

THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF EDUCATION
STUDENT / Nashua School District
IDPH-FY-25-07-001

Parent/Guardian Post Hearing Submission (Proposed Conclusions of Law)

I. Introduction – Questions to be Decided

Three questions were presented for decision in the case of a student, 3rd grade age [REDACTED] [REDACTED] with a primary diagnosis of autism (hereafter and in the Proposed Findings of Fact attached, “Student”), whose educational needs were not met by Nashua School District (hereafter “NSD” or “District”).

From the time [REDACTED] entered public school in 1st grade until a residential placement at [REDACTED] [REDACTED] ([REDACTED]) Severe Autism Unit (hereafter “[REDACTED]” or in the Proposed Findings of Fact attached “Residential Outplacement”), [REDACTED] did not receive the appropriate curriculum and related services to provide Free Appropriate Access to a Public Education (“FAPE”). Every bit of evidence presented established either regression or inconclusive evidence of adequate progress from the public school general education classroom to the intensive needs classroom and then to a day outplacement at [REDACTED] (hereafter “[REDACTED]” and in Proposed Findings of Fact “Day Outplacement”).

For every student with an Individualized Education Plan (“IEP”) the needed curriculum and services differ, by definition. This CANNOT mean that there are no general standards that can be discerned from statutory law, case law or common sense. Nor can individualization mean that there is no requisite process of deliberation to guide all IEP teams in determining the necessary components of an education for each individual student. (In fact, everything we know about the IEP process dictates just the opposite and requires rigor in process and decision-making not demonstrated here by NSD. The Individuals with Disabilities in Education Act (“IDEA”) specifically contemplates a wide range of educational and related services and specifies a distinct continuum of placement options that might be best suited to provide an education to every student with disabilities. Every student deserves to make progress from his/her starting point as quickly as is reasonable for that student in light of his/her circumstances. The “discretion” of the IEP team should come in to weigh all of the indicators in behavioral data, educator observations and outside

team participant referrals that help any IEP team determine services and placement. But there should be a process that considers such input and relies upon the informed decisions of a well-formulated team. Those prerequisites are NOT “individualized.”

In this case, evidence demonstrated (or, as often, the lack of evidence presented by NSD demonstrated) that the District neither had a clearly defined “team” on which it relied for individualized services and placement decisions nor did it have a legally defensible process for considering reliable data and recommendations. The lack of evidence will be highlighted throughout this Post-Hearing submission, each time for purposes of establishing that NSD failed to bear its burden of proof. Under RSA 186-C:16-b, III-a, “In all hearings the school district shall have the burden of proof, including the burden of persuasion and production, of the appropriateness of the child's program or placement, or of the program or placement proposed by the public agency. This burden shall be met by a preponderance of the evidence.” In this case, the lack of standards or process utilized by NSD -from April 2022 and continuing to the present - for determining adequate placement for Student, now renders two primary and one secondary question(s) out of the hands of NSD and into the hands of the Hearing Officer:

- 1) For Student is a year-round, residential EDUCATIONAL (emphasis added by Guardian) placement the least restrictive environment that is reasonably calculated to allow Student to receive FAPE;
- 2) If Student does require a year-round, residential EDUCATIONAL (emphasis added by Guardian) placement, is [REDACTED] an appropriate placement;

And only secondarily but made less relevant by the evidence, facts and the claims of the case,

- 3) If [REDACTED] is an appropriate placement, was it a unilateral placement, does that have any bearing on the case and should tuition paid to [REDACTED] for the residential placement be reimbursed by NSD to the party paying.

