

New Hampshire Department of Education

Student / **Alpha** School District

IDPH-E-FY-24-02-041

Expedited Due Process Decision

I. Procedural Background and Issues

The School District filed for a due process hearing on February 23, 2024. A prehearing conference via Zoom was held on March 20, 2024. Issues for hearing were clarified as follows:

1. Whether Student’s return to school would result in a substantial likelihood of injury to Student or to others, and therefore warrants placement in an interim alternative education setting?

2. Whether the interim alternative education setting proposed by Student’s IEP Team on February 8, 2024, is appropriate? Specifically, cross referencing the Written Prior Notice from the February 8 meeting, the School District’s proposal for consideration by the hearing officer is: “an alternative interim placement at the **Alpha** Learning Center¹ for 15 hours a week, with special education services to include 30 minutes of remote specialized instruction for reading/writing daily, 30 minutes of remote specialized instruction for math daily; related services of individual counseling for 30 minutes a week and individual occupational therapy for 30 minutes a week. Supplemental services include 1 to 1 paraprofessional support for 15 hours a week (3 hours a day), BCBA consultation for 15 hours the week of 3/4/24 to 3/08/24 with an hour a week of BCBA consultation from 3/11/24 to 8/16/24 as well as transportation 2 times a day for 30 minutes.”

An expedited due process hearing was conducted via Zoom on March 25 and March 26, 2024. Witnesses for the school district were **Alpha**, Director of Special Education; **Alpha**, Associate Director of Special Education; **Alpha**, Special Education L&A Teacher; **Alpha**, BCBA; **Alpha**, Principal of the **Gamma** Elementary School. The only witness for the guardian was the guardian.

The school district submitted 136 exhibits, plus an appendix of 100 emails. After hearing, the school district also submitted three additional exhibits that were discussed at hearing. The guardian did not submit any exhibits. The school district submitted a post-hearing memorandum. The guardian did not submit a post-hearing memorandum.

¹ The **Alpha** Learning Center was also referred to as the **Epsilon** Learning Center.

The school district was represented by counsel. The guardian was pro se.

II. Findings of Fact

1. **Alpha** is the Local Education Agency (“LEA”) responsible for educating the Student.
2. Student is nine-years-old and in the second grade.
3. Student’s **█** serves as the legal guardian, and was appointed to that role on March 4, 2018. Student resides with the guardian in **Beta** NH. Prior to living with current guardian, Student lived with **█** for two years until **█** died of cancer. Prior to that, Student had lived in four different homes during the first three years of **█** life.
4. Student qualifies as a student with a disability under state and federal special education laws. Student is eligible for special education and related services under the categories of Developmental Delay (“DD”) and Specific Learning Disability (“SLD”).
5. Student was homeschooled for most of the first Kindergarten year, 2020 – 2021. Student started at **Beta** Elementary School for the first grade year, 2021 – 2022. However, early that school year, the guardian and school district (“the Parties”) agreed that Student was not yet ready for first grade. Student therefore repeated Kindergarten for most of the 2021 – 2022 school year.
6. In October 2021, a Behavior Intervention Plan (“BIP”) was created to address noncompliance, elopement, disruptive behavior, verbal aggression and physical aggression. The plan listed behavior and escape as the hypothesized functions of behavior. SE-1.
7. In the fall of 2021, the school district conducted a special education evaluation. SE-2.
 - A. On the Psychoeducational evaluation, one of the tools was the Kaufman Test of Educational Achievement (KTEA-3). Student tested at the 1st percentile for Reading Composite, 0.2 percentile for Math Composite, and <0.1 percentile for Written Language Composite.
 - B. The Occupational Therapy evaluation showed Student testing Below Average in Fine Motor skills and Visual-Motor Integration.
 - C. A 45-minute Behavioral Observation documented 10 occurrences of non-compliance with directives, 42 occurrences of inappropriate vocal disruptions and 1 occurrence of physical aggression (against another student).
8. The December 2021 IEP documented removal from the regular education setting to receive Occupational Therapy (30 sessions per school year of 30 minutes) and

