

THE STATE OF NEW HAMPSHIRE

DEPARTMENT OF EDUCATION

Student/

School District/
IDPH-E-FY-19-12-017

School District

DUE PROCESS DECISION

I. INTRODUCTION

On December 18, 2018, the School District filed an expedited due process request seeking an order approving a proposed 45-day Interim Alternative Educational Setting (IAES).¹

The issues for hearing are as follows:

1. Whether the December 7, 2018 determination that Student's continued attendance at High School poses a substantial risk of injury to another Student, Doe,² warranting an IAES for 45 school days, pursuant to 34 C.F.R. § 300.532(b)(2)(ii);
2. Whether the IEP team's proposed placement – tutoring, related services and recreational services, with tutoring and other programming located at the SAU office, pending admission to another high school – is appropriate under 34 C.F.R. § 300.532(b)(2)(ii).

The prehearing conference was held on January 11, 2019, in conjunction with companion case IDPH-FY-19-12-016. The due process hearing took place on the following days: January 18, 22, 23, 24 and 25.³ Present each day were: Parents; Parents' counsel Attorneys and ; SAU Special Education Director ; Special Education Coordinator ; School District counsel Attorney ; School counsel Attorney ; of Assistant Attorney

All parties submitted voluminous exhibits, including a video of an Post-hearing submissions were filed.

The following witnesses provided testimony relative to the above issues:⁴

1. Doe's
2. Doe's ; accompanied by counsel for the family of Doe;
3. Student and Doe attended; High School special education teacher in the program, which
4. Ph.D., psychologist who evaluated and made recommendations regarding Doe;
5. Dr. , neuropsychologist who reviewed records relative to Doe and Student;
6. Dr. , forensic psychologist, who evaluated Student;
7. Dr. , neuropsychologist who evaluated Student;

¹ Although the two cases involve common issues of fact and law, they are not consolidated. However, both cases have a consolidated record.

² Doe's parents have authorized the use of records in this hearing, subject to certain protective provisions set forth in the protective order. This Decision is subject to the protective order.

³ The hearing in this expedited matter was originally scheduled for January 18 and 21, 2019; scheduling certain witnesses during the following three days was necessary due to witness availability and to insure full and fair presentation of evidence.

⁴ Most of the witnesses offered testimony relative to both cases.

8. Dr. _____, School District school psychologist;
9. _____, Board Certified Behavior Analyst (BCBA), who conducted a Functional Behavioral Assessment (FBA) on Student;
10. _____, School District Director of _____;
11. _____, School District Special Education Coordinator;
12. _____, SAU _____ Special Education Director;
13. Student's mother;
14. Student's father.

II. FACTS

1. Student is a _____-year-old high school _____ who has resided in the _____ of _____, New Hampshire with _____ Parents and _____ all of _____ life. Student is well-liked, and participates in many sports and other community activities, including basketball and bowling. Student is diagnosed with _____ disability, a _____ delay, and a _____ delay. _____ qualifies for special education under the Individuals with Disabilities Education Act (IDEA).
2. _____
3. The _____ School District is responsible for the provision of an education to the residents of the Town of _____. The _____ School District does not have a public high school and thus has entered into a long-term contract known as an Authorized Regional Area Enrollment Agreement (AREA Agreement) with the _____ School Department to provide a high school education to its residents at _____ High School (_____).
4. _____ is also responsible for transporting _____ students to and from _____ and contracts with _____ for that purpose.
5. Until April 29, 2018, Student received _____ instruction in the _____, taught by special educator _____. Eight to nine other students, including _____ Doe, accessed _____ classroom at _____.
6. Student's 2017-2018 IEP called for two (2) eighty-one (81) minute sessions per day of life skills programming. _____ program consisted of instruction in all academic areas, speech therapy, occupational therapy, and adaptive physical education. Student also attended two (2) regular education classes per day. Student's IEP calls for supervision in the building at all times, to ensure _____ is behaving appropriately and safely.
7. _____ Doe is a _____ entitled to special education and related services under the IDEA by _____ I _____.
8. _____ Doe receives _____ programming in _____'s _____ classroom for _____ per day. _____ also accesses _____'s classroom for support throughout _____ day.