II. A Year-Round, Residential placement is the least restrictive environment for the Student to receive FAPE.

During the course of the presentation of the District's case, it became clear that it is not general practice for NSD IEP teams properly to consider all options on the continuum of placements required under IDEA so as to individualize education to each student with disabilities precisely by matching the needed services/supports to the setting in which those supports are available. The LEA representative testified, as did the Out of District placement coordinator, that in the prior eight years NSD (the largest school district in New Hampshire) has not made an IEP team decision to place a student in a residential outplacement. This, in and of itself, is not indicative of a violation of the requisite IEP team process in considering a continuum of placements for this Student to access the services and supports needed to obtain a FAPE. It is possible that no student in eight years has required the more restrictive environment of residential outplacement in order to receive supports and services designed to allow that student to access education. However, multiple aspects of the NSD witnesses' testimony did indicate that NSD IEP teams, including this Student's, are either not guided to properly consider the continuum of placements in light of the individualized needs of students or are not respected in their assessments of the proper placement on the continuum based on the availability of needed supports and services.¹

Testimony of NSD witnesses indicated that NSD incorrectly views the continuum of placements (and even the availability of greater supports) as one that every student must step sequentially through. Recommendations for 1:1 behavioral supports and for a consistent behavioral approach from the outset of Student's public schooling were provided by Student's outside BCBA. Yet, NSD testified through Student's first public school Principal that recommendations for 1:1 behavioral supports from the first day of school were not followed

¹ It is of concern to the New Hampshire Office of the Advocate for Special Education that NSD demonstrated only a very literal understanding of the word "access" in the context of assessing whether Student was accessing education. On several occasions during testimony, the focus was on physical access, which appeared to be assumed by Student entering a classroom or getting onto transportation, first to the public school and then the day outplacement. While the success of transportation and the distance to an outplacement are factors in the consideration of the continuum of placements, physically being transported to and entering a classroom are not indicators of accessing education. Rather, access must focus on whether supports and services available in the placement allow for progress as further discussed herein.

because NSD had to assess the need in their general education environment. The Principal testified that an increase in supports is a step function only when a student demonstrates the inadequacy of shared para support. The Principal further testified that the student did not receive individualized services of a BCBA until mid Fall of ■ second year, having started in April of the year prior and having attended ESY so not until more than six months after commencement of school. Guardian testified that Student had experienced significant regression by this time. Guardian's Proposed Findings of Fact ("GPFF") 12, 13. BCBA testified and validated documentary evidence showing that Student had experienced significant regression by this time. GPFF 12.13. Principal also admitted that Student had experienced a regression in behaviors, sometimes requiring 2:1 supports. GPFF14, 15. Arguably, the very refusal to heed the multiple recommendations to provide preventative, rather than stepped increase in support once Student demonstrated failures, led to the regression admittedly experienced at school. The Principal admitted that the Student's behavior was more manageable in the general education setting at the start of school than six months later. Successive Written Prior Notices tell the same story. GPFF 11, 17, 26. The District's need to cut more than once the length of Student's day was based on behaviors that became more unmanageable at school, admitted in testimony from the Principal. GPFF 14, 16, 17, 18. Without adequate supports Student regressed rather than making progress.

In a similar misunderstanding that the continuum of placements required sequential "step movement", the LEA representative testified that a student would ALWAYS start with the less restrictive environment of a day outplacement if the student were unsuccessful in an intensive needs specialized setting within the public school.² This distorts the reasons that IDEA requires Districts to have a continuum of placements. The intent is not for any student to be required to step through each placement from least to most restrictive, making inadequate progress or

² The LEA also testified that if a student were unsuccessful with day outplacement supports, a student should then be moved to a home placement with educational services delivered in the home before a residential outplacement. This ignores the ordering of the continuum set forth in New Hampshire ED 1111, Table 1100.3, reflecting the requirements of 34 CFR 300.115. More importantly, it misunderstands the legal standards that have been set forth, namely that a need for greater continuity and consistency in a structured setting than is available in a day placement can be determinative of the need for residential placement. See discussion of the First Circuit's Abrahamson decision herein. Home placements, with necessarily limited hours of education delivered by the District, regardless of the skill or time available from the parent or guardian at home, do not provide the "continuity and consistency of educational approach" that might determine a need for residential placement and, thus, do not rationally come before residential on the continuum in light of the needs of this Student and others.