- Reading instruction (120 sessions per school year of 30 minutes). Placement was 6.5 hours per day in the Regular Classroom at **Beta** Elementary School. This IEP was accepted by the guardian. SE-3.
9. In February 2022, the school district’s BCBA developed a new Behavior Support Plan. The Plan called for use of the following on a daily basis: Visual Schedule, Behavior Data Sheet, ABC Data Sheet, Timer (to time behaviors), Token Board. Therapy schedule and recommendations were listed as TBD. SE-6.
 10. In February 2022, Student was moved from the Regular Classroom at **Beta** Elementary School to the Learning and Adjustment Program (“L&A Program”) within the **Gamma** Elementary School. This program is staffed by a full-time special education teacher, a full-time classroom assistant and a full-time counselor. In addition, nearly all students in the L&A program have a 1:1 paraprofessional. All staff are trained in Crisis Prevention Intervention.² Testimony of Dir. of Spec. Educ.
 11. An Accident Report dated March 27, 2022 documents that a pencil was thrown at the eye of a staff member in the L&A classroom. However, it does not document who threw the pencil, whether the pencil hit the eye, or the extent of injury, if any. SE-7.
 12. In September 2022, the school district’s BCBA developed a new Behavior Support Plan. Behaviors to be decreased were verbal aggression, refusal, property destruction, eloping and physical aggression. This plan called for daily use of a device with the Catalyst app for collection of ABC data, a visual schedule, and token board.
 13. School district exhibits show that during the 2022 – 2023 school year, there were sixteen Staff Accident Reports, seven Incident Letters and three Notices of Intervention. Some of the Staff Accident Reports identify Student as the student causing an accident, while others do not. Similarly, some indicate injury occurred, while others do not. I will not give any weight to reports that do not identify the Student or cannot be connected to the Student through related reports or witness testimony. Among the more concerning reports where the Student can be identified and either caused injury or engaged in behavior that could easily lead to injury, are the following:
 - A. On September 28, 2022, Student “eloped from class and began running around the first grade wing. **█** went into two different first grade classrooms and started throwing items, emptying materials around the room, resulting in the complete upheaval of both classrooms. As a result, students in both rooms were evacuated.” Student was given a two-day suspension. SE-12.

² Evidence of this move was documented through testimony at hearing. However, no submitted exhibits from the 2021 – 2022 school year documented a shift to a different school or a more restrictive placement.

- B. On October 31, 2022 and again on November 2, 2022, Student hit teacher's arms multiple times. SE-13.
- C. On November 10, 2022, "[Student] punched [redacted] paraprofessional in the chest two times. When another adult went in to intervene, [Student] began whipping [redacted] with a body sock that [redacted] has recently used during a sensory break. Administration was called to support. [redacted] continued to be physically aggressive with administration and kicked me [Principal] on three occasions. [redacted] was also yelling obscenities under the door causing the wing of the building to be closed for a period of time." SE-16.
- D. On December 6, 2022, Student eloped from the building. After returning and reentering the classroom, Student charged at other students and then started to remove items from the teacher's desk. SE-18.
- E. On December 7, 2022, Student spit in the face of a staff member several times. SE-19.
- F. On January 10, 2023, Student "punched a support staff member in the stomach. [redacted] also shoved a chair into [redacted] legs injuring [redacted] knee." SE-30.
- G. On February 22, 2023, Student whipped a staff member in the chest with a yoga mat. SE-34.
- H. On March 20, 2023, Student "repeatedly" spit in the face of the L&A teacher. SE-35.
- I. On March 20, 2023, Student hit the L&A teacher in "my stomach & chest twice... [and then] threw beads in my face." SE-36.
- J. On March 29, 2023, Student "smacked [staff member] across the face, pushing my glasses into the bridge of my nose. [redacted] also hit my left cheek." SE-38.
- K. On March 31, 2023, Student engaged in a multi-incident event. Student ran from the classroom with a pair of scissors and then ran into the [redacted] bathroom with two staff members. Student locked the stall door, climbed on top of the toilet paper holder, grabbed the metal bar above the stalls and swung. Student came down, started to leave, but then returned, climbed on top of a [redacted], held down the flusher and flooded the bathroom floor. Student then left the bathroom and ran to a recycling bin, where Student used the scissors to cut paper. Student eventually ran outside, lifted a rock and threw it inside. Student returned to the recycling bin and cut up more paper. SE-29.
- L. On April 4, 2023, after completing an evaluation, Student became very dysregulated. Student drove a scooter into the bathroom, left and returned with a wooden bench that [redacted] repeatedly banged on the floor. [redacted] then banged a stall

door repeatedly until it snapped and the door fell to the floor, almost hitting Student. Student then fled the building. ■ pulled a wooden section from a flower bed with nails protruding and ran with it. ■ eventually returned to the L&A classroom, but then eloped again. Student was given a five day suspension. SE-39.