9. On the morning of _____, 2017, _____ reported that _____ Doe told _____ that Student had _____ the day before.

10 In late December 2017, a Title IX investigation was conducted by _____. In _____ 2018 report, _____ made several recommendation, including: Student's current program should be reviewed to discuss additional behavioral supports or consultations that might be needed; the two students should be seated separately on the school bus at all times and that all bus drivers, including substitutes, be informed of this necessary separation; the two students should not have unsupervised time together in the school environment; both students "receive some direct instruction in _____"

11. _____'s Title IX Summary Report concluded that, "considering all factors, the incident does not meet the definition of _____ per _____ Policy JBAA. However, the interaction constituted "an inappropriate exchange that warrants follow-up."

12. Student's IEP Team met on February 22, 2018; at that meeting, and at subsequent meetings throughout the remainder of the 2017-2018 school year, the team and proposed a _____ consult and a _____;

13. The purposes of the FBA included addressing Student's inappropriate behaviors and informing inform the team as to how best to provide direct _____ to Student.

14. Ultimately, in July of 2018, the Parents provided consent for the FBA. The FBA was conducted by _____, BCBA.

15. On April 13, 2018, a complaint was received from _____ Doe's father regarding an incident the previous _____ day. The initial complaint was that _____ Doe's _____ saw Student and _____ Doe _____

16. A request of _____ for all relevant _____ video footage for _____ 2018 resulted in the discovery of a second incident which had occurred on _____ 2018, during _____ According to _____ there was no video available for _____ 2018.

17. Immediate steps were taken to see that, from that day forward, Student and _____ Doe were separate _____. Steps were also taken to see that the Students were separated in the school.

18. Expert witnesses and others who viewed the _____, 2018 video testified that they saw _____

19.

20. On April 30, 2018 a disciplinary referral was made, and Student was suspended for five (5) school days.

21. Upon completion of Student's suspension, _____ hired a tutor who was certified as a special education teacher to provide tutoring and life skills programming, overseen by _____ For the remainder of the 2017-2018 school year, the tutoring took place in the _____ at _____.
22. The _____ was not isolated, and Student also continued to attend _____ classes for the balance of the school year.. The _____ presented opportunities for interaction with other students, including students (other than _____ Doe) who frequented _____ classroom.
23. A second Title IX investigation was assigned to Associate Principal _____ . On _____ 2018, Principal _____ issued a Title IX Investigation Summary Report. That report found, among other things, that Student's _____ be separated from _____.
24. The May 8, 2018 Title IX Report contained a number of directives and recommendations, including:
- The two students should never be transported in the same vehicle, and bus personnel should be made aware of this requirement and be trained in safety protocols;
 - In the school environment, the Students must be kept separated and not have contact with each other during the school day or extra-curricular activities;
 - Student's team should meet to review the current plan, including necessary behavioral supports to address inappropriate behaviors;
 - The Student's team should employ outside behavioral consultation for evaluation and to develop a comprehensive behavior plan;
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25. The school districts met with Student's Parents on May 9, 2018 to review the outcome of the Title IX investigation.
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26. Student's Parents did not appeal the determinations from the _____ Title IX report.
27. In May 2018, the Parents contacted Dr. _____ to complete a risk assessment of Student. As part of assessment, Dr. _____ viewed the _____, 2018 _____ video. _____ did not meet with or assess _____ Doe.
28. Dr. _____ noted, among other things, that developmentally, Student presents as a very young child, has no knowledge of _____ anatomy or the mechanics of sexual activity, and has deficits in understanding of relationships; Dr. _____ opined that Student's actions are consistent with past problems with impulsivity that have been noted in _____ academic records. Dr. _____ concluded that there was no indication of anything predatory about Student's behavior, and _____ problems in the area of boundary setting can be easily managed with routine precautions.

29. Dr. _____ recommended the following services to be provided to Student:

- (a) _____
- (b) A behavioral support program designed to help Student develop better social skills and understanding of interpersonal boundaries; and
- (c) Close supervision throughout the school day, especially during unstructured times.

Dr. _____ opined that _____ recommendations could be carried out at _____

30. In August of 2018, the Parents obtained a neuropsychological evaluation of Student from Dr. _____ from _____ Center. As part of _____ evaluation, Dr. _____ reviewed the _____ 2018 _____ video and incident reports, and met with the Student, _____ parents and teachers.

31. Dr. _____ concluded, among other things, that Student's significant cognitive deficits, language impairments, poor reasoning, impulse control challenges, and social processing weaknesses would likely negatively impact _____ ability to process social cues, demonstrate appropriate social judgment (especially in unsupervised situations), and utilize appropriate behaviors in specific situations. Dr. _____ opined that Student can access _____ education in a public school setting with appropriate supports as well as increased and consistent supervision.