regressing, until the student finally finds a placement where progress can be achieved. Rather, the intent is for the IEP team to consider the level of supports needed by a student, determined in the course of annually developing the IEP services for a student to achieve goals (which achievement of goals would, in turn, demonstrate progress and accessing of education.) The IEP team needs to deliberate to assess the availability of the services deemed necessary in the IEP in each of the settings along the continuum of placements. If a residential setting is the one in which the individualized necessary services are available, then that is the least restrictive setting in which a student can receive a free appropriate public education and should be the placement recommended by the IEP team. Placement decisions do not require and should not be sequential trial and error of environments, harming a student and causing regression!

Multiple Circuit Court decisions have provided guidance to school districts and IEP teams with respect to determinations regarding whether placement in residential settings is educationally necessary to provide FAPE. These decisions are highly relevant to this case and the facts upon which courts decided that residential placement was necessary do not meaningfully differ from the facts of Student's educational needs in this case. The First Circuit, in assessing whether a school district was responsible for residential placement, articulated this consideration: Does the student need "greater continuity and consistency of approach than is available in a day program"? *Abrahamson v. Hershman*, 701 F.2d 223, 227 (1st Cir. 1983). In that instance the district court had considered whether the student needed a 24 hour education program "in order to avoid regression" and determined that the student did need this, which decision was upheld by the First Circuit. *Id* at 226. In considering whether residential placement was necessary to achieve educational progress, the Court articulated, "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 228.

As with the student considered by the First Circuit in *Abrahamson*, members of the IEP team for Student in this case testified that Student required a consistency of approach across all aspects of the day. The outside BCBA from [REDACTED] who had worked with the Student across multiple settings prior to Student's entering school and who continued in-home supports (until regression in behavior made it unsafe for staff and services were halted) testified that consistency

was required and that a lack of consistency led to the regression being seen after starting public school full-time. GPFF 12. The [REDACTED] case manager testified to the appropriateness of the [REDACTED] residential program for Student because staff, who are trained by specialists in behavior, speech and communication and related services, work across all hours of the day in both school and residential settings. GPFF 65. The [REDACTED] draft IEP was developed in October after Student began at [REDACTED] and had been observed. Proposed services in the service delivery grid specified 7 days a week across school and residential settings, delivered by special education staff. GPFF 48, 49, 50.

The First Circuit in *Abrahamson* cited the Third Circuit's decision in *Kruelle v. New Castle County School District*, 642 F. 2d 687 (3rd Cir. 1981) regarding what may be considered education for students with severe disabilities. The "concept of education is necessarily broad with respect to persons such as [student]." Id at 693. "Where basic self-help and social skills. . .are lacking, formal education begins at that point." Id. The Court was clear that education can encompass basic skills such as how to dress or eat. Id at 688. The Kruelle Court emphasized these aspects to be clear that the learning process for a group of students with severe disabilities could be defined precisely as it is defined for Student in this case, namely acquisition of those learning readiness skills needed for any possible academic teaching. The Third Circuit in Kruelle defined the legal standard for inquiry as being whether residential placement is necessary for education and "inextricably intertwined" with the learning process rather than residential placement addressing social or emotional problems "segregable from the learning process." Id at 693-694. This Student's case exactly mirrors the standard defined by the Third Circuit for deeming residential placement necessary for FAPE. Though staff at [REDACTED] agreed to create two separate documents, an IEP and a treatment plan, covering different hours of the week, the services and learning goals in the two documents were EXACTLY the same, as testified to by the [REDACTED] case manager, [REDACTED]. GPFF 49, 50. By definition, the fact that the IEP and residential treatment plan are identical is overwhelmingly compelling evidence that the needs being addressed through all hours of the day are not "segregable" into an education component and a component addressing distinct social or emotional needs.

