do not – the commute from home to [REDACTED] could be well over an hour. It is not reasonable to expect Student to be able to endure a commute of one hour or more twice a day. Furthermore, [REDACTED] rejected student as a residential placement, so the [REDACTED] option is not really an option at all.

Finally, I should point out that this case concerns two parties – the Guardian as the petitioner and the District as the respondent. There are no other parties involved in this litigation. Although the District made arguments that implied that a state agency such as DHHS or DCYF should be responsible for paying the residential portion of the Student’s placement at [REDACTED] no such state agency was joined as a party in this case. Therefore, even if I believed that a party other than the District should bear financial responsibility for any portion of the Student’s placement, I have no authority to hold a non-party – even a state agency that has provided funding – financially responsible.

## **VI. Order**

1. The Student shall remain in the [REDACTED] year-round residential program.
2. Nashua shall assume all financial responsibility for the [REDACTED] placement.
3. Nashua shall convene a Team meeting to draft a new IEP placing Student residentially at [REDACTED]

## **VII. Proposed Findings of Fact and Rulings of Law**

Both parties submitted Proposed Findings of Fact and Rulings of Law.

1. Guardian’s Proposed Findings of Fact:
  - A. Granted: 1 – 31, 33 – 41, 43, 45 – 69.
  - B. Denied: 32, 42, 44.
2. Guardian's Proposed Rulings of Law: The Guardian’s Proposed Rulings of Law are not in a format that allow the Hearing Officer to rule on them individually (i.e. a numbered list). However, the content has been carefully considered, and portions of the submission have been incorporated into this Due Process Decision. To the extent that proposed rulings are inconsistent with this Decision, they should be deemed denied.
3. District’s Proposed Findings of Fact (which start at number 6):

A. Granted: 6 – 8, 11, 15 – 16, 18 – 20, 24, 27.

B. Denied: 9 – 10, 12 – 14, 17, 21 – 23, 25 – 26.

4. District’s Proposed Rulings of Law:

A. Granted: 2 – 5, 10.

B. Denied: 1, 6 – 9, 11.

**VIII. Appeal and Post-Hearing Enforcement**

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

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

So ordered.

/s/ James Baron, Hearing Officer

October 22, 2024