32. On August 22, 2018, the IEP Team met and proposed three alternative schedules that would allow Student's IEP to be implemented at _____ pending completion of the FBA, but which would continue to maintain separation between the two students.

33. _____

34. On _____, 2018, Dr. _____ authored a clinical consultation opinion regarding _____ Doe.

35. Dr. _____ opined, among other things, that:

36. Both _____ and _____ had their school psychologists review Dr. _____'s report. Dr. _____'s school psychologist, also met with Dr. _____ and _____ Doe's _____ on or about _____, 2018.

37. Dr. _____ is a clinical and school psychologist with experience in working with children with disabilities who have _____. _____ is familiar with the clinical criteria for the diagnosis of _____

38. Although there were elements of Dr. _____'s opinion pertaining to Student that lacked clinical foundation, the school districts did take into consideration Dr. _____'s opinions pertaining to _____ Doe.

39. _____ also had Dr. _____'s report reviewed by Dr. _____. Dr. _____ questioned the diagnosis of _____ but conceded that _____

40. On _____, 2018, _____, Principal, determined that Student presented a substantial and serious risk of causing injury to _____ Doe if _____ remained at _____. Dr. _____' memorandum, which was shared with the IEP team, stated that
41. After _____, 2018, Dr. _____ conducted a comprehensive evaluation of _____ Doe and issued a _____ is well-qualified in the evaluation of children with _____ has provided consultation to both parents and school districts.
42. In Dr. _____'s professional opinion, re-exposure to Student would present a substantial mental health risk to _____ Do
43. The _____ School District determined an appropriate IAES for Student and also proposed that _____ be placed in another public high school.
44. On October 10, 2018 the parties entered into a mediated settlement agreement. Student remained in the IAES pending the outcome of the settlement agreement, and remained in the IEAS after the mediated agreement became null and void in early December of 2018.
45. On December 7, 2018, the _____ School District, though its counsel, issued a second determination that Student presented a substantial risk to _____ Doe.
46. On December 14, 2018, the _____ IEP team proposed an IAES, consisting of the following: 10 hours per week of tutoring by a Special Education, with _____ added; one 45-minute session of one-to-one Speech/Language therapy per week; one 45-minute session of Occupational Therapy per week; behavioral consultation by a BCBA; two hours per week of community access as recreational therapy per week provided by _____, in lieu of adaptive physical education. Tutoring and other services would be based at the SAU office until an appropriate school accepted Student, and then Student would be placed at that school.
47. At the time of the December 14, 2018 team meeting, the IEP team had explored various options for placement at public and private high schools. _____ High School had indicated a willingness to consider Student for admission, subject to its policy of only accepting non-resident students via a "manifest educational hardship" placement.
48. _____ School Board has indicated that, if Parents applied for placement to _____ based on ~~manifest educational hardship, it would approve that request without requiring an additional hearing.~~ Once this occurs, _____ would convene its IEP team to make a final decision regarding Student's admission.
49. The _____ School District offered to cover Parents' legal costs incurred in preparing a manifest educational hardship request to the _____ School Board. _____ also proposed that Parents could make a manifest educational hardship request without prejudice to their position that Student should return to _____.
50. _____ High School provides transition programming to age 21. Although _____ does not have Unified Sports at present, it does have other activities, such as _____, after school events, and clubs, which provide integration into the school community. _____ also has a Life Skills program.

51. In November of 2018, Student visited _____ High School and participated in an after-school activity with _____ disabled and non-disabled peers. _____ told _____ staff that _____ liked _____ and had made friends there.
52. No evidence was proffered that Student failed to make meaningful educational progress on _____ goals and objectives during the three weeks that _____ was separated from _____ Doe at _____, or in any other setting.
53. The separation of the two students at _____ was not, and is not, a viable plan for either student in that it deprives them of access to portions of the high school and is not a realistic placement option.
54. If Student attends _____ it is virtually impossible to guarantee that the two students would never encounter one another.
55. Student can access _____ education in a public school setting with appropriate supports. An inclusive school setting for Student is recommended as the least restrictive school environment.
56. According to _____ school staff.
57. Dr. _____ reviewed educational records relative to both Student and _____ Doe. _____ did not examine or meet either student or their parents, or speak with teachers. Dr. _____ opined that the students could remain at _____ together following a therapeutic reintegration plan, which _____ believes can occur over the course of four (4) to eight (8) weeks.
57. Although the experts testified as to other possible factors, such as _____, and although there are conflicting accounts as to some of the reported incidents, there is sufficient evidence proffered by experts and others that Student's presence at _____ poses a risk to _____ Doe at this time.
58. If Student is closely supervised by skilled paraprofessionals, and receives behavioral interventions pursuant to a behavior plan written and supervised by a BCBA, he does not pose a risk to any student other than _____ Doe and can be educated in a regular public high school.