The Fifth and Seventh Circuits have articulated variations on the standards set forth above that are arguably stricter standards for deeming a school district responsible for a residential placement to provide FAPE. The facts of this case easily meet those stricter standards. NSD has not met its burden, articulated in these cases, to show that residential placement is NOT necessary

for this Student. In *Richardson Independent School Dist. v. Michael Z*, 580 F.3d 286 at 299 (5th Cir. ____), the Fifth Circuit stated two prongs: “In order for a residential placement to be appropriate under IDEA, the placement must be 1) essential in order for the disabled child to receive a meaningful educational benefit, and 2) primarily oriented toward enabling the child to obtain an education. . . If a child is able to receive an educational benefit without the residential placement, the school is not required to pay for it under IDEA.” Id at 300. For NSD to succeed in its argument that a day placement is adequate and fulfills the duty to provide FAPE, NSD must show that Student received an “educational benefit” in a day placement. As already discussed above, all of the evidence points to regression during Student’s time in the public school placement. Therefore, the question becomes, what evidence did NSD present to show an adequate educational benefit at [REDACTED] the day outplacement?

NSD’s exhibits contain just a single page that touches upon Student’s educational experience at [REDACTED] GPF 27. It is an email indicating that the [REDACTED] teacher (“[REDACTED]” or “Day Placement Teacher” herein and in GPF) is getting Student outside with some frequency. The Out of District Placement coordinator indicated in testimony that this report was his (sole) basis for stating that Student made progress in a day outplacement. However, his testimony was that Student got out to the playground, used the seesaw or swingset and played with other children. GPF 43. By contrast to this hearsay, the testimony of [REDACTED] directly, explicitly denied this account and made a finding of progress questionable at best. She indicated that the playground was attached to the building and sometimes Student only stepped out the door under the awning, occasionally picked at the grass or mud but did not play with other children or use any playground equipment. GPF 27. Further, [REDACTED] when pressed for data explicitly said that she could not testify that there had been progress in behavioral elements. NSD did not enter any behavioral data in its exhibits or any progress reports from [REDACTED] the day outplacement, to support the repeated contention that progress was made in a day placement. Upon cross-examination [REDACTED] as the [REDACTED] special educator held up a graph of data on “tantrum behavior” but confirmed in testimony that she could not conclude that progress had been made in reducing such behavior in the six weeks that Student attended. GPF 29. Further, 1) addressing tantrum behavior, 2) getting Student outside the door of the building and 3) getting Student for a minute or so daily out of the corner of the classroom to put something on a board for circle, was the full scope of what was attempted educationally. GPF 30. There was no progress report on the six weeks of Student’s attendance prepared. [REDACTED] confirmed that she was

not working on any explicit IEP goals at that time and only observing or working to formulate proposed goals. GPFF 27. A progress report was created for IEP goals to be begun in July, 2023 (for which session Student never returned to school because of [REDACTED] hospitalization.) That progress report was entered by Guardian as an exhibit and notes ONLY that Student was not in attendance so no progress could be noted. GPFF 30. Upon cross-examination, [REDACTED] testified that Student required 2 and sometimes 3 staff members for restraints daily. GPFF 21. Out of District placement coordinator confirmed in his testimony that [REDACTED] received daily reports of restraints while Student attended the day outplacement. GPFF 21. Both Guardian and Teacher testified that Student took no nourishment during the full time from boarding the van to returning home other than licking salt off pretzels.³ GPFF 28.

More of NSD's exhibits focus on the van ride to and from the day placement, which was over an hour each way. The Principal of the public school testified to recalling that there were issues on the van. GPFF 22. Guardian told of a time the van had to pull over and route to Concord Hospital ER on its way back to the home because the bus staff could not safely control Student's behavior to get home. GPFF 22. The transportation company was skilled in ABA and had to create a Transport Protocol that sometimes used the services of both an RBT and a BCBA (multiple staff in addition to the driver.) GPFF 19.