- M. On May 2, 2023, Student ran out of Math class, out of the building, into woods and then into an area with power lines. Once back in the building, Student spit in a staff member's face. Student repeatedly kicked the principal's chair, causing the principal's legs to hit the door jamb. Student also hit the hand of a teacher who was trying to stop Student from opening and slamming a microwave door. Student was given a three day suspension. SE-48.
 - N. On May 18, 2023, Student eloped from the classroom and building, ran to a dumpster and tried to climb into the dumpster. The principal physically removed Student from the dumpster. Once back inside the building, Student moved beads from Student's pocket to mouth, and spit beads and saliva at a staff member and at the principal. Student was placed in seclusion for one minute. This multi-incident event required both physical restraint and seclusion. SE-51.
 - O. On May 23, 2023, Student allegedly brought an undocumented medication to school and attempted to get other students on the bus to ingest the medication. This incident did not have a separate Incident Report, but was referenced in the May 31, 2023 Incident Report.
 - P. On May 24, 2023, Student attempted to whip staff with Student's belt and buckle. This event required seclusion for safety and de-escalation. SE-52.
 - Q. On May 31, 2023, Student brought a knife, approximately three inches long, to school. Student refused to relinquish the knife, which resulted in the class being evacuated. Student was told the police would have to be called, at which point Student relinquished the knife. Student was given a ten day suspension. Principal also expressed in the Incident Report an intention to request a Superintendent's Hearing to request an additional seven days of suspension to correlate with the end of the school year. SE-55.³
14. The 2022 – 2023 Report Card shows student being absent for 8 days in the first trimester, 8 days in the second trimester, and 28 days in the third trimester, totaling 44

³ Student had already been suspended at least 10 days prior to this 10 day suspension. Adding another 10 days brings the total to 20 days. Adding another 7 days brings the total to 27 days for the school year. The records provided show no indication that a Manifestation Determination meeting was held during the 2022 – 2023 school year. At hearing, the Director of Special Education could only point to a Manifestation Determination meeting held in November 2023.

- days. The Report Card shows the majority of Student's grades being very low: primarily "1" (Limited Proficiency) and "R" (Rarely). SE-28.
15. On January 25, 2023, the school district proposed a new IEP. This was accepted by the guardian on February 3, 2023. This remains the stay put IEP. Placement is the **Gamma** Elementary School, with 2 hours per day in the general education setting and 4.5 hours per day in the L&A special education classroom. Services include Specially Designed Instruction in Math with a Special Educator, 120 sessions per year of 30 minutes each; Special Designed Instruction in Reading with a Special Educator, 120 sessions per year of 30 minutes each; Behavior Consultation with a Behavior Consultant 9 times per school year; Group OT with an Occupational Therapist 30 sessions per school year of 30 minutes each; Individual Counseling, 30 sessions per school year of 30 minutes each; Behavior Support with a Paraeducator, 4.5 hours per day in the Special Education setting and 2 hours per day in the Regular Education setting. All services are listed as occurring in the Special Education setting, other than the Paraeducator for 2 hours per day in the Regular Education setting. SE-33; Testimony of Dir. of Spec. Educ.
 16. On March 31 and April 3, 2023, school district conducted a Psycho-Educational evaluation of Student, using the WISC-V and KTEA-3. The KTEA-3 was also administered in 2021. The 2023 results were very similar – 1st percentile in Reading, 3rd percentile in Math and 0.1 percentile in Written Expression. On the WISC-V, results were at the 2nd percentile for Working Memory, 8th percentile for Fluid Reasoning, 13th percentile for Processing Speed, 18th percentile for Visual Spatial and 45th percentile for Verbal Comprehension.⁴ SE-42.
 17. On April 13, 2023, the school district made a referral for Student to Spaulding Academy and Family Services, without identifying the Student. At hearing, the Director of Special Education for the school district referred to this as a "blind referral." SE-40; Testimony of Dir. of Spec. Educ.
 18. The guardian testified that ■ visited Spaulding, and found the Student's potential peer group to be inappropriate for Student, with very different and severe disabilities. Testimony of guardian.
 19. On April 17, 2023, Student was found to have a Specific Learning Disability ("SLD"), with weaknesses in Writing, Reading and Math. School district changed Student's listed disabilities to be Developmental Delay as the primary and SLD as the secondary. SE-32; SE-45; Testimony of Dir. of Spec. Educ.
 20. The BCBA amended the Behavior Support Plan in May 2023. SE-47.

⁴ It was on March 31, 2023 that Student also had a significant multi-incident behavioral episode following the evaluation, described supra.