III. RULINGS OF LAW

59. The _____ School District bears the burden of proof and persuasion. Schaffer v. Weast, 546 U.S. 49 (2005). The burden in this case requires the district to proffer evidence that maintaining Student's current placement at _____ is substantially likely to result in injury to _____ Doe. 34 CFR 300.532 (a), and that the proposed IAES is appropriate.
60. A hearing officer has the authority under 20 USC 1415(k)(3)(B)(ii)(II) to order a change in placement of a child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of such child is substantially likely to result in injury to the child or to others.
61. Hearing officers have the authority under 34 C.F.R. § 300.532 to exercise their judgment after considering all factors and the body of evidence presented in an individual case when determining whether a child's behavior is substantially likely to result in injury to the child or

others.

62. In view of the Title IX findings, it was appropriate and reasonable for _____ to take steps to protect _____ Doe from further harm. *See Davis v. Monroe Cnty. Bd. Of Educ.*, 526 U.S. 629, 646-647 (1999); *see also Thomas v. Springfield Sch. Committee*, 59 F.Supp.3d 294, (D. Mass. 2014).
63. There was no appeal from the May 8, 2018 Title IX determinations. This forum lacks authority for an appeal or a collateral challenge to the Title IX findings.
64. Students with disabilities may, under appropriate circumstances and in accordance with proper procedures, be removed from a placement due to Title IX violations. .
65. The IAES proposed by _____'s IEP team, as described in the December 14, 2018 written prior notice, will enable Student to participate in the general education curriculum and progress toward meeting IEP goals.

IV. PARTIES' REQUESTS FOR FINDINGS OF FACT AND RULINGS OF LAW

I have carefully read and considered the parties' legal arguments, as well as each of the proposed findings of fact and rulings of law. However, many of the proposed findings and rulings either cannot be granted or denied as written, or pertain primarily to the companion case, or both.

Accordingly, a number of the parties' proposed findings and rulings have instead been incorporated into this Decision. To the extent that a proposed finding of fact or ruling of law conflicts with those set forth herein, it is deemed denied.

V. CONCLUSION AND ORDER

This case presents a unique set of circumstances. Student can be educated in a regular public high school, with certain services in place. _____ could remain at _____, but for the presence of one other student. This case does not turn on any "intent" on Student's part, nor does the potential harm to _____ Doe depend on whether Student engages in inappropriate behavior toward _____.

The impact on _____ Doe is not the only consideration when evaluating the appropriateness of the proposed IAES. Given the history of this case, there is some question as to whether placement at _____ might negatively impact *Student* as well. For example, possible repercussions from even a chance encounter between Student and _____ Doe could potentially jeopardize Student's ability to receive a FAPE at _____.

There is nothing to prevent the IEP teams from developing a carefully crafted therapeutic re-integration plan as suggested by Dr. _____. A transition period for Student's re-entry into _____ is required to ensure sufficient supports are in place to protect the health and safety of both students. However, such a plan would have to include and be endorsed by _____ Doe and _____ parents, something that this forum cannot order. There is sufficient evidence on this record to conclude that, absent such a plan, the proposed IAES, which includes identification of an alternative public high school placement such as _____, is necessary to avoid further harm while providing Student with a FAPE.

Accordingly, it is ordered:

- A. The December 7, 2018 determination that Student's continued attendance at _____ poses a substantial risk of injury to _____ Doe, warranting an IAES for 45 school days, pursuant to 34 C.F.R. § 300.532(b)(2)(ii), is supported by the evidence;
- B. The _____ IEP team's proposed IAES, as described in the December 14, 2018 Written Prior Notice, is appropriate under 34 C.F.R. § 300.532(b)(2)(ii).

Date: February 1, 2019

Amy B. Davidson, Hearing Officer

APPEAL RIGHTS

If either party is aggrieved by the decision of the hearing officer as stated above, either party may appeal this decision to a court of competent jurisdiction. The Parents have the right to obtain a transcription of the proceedings from the Department of Education. The School District shall promptly notify the Commissioner of Education if either party, Parents or School District, seeks judicial review of the hearing officer's decision

Cc:

*Via electronic transmission
and certified mail, return receipt requested*