NSD fails to carry its burden to demonstrate progress or educational benefit. Educational benefit is an essential element of the inquiry into whether Student could receive FAPE in a setting less restrictive than residential. This was emphasized, as discussed above, by the First, Fifth and Seventh Circuits in determining the standards articulated that were slightly more onerous than the Third Circuit's criteria that Student's needs merely be "inextricably intertwined" and "non-segregable" from the learning goals.

Indeed, progress is not a criteria solely in the placement context but also in the context of evaluating the adequacy of any IEP. In 2017, the US Supreme Court articulated a progress standard to replace the earlier *de minimis* progress interpretation of its precedent. *Andrew F. v. Douglas City School District*, 137 S.Ct.988, 999 (2017), established that standard for FAPE in an IEP/Placement

³ Ultimately, [REDACTED] was considering a residential placement, with the full knowledge of NSD. However, the inability to provide Student with nourishment caused [REDACTED] to decline a residential placement after a team of medical specialists in July 2023 deemed Student NOT to need a GI tube as [REDACTED] was taking nourishment in the home from a bottle and there were no medical concerns about [REDACTED] ability to drink a bottle at school. GPFF 40.

must be that the IEP and services be “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” Consideration of Student’s unique circumstances brings us back to the inquiry into the opinions of members of a group with the most knowledge of Student’s circumstances. Starting with the most current knowledge, [REDACTED], [REDACTED] case manager (hereafter “[REDACTED]” or “Outplacement Case Manager”) not only oversaw the preparation of the draft IEP covering the current period that recommended services 7 days per week (GPFF 48, 50) but also testified that she would NOT recommend step down to a day placement for Student in light of [REDACTED] educational needs at present. GPFF 53. [REDACTED] staff member [REDACTED], long having knowledge of Student through the area agency role in providing in-home services and Medicaid support services overseen by BDS, believes that Student needs residential outplacement. This is evidenced by her role in assisting in finding such placement to get Student out of the hospital in September, 2023. Guardian has asserted that Student needs residential placement and continued to assert such need when asked to sign the current IEP as late as February, 2024 by seeking additional meetings with the District to put the recommendation for 24/7 (all waking hours) education back in the IEP as an educational need. GPFF 54. NSD is in possession of three letters recommending residential placement from outside providers: pediatrician, neurologist and outside BCBA from [REDACTED]. GPFF 33, 34, 35. Even the District’s own witnesses, Principal and Out-of-District placement coordinator, indicated that they believe that residential placement is appropriate. GPFF 51, 52.

So, how does NSD continue to deny that it is responsible for residential placement? NSD tried throughout the Hearing to distinguish between the needs of Student educationally vs. needs in the home, implying that the problems and challenges are home-based because Student lives with Grandmother as Guardian and that those home-based problems are distinguishable from educational challenges. In fact, while the LEA representative declined to answer the direct question on cross-examination of what weight was given by the IEP team to the multiple outside recommendations for residential placement, the LEA tried to deflect the question by testifying that the outside providers “did not see [REDACTED] in an educational setting.” GPFF 37. This is only relevant when the challenges at school and home or elsewhere differ. *Legally, if challenges at school were distinguishable from those in the home and this was supported by a preponderance of the evidence*, this argument would give NSD a leg to stand on. “When evaluating whether a residential placement is appropriate for a particular student, the Hearing Officer must determine whether around-the-clock educational services are necessary to enable the student to make meaningful

educational progress in the areas identified as special needs, or whether the challenges a student experiences or presents outside of the school setting are ‘separable from [the student’s] educational problems.’” In Re: Darnell and Silver Lake Regional School District – MA BSEA #18-01959 (2018), quoting Gonzalez v. Puerto Rico Dept. of Education, 254 F.3d 350 (352-353 (1st Cir. 2001).