21. On July 25, 2023, a new IEP was drafted but not signed by either party. SE-56.
22. Student's 2023 ESY program was in-home tutoring for eleven days, between August 14, 2023 and August 25, 2023. A paraprofessional or behavior consultant was also present on most days. The tutor documented behaviors such as hissing, throwing items or escaping to the door. SE-56.
23. In August 2023, the BCBA conducted an FBA. Primary behaviors are listed as Eloping and Multiple Behavior Episodes. Secondary behaviors are listed as Aggression, Stealing, Property Destruction and Inappropriate Vocalizations. Hypothesized reasons for behaviors were listed as escape and attention. The BCBA summarized:

In the public school setting, [Student] lacks the intrinsic motivation to comply with the environmental norms making it difficult to make progress with the limitations of a public school setting... While it can be predicted that [redacted] behavior is primarily attention maintained, it does not account for why [redacted] needs such high rates of attention nor does it explain why simple, ordinary age-appropriate demands can be so aversive. For this reason, it can be understood why interventions have not been able to maintain appropriate levels of behavior or why the school setting cannot compete with [redacted] current motivation(s). SE-58.
24. The Behavior Support Plan was updated again in September 2023. SE-60.
25. In September 2023, the school district conducted another Psycho-Educational evaluation. This was the second Psycho-Educational evaluation conducted in just five months, and the third conducted within two years. The primary tool in this administration was the BASC-3. Rating scales were completed by Student's L&A teacher. The teacher rated Student At Risk in Adaptive Skills, and Clinically Significant in Externalizing Problems, Internalizing Problems, Behavioral Symptoms and School Problems Index. Executive Functioning was rated as Extremely Elevated. The guardian did not complete the BASC-3 questionnaire because [redacted] was uncomfortable with the format of the questions. SE-63; SE-64.
26. The Team met on September 8, 2023 and again on September 11, 2023 to review the Psycho-Educational evaluation, the FBA, and to develop placement recommendations. The guardian did not attend either meeting. The school district recommended school-based counseling through Riverbend. The school district also recommended a therapeutic day setting as a placement. In the interim, the school district recommended increasing Student's time in the L&A classroom from 4.5 to 6.5 hours per day. The meeting notes also highlight that Student cannot maintain regulation in the classroom for more than one minute. SE-64; SE-71; SE-72

27. The school district reissued the IEP on September 11, 2023, maintaining the primary disability identification of Developmental Delay and the secondary identification of Specific Learning Disability. The school district Director of Special Education signed the IEP, but the guardian did not. SE-66; SE-69 – SE-72.
28. Between September 14, 2023 and October 24, 2023, the exhibits submitted by the school district show several behavioral incidents of significant intensity, disruption, and threat of or actual injury. Among the more concerning behaviors from the standpoint of injury or threat of injury are the following:⁵
- A. September 15, 2023: Throwing items from the teacher’s desk, such as pencils, a metal stapler, binder clips, and keys. Throwing chairs across the room. Taking off ■ shoes and attempting to hit staff by swinging them by the shoelaces. Student required a 32-second seclusion. A staff accident report was completed. SE-74; SE-75.
 - B. September 18, 2023: Striking a staff member in the arm. Spraying a spray bottle in the OT Room. Punching a staff member who attempted to take the spray bottle. Student was given a 4.5 hour out-of-school suspension. SE-76; SE-77.
 - C. September 26, 2023: Banging desk on ground repeatedly, causing desk to move uncontrollably around the room. Hitting a paraprofessional and an administrator on the arm. Whipping and striking a paraprofessional with a plastic chain, and also striking an administrator in the shoulder with the plastic chain. Student was given a one-day out-of-school suspension. SE-79; SE-80.
 - D. October 3, 2023: Traveling down hallway on a scooter with other students in the hallway. Kicking L&A teacher to the point that teacher had visible markings on ■ leg. Breaking a wooden drawer from an outdoor mud kitchen and using one of the broken pieces to strike the L&A teacher in the arm and leg, leaving red, raised welts still visible hours after the incident. Jumping into a dumpster and using the jagged edges of open cans to cut cardboard in the direction of Student’s body. Student was given a two-day suspension. SE-84; SE-85; SE-87.
 - E. October 17, 2023: Riding a bike down hallway uncontrollably in direction of preschoolers and staff. Climbing a steep metal staircase leading to the attic. Striking two staff members with a hard plastic hula hoop. Repeatedly hitting hula hoop on table in L&A classroom, resulting in classroom having to be evacuated. SE-92.
 - F. October 20, 2023. Swinging headphones around the room. Repeatedly hitting headphones on desk near another student, resulting in headphones breaking into several pieces and the classroom having to be evacuated. Running with a rolling

⁵ Only exhibits that identify the student directly or by reference from another report or through witness testimony are included.

chair, jumping on it and hitting staff members. Spilling soapy water, beans and beads on the floor. Throwing liquid at staff members. Breaking a broom by repeatedly banging it on the table. Bending the metal handle of the broom causing it to break in half, exposing sharp edges, and then continuing to break that into smaller pieces. Student required a five minute seclusion. SE-93; SE-94.

- G. October 24, 2023. Running around room taking items that were not [REDACTED]. Kicking teacher in shin leaving a purple bruise. Kicking paraprofessional in knee. Climbing metal stairs to attic. Student was given a three-day suspension, but has not been allowed to return to school since. SE-96; SE-97.