Not a shred of evidence in this case supports the argument that home and school saw different challenges. This was illustrated in the attempt by LEA for the District to explain why the District was sending Student home on shortened days (as short as two hours) if there were not the same manifestations of autism based disability challenges at school. The LEA attempted an explanation - in the face of questioning from the Hearing Officer - that the demands of school were creating challenging behaviors not manageable at home so for the benefit of home the school, which ostensibly had more staff support for the behaviors, would keep the Student at home for more time rather than at School. The explanation fell flat.

Instead, all evidence supports an understanding that Student has strong home supports but displays the same challenges at home as ■ does at school and in every other setting and that such challenges exist for Guardian AND for any others in the home or community. The fact that Guardian is a ■ is irrelevant. Principal testified that Student sometimes needed 2:1 support at the public school. GPFF 15. The BCBA providing in-home supports after school testified that 2 staff were needed and were still not always safe. In fact, home supports were halted to develop a safety strategy in Spring 2023, as also evidenced by the documents. GPFF 60. Van transport required multiple staff and a Transport Safety Protocol. GPFF 19, 22. Community providers of swimming lessons, speech therapy and even regular doctor’s appointments were unable to safely manage Student after the regression concurrent with school attendance. GPFF 13, 36. Day outplacement Teacher testified that daily 2 staff members and sometimes 3 were required for restraint. GPFF 31. Emails evidence the fact that even if Guardian left Student with 2 other qualified staff at home, neighbors complained about Student’s self-injurious behavior shaking the walls of their home next door. GPFF 20. Staff in the hospital were unable to manage Student, with Guardian testifying as to the use of mechanical restraints and the restraint of a “tented bed.” GPFF 23.

In fact, just the opposite of problems being confined to home, Guardian did as well or better than others in transporting Student to services and schools. Guardian brought Student as a baby to Early Intervention, enrolled Student in and brought him to feeding and speech therapies, enrolled

Student in ABA programs before starting School, and was generally able to manage taking him to appointments until the regression that was correlated with time in school. GPFF 1-7. Guardian sought out every possible service by her own testimony. GPFF 5. Guardian continues to visit Student at the residential outplacement, maintains [REDACTED] home and is prepared to bring him home if it is recommended by [REDACTED] and [REDACTED] has made progress in communication and self-regulation. GPFF 24.

Based on all of the above affirmative evidence demonstrating that many members of Student's IEP team and outside knowledgeable providers from Summer and Fall of 2022 onward to the present recommended residential placement AND based on the fact that no defenses of either: 1) progress outside of residential placement or 2) needs requiring residential are distinct from education have been established, Guardian urges this Hearing Officer to conclude in answer to Hearing Question 1 that a residential placement IS required for the Student to access FAPE.

III. [REDACTED] is an appropriate placement at which Student is making progress.

It has been the testimony of every witness and is the position of the District that [REDACTED] is an appropriate setting for Student. Therefore, this Post Hearing Submission will not belabor arguments that [REDACTED] is appropriate. [REDACTED] testified that [REDACTED] has a unique program design. Rather than specialists in Speech, OT, PT, Adaptive communications technology, and behavior delivering services in limited blocks, those specialists train certified special educators. Those special educators then go between school and residential settings and deliver services across all waking hours. Student is making meaningful progress with this consistency. [REDACTED] behavioral data and the [REDACTED] progress report show progress on all goals and a significant decline in self-injurious behaviors. GPFF 69. Stuningly, 2 or 3 restraints over the course of the year were reported to the NSD Out of District Coordinator versus daily restraints from [REDACTED] GPFF 67. Testimony of [REDACTED] highlighted the fact that Student goes out daily to play on the playground and DOES use the equipment and interact with other children. Student recently began swimming. Student is tolerating medical care and assistance in self care. Student is transitioning between settings. Student has begun to voice more verbally in addition to effective use of a communication device. GPFF 68.

Guardian urges this Hearing Officer to find on Hearing Question 2 that [REDACTED] is an appropriate placement.

IV. Student was NOT unilaterally placed since Guardian made District a Part of the Process or, in the Alternative, if Student is deemed unilaterally placed by another Agency such action was necessitated by NSD's Abdication of Placement Responsibility but does not relieve NSD of the burden to evaluate residential placement as an educational necessity

Guardian, through [REDACTED] Advocate, argues that Sections II and III above, addressing the need for a residential placement educationally and the appropriateness of the [REDACTED] residential placement allow for full disposition of this case. Guardian urges the Hearing Officer to come to the conclusions and grant the relief requested solely on the basis of the two previous legal questions already addressed herein.

NSD has focused on the part played by DHHS in securing residential placement and the fact that, currently, residential placement is being funded by DHHS. Ultimately, when Student was hospitalized for an extended period of time in Summer 2023, senior staff members at DHHS were involved in this case. The extended hospital "placement" was ultimately determined by doctors to be doing harm because the presentation of this Student was a presentation of [REDACTED] autism disability and not a medical condition that a hospital or a team of doctors could "fix" so as to render Student able to receive an education and go about daily living skills. After numerous tests were performed and no medically treatable conditions were found, the hospital staff at MGH were adamant that to leave this Student in a hospital "placement" was violating the principle of doing no harm. GPF 62, 63. Rather than allow harm, DHHS stepped in temporarily with a Director level approval for funding until a resolution could be found, or ordered, through NSD. GPF 64. The fact that DHHS temporarily funded the residential placement is in no way dispositive of the question of whether the District bears a burden to place Student residentially to access FAPE. The Ninth Circuit has considered and answered this question directly. In *M.S. v. Los Angeles Unified School District, No. 16-56472 (9th Cir. 2019)*, the Court upheld an appeals panel finding that despite a residential placement by DCYF for a student for mental health, "LAUSD had an independent obligation to ensure that a continuum of alternative placements was available to meet student's educational needs and to consider whether a residential placement was necessary for educational purposes and not merely necessary quite apart from the learning process." NSD has the same obligation in this case, even if one accepts NSD's contention that DHHS affirmatively placed the student residentially.

In no way do the above facts support the idea seemingly advanced by NSD that they were “not involved in the residential placement” and, therefore, not responsible for it. Testimony of [REDACTED] and validated email documents indicated that [REDACTED] was made aware that Student was effectively in a hospital placement and that [REDACTED] was kept updated and was in communication. GPFF 38. Email documents affirmed by [REDACTED] in testimony indicate that [REDACTED] did NOT have a concrete plan going forward. GPFF 41. While NSD continued to assert that the [REDACTED] day outplacement was the plan post hospitalization, testimony as to whether or not that continued to be available to the Student or whether hospital staff would provide an opinion that such a step - down placement was appropriate is inconclusive. GPFF 39, 40. Tellingly, the District, which bears the burden, provided no evidence of communication with [REDACTED] day outplacement staff regarding a timeline for or the continued appropriateness of Student’s return to this placement. The only evidence of communication with [REDACTED] was to deny residential services to this Student because they determined during the time of Student’s hospitalization that they could not meet the needs of this Student residentially.⁴ GPFF 40. [REDACTED] initially testified that Guardian was both seeking the help of DHHS staff for placement AND told the District to stay out of the search. Notably, [REDACTED] recanted the latter part of that testimony on cross examination, indicating the Guardian NEVER asked that the District not be involved in a search for placement.⁵ GPFF 44.

Useful for consideration and by way of comparison to this case is the framework in Massachusetts under 603 CMR 28.08(3) explicitly allowing a Hearing Officer to join DHHS or other social service organizations as parties to special education due process hearings and to order them to provide a residential placement or other services complementary to the IEP if the ordered placement or services are “(a) among those that the agency’s own regulations authorize or require it to provide for the student at issue and (b) necessary to enable the student to benefit from the free

⁴ Notably, a couple of months later during what should have been an IEP and placement meeting for the new annual IEP in November/December, 2023, the LEA for NSD indicates that [REDACTED] could leave the Student at the residential placement solely for residential time and go “find a day outplacement.” This indicates that the District was not itself certain of where they would place the Student in a day placement and had not done the work to propose a specific day placement where they believed FAPE was available at this time.