- 29. On October 13, 2023, the school district convened a Team meeting to discuss proposals from September 11, 2023, to which the guardian had not yet responded.

The school district discussed a possible interim placement at the [REDACTED] **Epsilon** Learning Center program, but the school district documented: “We could look at the [REDACTED] **Epsilon** learning center but the programs there serve middle and high school students and it is not appropriate for [Student].” (emphasis added).

Instead, the school district proposed a Home-Based Tutorial for two hours a day of general education instruction, thirty minutes of specialized reading instruction, thirty minutes of specialized mathematics instruction, and three hours a day of 1:1 paraprofessional support. At hearing, the Director of Special Education testified that the three hours of paraprofessional support was intended to coincide with, not be in addition to, the general education, reading and math instruction, so that the total Home-Based Tutorial time for all services would be three hours with two people. SE-91.

- 30. On October 24, 2023, the school principal emailed the guardian that Student would be suspended for three days, and that a Manifestation Meeting was necessary since Student was approaching 10 days of suspension. On October 27, 2023, the Director of Special Education emailed the guardian with an outline of home services. The school district has not allowed Student to return to school since the October 24 incident. The Manifestation Meeting did not occur until November 17, 2023. SE-Appendix-24 – 25; Testimony of Dir. of Spec. Educ.

- 31. Also on October 24, 2023, the school district proposed a new IEP, listing the location of all services as “Homebound / Hospital Based.” The following special education, related and supplementary services would be provided under this IEP:

- A. Specially Designed Instruction in Math with a Special Education Teacher for 30 minutes per day;
- B. Reading Instruction with a Special Education Teacher for 30 minutes per day;

- C. General Education Instruction in Science and Social Studies with a General Education Teacher for 2 hours per day;
- D. Individual Counseling with a Counselor twice a week for 30 minutes each session;
- E. Occupational Therapy with an Occupational Therapist once a week for 30 minutes;
- F. Behavior Support with a Paraeducator daily for 3 hours;
- G. BCBA consultation for 60 minutes per week.

The IEP describes this as “an interim placement of home based tutoring and special education services due to significant safety concerns...” Even though this is described as “interim,” the dates of services are listed as 10/30/2023 – 07/24/2024. This IEP was signed by the school district, but not signed by the guardian. SE-101.

- 32. On or around October 27, 2023, the school district filed for an expedited due process hearing. The hearing request was withdrawn on November 29, 2023, after the Parties “reached a tentative agreement regarding [Student’s] tutoring placement...” SE-Appendix-25, 37.
- 33. On November 1, 2023, a Team meeting was held. Guardian and school district disagreed about the need for a second school district person being present in the house. Guardian opposed two people being present. School district would like a second person there because the IEP calls for para support, as well as to provide safety and confirmation of reporting. School district recommended changing the counseling session to in-person. SE-104; SE-105; SE-106.
- 34. On November 17, 2023, a Manifestation Determination meeting was conducted. The school district stated at the meeting that Student had been suspended for 9.5 days. Student’s conduct was found to be a manifestation of the disability. The Team believed a new FBA would not be necessary, since one was completed over the summer. The Team also “determined that the IEP is appropriate,” though it is unclear whether that reference was to the stay put or currently proposed IEP. The Director of Special Education stated that the L&A program was not meeting Student’s needs. SE-108; SE-109; SE-110.
- 35. In addition to the specific behavioral incidents described above, the school district submitted approximately eighty pages worth of discipline referrals, showing behavioral issues on a near-daily basis, if not multiple times per day. One of several examples of injury caused by the Student was when Student used a pen to stab the BCBA, leaving a puncture wound through the sweatshirt and undershirt the BCBA was wearing. SE-113; Testimony of BCBA.

36. Between October 2023 and January 2024, Student participated remotely in the Virtual Learning Academy Charter School (“VLACS”). In January, however, the guardian received an automated email from the VLACS instructor stating that the course was cancelled because Student was not keeping pace. Testimony of guardian.

37. On January 17, 2024, the Director of Special Education, the Associate Director of Special Education and the guardian had a remote conversation regarding placement. The school district’s meeting notes, as well as hearing testimony, document the difference of opinion between the district and guardian. The school district sought any of several options for an interim or regular placement, including a 45-day interim placement, a more permanent therapeutic day placement, tutoring in the home provided by the district if two people can be present, or tutoring in the home with one tutor if arranged by the guardian. The guardian appears opposed to all of those options, and is only open to Student returning to the stay put placement of the public elementary school, or having the school district provide one tutor in the home. SE-117; Testimony of Dir. of Spec. Educ.; Testimony of guardian.