⁵ During testimony, it was revealed that NSD’s outplacement coordinator, [REDACTED] was actually on leave and monitoring emails intermittently. This does not support the idea that a “unilateral placement” took place but rather that others were filling a void because NSD abdicated responsibility. [REDACTED] testified that [REDACTED] did not notice a placement meeting (although it is not clear whether [REDACTED] or another should have done that during [REDACTED] leave of absence) during hospitalization because [REDACTED] “did not want to add stress.” There is no indication that this was in accordance with the wishes of the Guardian who was working with anyone who would help to find a placements, to which the Student could “step down” after a long hospitalization.

appropriate public education already required of and provided by the school district.” MA BSEA #24-04733. By contrast to both the Ninth Circuit LAUSD case, where DCYF acknowledged an obligation to place residentially, and the MA framework articulated wherein agencies can be ordered if services are authorized by their regulations, in this case NH DHHS worked systematically to determine whether any DHHS programs could provide greater supports or were appropriate for matching services to Student’s needs and found in each case that they were NOT. DHHS’s current funding is merely temporary and was a response to the fact that continued hospitalization was doing harm to Student. GPFF 63, 64. [REDACTED] of [REDACTED] -one of the area agencies under the umbrella of the Bureau of Developmental Services (“BDS”) within DHHS- laid out in detail in her testimony each of the DHHS programmatic aspects under which services were evaluated for Student. These included: 1) DCYF residential placements (discussed above), 2) Bureau of Children’s Behavioral Health (“BCBH”) CAT assessments and episodes of treatment (“EOT”) for which a treatment plan is appropriate in addition to an IEP for education, 3) In-Home Supports through BDS and area agencies and funded through Medicaid and 4) petitions for Children in Need of Services (“CHINS”) that are court-ordered through the Family Division, sometimes with consent of DHHS. Juvenile Justice. Testimony established that each of these DHHS funded programs were inappropriate for Student or that available supports were maximized and at times unavailable based on Student’s presentation. GPFF 56-61.

DHHS’s stop gap Director’s Approval funding mechanism was temporary and is not relevant to the questions of whether NSD has an obligation to place Student residentially to receive FAPE and should continue such placement at [REDACTED] namely Questions 1 and 2 for Hearing. The unusual way in which this funding temporarily was provided should not be used to muddy the waters of whether this was a unilateral placement by Guardian. (DHHS is not seeking reimbursement and Guardian is not out of pocket tuition for reimbursement.) Even if a unilateral placement were found to have occurred at the outset, that does not impact the going-forward analysis of whether District is responsible for FAPE through an IEP based placement residentially at [REDACTED]

Guardian urges this Hearing Officer to find that Hearing Question #3 is moot or that even if arguments that this was a unilateral placement by Guardian or DHHS are founded, it is not dispositive of the question(s) at issue regarding placement and merely brings the inquiry back to Questions #1 and #2 set out for Hearing.

V. Requested Relief and Conclusions

Guardian seeks a Finding and Order that:

- 1) Student requires residential placement for FAPE through [REDACTED] IEP, making it the responsibility of NSD, without reference to any residential treatment plan;
- 2) [REDACTED] is an appropriate residential placement at which Student should continue.

Respectfully Submitted by,

/s/ Kristen Mansharamani

Kristen Mansharamani, Advocate for Special Education

On Behalf of Guardian, [REDACTED]

Office of the Advocate for Special Education - NH

Certificate of Service:

I hereby certify that I have served this by electronic means as of the date here below signed on the attorney for the school District simultaneously with filing.

Date: 10/11/24

/s/ Kristen Mansharamani

Kristen Mansharamani

NH Advocate for Special Education