The same parties talked remotely again on February 2, 2024. The Director of Special Education suggested the Learning Center which “has programming for older students...”⁶ [REDACTED] also documented that “[Student] is not suspended.” SE-120; Testimony of Dir. of Spec. Educ.; Testimony of guardian.

38. On February 8, 2024, the school district proposed an interim placement at the Learning Center “which is an off campus setting for students needing emotional and behavioral support for 6th to 12th grade students.” Student would receive three hours per day of academic instruction, listed as thirty minutes of math, thirty minutes of reading, and two hours of general education. Services would be provided by a “tutor or teacher” along with a paraprofessional. Student would also have thirty minutes per week of individual counseling and thirty minutes per week of individual OT.

However, at hearing, when the Director of Special Education was asked by the school district’s attorney if the Learning Center interim placement would provide the Student with FAPE, [REDACTED] testified, “I don’t think an interim program is FAPE for any student typically, and so no, I would anticipate a full day, all day in that therapeutic setting as an appropriate placement that would provide [REDACTED] with FAPE.” SE-122 – SE-128; Testimony of Dir. of Spec. Educ.

39. The school district has looked into seven out-of-district day programs, but without guardian support, most are unwilling to consider or accept Student. SE-130; Testimony of Dir. of Spec. Educ.

40. Student’s school BCBA testified that the Student’s FBA includes replacement behaviors, which should serve the same hypothesized functions as the maladaptive

⁶ This appears to be the same program that was deemed “not appropriate” on October 13, 2023.

behaviors targeted for decrease. However, the BCBA testified that it was difficult for Student to consistently use those replacement behaviors because of the immediacy of the maladaptive behaviors. The FBA also includes numerous interventions and strategies to try to improve Student's behaviors. However, the BCBA and the Director of Special Education testified that none of those interventions have led to a reduction in the Student's behaviors. The BCBA testified that it is unknown why the Student requires such high levels of attention. ■ also testified that ■ believes Student should not be with other students in a classroom – Student should be by ■ self with no other students in a classroom. ■ also testified that the FBA did not reveal what the root cause is for why the Student needs such a high level of attention, nor is that ■ specialty. SE-58; Testimony of BCBA; Testimony of Dir. of Spec. Educ.

41. At hearing, guardian stated that when ■ heard Student was hitting teachers, ■ talked to Student about that. ■ testified “there is very likely not a good reason for [Student] to hit an adult teacher,” and that there was a consequence for doing so. When asked what the consequence was, guardian refused to answer, stating that ■ would keep that personal. Testimony of guardian.
42. The guardian testified that “[Student’s] mind changes – ■’s in a different place when ■ goes to school – it’s obvious. I stay consistent with ■.... [Student’s] behavior works with me. [Student’s] behavior is not an issue with me... I don’t have the problem at home. There is something else going on [at school].” Testimony of guardian.

III. Guiding Law

1. 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. RSA 186-C:16-b, III-a
2. *34 CFR § 300.532(b) – Authority of a Hearing Officer.*

...

(2) [T]he hearing officer may-

(i) Return the child with a disability to the placement from which the child was removed if the hearing officer determines that the removal was a violation of §300.530 or that the child's behavior was a manifestation of the child's disability; or

(ii) Order a change of placement of the child with a disability to an appropriate interim alternative educational setting for not more than 45 school

days if the hearing officer determines that maintaining the current placement of the child is substantially likely to result in injury to the child or to others.

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

3. *34 CFR § 300.530 – Authority of school personnel.*

...

(b) *General.*

(1) School personnel under this section may remove a child with a disability who violates a code of student conduct from his or her current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 consecutive school days...

(2) After a child with a disability has been removed from his or her current placement for 10 school days in the same school year, during any subsequent days of removal the public agency must provide services to the extent required under paragraph (d) of this section.

...

(d) *Services.*

(1) A child with a disability who is removed from the child's current placement pursuant to paragraphs (c), or (g) of this section must-

(i) Continue to receive educational services, as provided in §300.101(a), so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP; and

(ii) Receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.

...

(e) *Manifestation determination.*

(1) Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the LEA, the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA) must review all relevant information in the student's file, including

the child's IEP, any teacher observations, and any relevant information provided by the parents to determine-

(i) If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or

(ii) If the conduct in question was the direct result of the LEA's failure to implement the IEP.

(f) *Determination that behavior was a manifestation.* If the LEA, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team must-

(1) Either-

(i) Conduct a functional behavioral assessment, unless the LEA had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the child; or

(ii) If a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior; and

(2) Except as provided in paragraph (g) of this section, return the child to the placement from which the child was removed, unless the parent and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan.

(g) *Special circumstances.* School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability if the child—

(1) Carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function under the jurisdiction of an SEA or an LEA;

(2) Knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA; or

(3) Has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA.

4. 34 CFR § 300. 530(i)(3) defines *serious bodily injury* as having the meaning given the term under 18 USC § 1365(3), which states:

- (3) the term “serious bodily injury” means bodily injury which involves—
- (A) a substantial risk of death;
 - (B) extreme physical pain;
 - (C) protracted and obvious disfigurement;
 - (D) or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

5. *34 CFR § 300.502(d) – Requests for evaluations by hearing officers.*

If a hearing officer requests an independent educational evaluation as part of a hearing on a due process complaint, the cost of the evaluation must be at public expense.

6. *Ed 1124.02 Services for Children with Disabilities Removed from Current Placement.*

When a child with disabilities has been removed from the child's current placement for more than 10 days in a school year, in addition to providing services necessary to enable the child to continue to participate in the general education curriculum, as provided in 300.530(d)(1)(i), the LEA shall provide service necessary to provide the child with a disability an opportunity to progress in the general education curriculum consistent with the child's IEP. Such services, if provided at the child's home, shall consist of:

- (a) a minimum of 10 hours/week of instruction, including special education as specified in the child's IEP; and
- (b) related services as specified in the child's IEP.

IV. Rulings of Law

1. Returning the Student to the Stay Put placement, or even to the L&A program full time, is substantially likely to result in injury to the child or to others (34 CFR § 300.532(b)(2)(ii)).
2. The **Alpha** Learning Center program is not an appropriate interim alternative educational setting (34 CFR § 300.532(b)(2)(ii)).
3. A home-based program based on the October 24, 2023 proposed IEP, with services delivered by a special education teacher, a general education teacher, an occupational therapist, a counselor and a BCBA, is acceptable as an appropriate interim alternative educational setting, for a maximum of 45 school days or until the end of the current academic year, whichever occurs first. Since all services will be 1:1, with no other students present, a paraprofessional will not be needed for the home-based services,

as long as the guardian remains present and immediately available to assist should any behavioral issues arise (34 CFR § 300.532(b)(2)(ii)).

4. Student's FBA and Behavior Plan are inadequate to understand and properly address Student's behaviors. Furthermore, following the November 17, 2023 Manifestation Determination meeting in which Student's behaviors were deemed a manifestation of the disability, the school district failed to review and modify the Behavior Plan. School district should now obtain an independent FBA followed by a Team meeting to amend the Behavior Plan based on the independent FBA (34 CFR § 300.530(f)(2); 34 CFR § 300.502(d)).
5. School district was out of compliance with 34 CFR 300.530(e) – (g) when it delayed holding a Manifestation Determination meeting until November 17, 2023.

V. Discussion

The school district has met its burden of proving that Student is substantially likely to cause injury to self or others if Student is returned to the Stay Put placement and services at **Gamma** Elementary School. Furthermore, even if Student were to return to **Gamma** Elementary and spend the entire day in the L&A program, there is ample support to believe that Student is likely to cause injury to self or others. An examination of the behavior and discipline reports over the past two years provided by the school district show numerous examples of Student injuring staff and engaging in behaviors that very easily could have resulted in injury to self or others. The incidents show an increase in what the school district referred to as multi-incident events.

The Behavior Plan has been amended several times over the past two years, without any improvement in Student's behavior. In fact, Student's behavior appears to be getting more intense and dangerous, not less. Beyond the failure of the Behavior Plans to improve the Student's behavior, it is also concerning that the school district appears to be at a loss for what else to do. More specifically, the BCBA testified that it is unknown what the root cause is for why the Student requires such high levels of attention. The BCBA even went on to say that this was not **█** specialty. It was also extremely concerning to hear the BCBA state that Student should not be with other students in a classroom, but should instead be isolated. Although I do agree with the school district that Student is substantially likely to injure himself or others given **█** current behaviors and the program currently in place to support **█**, I do not see the current set of facts giving rise to such an extreme level of behavior and risk that the Student should be totally isolated from other students. Such a highly restrictive placement seems extreme. I am also concerned with the guardian's testimony that Student's behavior only occurs at school and not at home. I find it very hard to believe that there is such a sharp dichotomy in the Student's behaviors between school and home, but whether true or not, the Parties need to dig even deeper to better understand Student's behaviors. To help the Parties better understand the root cause of the Student's behaviors and how a school program should address the Student's behavioral needs, I am ordering

the District to obtain an independent Functional Behavioral Assessment and an amended or redrafted Behavior Plan, both to be provided by an independent BCBA not associated with the school district. This needs to be completed during the time period of the interim alternative educational placement, so that it can be utilized by whichever placement Student attends after the interim period.

Although the school district has met its burden regarding the substantial likelihood of injury, it has failed to meet its burden to prove that the [Alpha] (aka [Epsilon] Learning Center is an appropriate interim alternative educational placement. As described above, isolating the Student is overly restrictive. Making this even more concerning is isolating a second grade student in a completely separate building that houses a program for middle and high school students. On October 13, 2023, the Director of Special Education opined that the program was not an appropriate interim program, yet is now advocating for it as being appropriate. There was no evidence provided to show why the program would be inappropriate on October 13, but appropriate now. If it is not appropriate, placing the Student there would be a denial of the Student's right to a Free Appropriate Public Education in the Least Restrictive Environment.

The only other interim alternative option provided by either party for my consideration was for the Student to receive education at home during the interim period. While this option is also not very appealing, at least the Student will not be with a totally inappropriate peer group, or in a program previously deemed inappropriate by the school district. The October 2023 IEP appears to be the IEP that best defines the type of services that can be implemented at home on an interim basis. This should be considered more than just tutoring – services should be provided so that the Student can participate in the general curriculum to the maximum extent possible, given [] disabilities and the reality that [] will not be physically located with [] peers during the interim period. Services are to be provided in the home for a minimum of three hours per day.

Finally, there is an issue regarding when the school district conducted the Manifestation Determination meeting during the current school year. On October 24, 2023, the school principal emailed the guardian that Student would be serving a three-day suspension through the remainder of that week, and that “we are nearing 10 days that [Student] has been suspended from school. [L&E Teacher] will be reaching out to schedule this meeting.” The meeting did not actually occur until November 17, 2023. Student has not returned to school since the October 24 incident. If October 27, 2023 was the tenth day of suspension, then the school district was not in compliance with the requirements of 34 CFR § 300.530(e) – (g) between October 27 and November 17. The non-compliance in terms of excluding Student from [Gamma] Elementary School might be more extensive, but there also appears to be some mitigating evidence which likely requires more information to clarify. For example, there was an insinuation from the school district's testimony, as well as some documentary evidence, that the guardian might have been delaying or obstructing the Team's attempt to find a placement other

than the **Gamma** Elementary School, or might have led the school district to believe that they had an agreement in principle yet refused to actually execute such an agreement. Regardless, at a minimum, it is clear that the required Manifestation Determination was delayed by three weeks.

VI. Order

1. The school district's request for hearing officer authorization to provide Student with **█** education in an interim alternative educational setting is granted.
2. The school district request for an interim alternative educational placement at the **Alpha** Learning Center is denied.
3. The approved interim alternative educational placement is a home-based program consisting of Special Education, Related and Supplementary Services as described in the October 24, 2023 proposed IEP. More specifically:
 - A. Specially Designed Instruction in Math with a Special Education Teacher for 30 minutes per day;
 - B. Reading Instruction with a Special Education Teacher for 30 minutes per day;
 - C. General Education Instruction in Science and Social Studies with a General Education Teacher for 2 hours per day. NOTE: If 2 hours per day turns out to be more than is needed for Science and Social Studies, I authorize the school district to use any unused portion of the 2 hours for other General Education subjects, or for additional Special Education Math or Reading instruction;
 - D. Individual Counseling with a Counselor twice a week for 30 minutes each session;
 - E. Occupational Therapy with an Occupational Therapist once a week for 30 minutes;
 - F. BCBA consultation for 60 minutes per week.
 - G. Since all services will be provided 1:1, a paraprofessional is not necessary, as long as the guardian is present and remains immediately available to assist with any behavioral issues that might arise.
4. The approved interim period shall be a maximum of 45 days or until the end of the current school year, whichever occurs first.
5. Student's FBA and Behavior Plan are insufficient and must be amended through an independent FBA followed by a Team meeting to amend the Behavior Plan based on the independent FBA.

6. The school district shall provide Student with compensatory services for the three-week delay in conducting the Manifestation Determination. The Team, including the guardian, shall reconvene to discuss and agree on compensatory services.
7. The stay put IEP shall remain the IEP proposed by the school district in January 2023 and accepted by the guardian in February 2023.
8. The October 24, 2023 IEP is acceptable for use during the interim period only. It should not be considered as providing stay put rights, or as providing FAPE beyond the interim period, unless a hearing officer so rules subsequent to this decision.

VII. Proposed Findings of Fact and Rulings of Law

The school district submitted a post-hearing memorandum setting forth its proposed findings of fact and rulings of law. The submission has been carefully considered, and portions of the submission have been incorporated into this Due Process Decision. To the extent that proposed finding and rulings are inconsistent with this Decision, they should be deemed denied.

VIII. Appeal and Post-Hearing Enforcement

Any party aggrieved by this may appeal as noted in Ed 1123.20 and Ed 1123.25.

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

So ordered.

/s/ James Baron, Hearing Officer

April 9, 2024