STATE OF NEW HAMPSHIRE DEPARTMENT OF EDUCATION

Student/Nashua School District IDPH-FY-22-08-004

DUE PROCESS DECISION

I. INTRODUCTION

This due process proceeding was initiated by the Parents on August 12,
hearing was initially scheduled for September 28 and 30, type 30; by agreement, the hearing was
continued to October 21 and 22, with the decision date of November 12, The decision
date was further extended by agreement to November 16,

The telephonic prehearing conference was held on October 6, and a Prehearing Conference Report was issued on October 13, and a Prehearing Conference Report was issued on October 13, and a Prehearing Conference Report was issued on October 13, and a Prehearing Conference Report was issued on October 13.

Issues for due process were as follows:

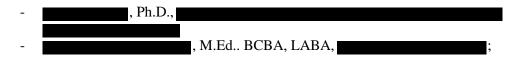
- 1. Whether the District's proposal of a day program was reasonably calculated to enable Student to make meaningful educational progress;
- 2. Whether placement in a residential setting is necessary to provide Student with a free appropriate public education (FAPE) in the least restrictive environment, and to enable Student to make meaningful educational progress.

The due process hearing was held via Zoom on November 21 and 22, ______. In attendance were: Parents; Attorneys Greg Van Buiten and Meagan Black-Pisick; Marcia Bagley, Director of Special Education; Daniel Alexander, Assistant Director of Special Education; and Attorney Stephen Bennett. District presented first, and bore the burden of proof as to the appropriateness of its proposed placement. The Parents presented their case on the second day, and bore the burden of proof as to their request for residential placement.

The following witnesses testified for the District:

- classroom teacher ¹and case manager;
 , Ph.D., School Psychologist;
 , Regional Program Coordinator —
 , Board Certified Behavior Analyst (BCBA),
- Marcia Bagley, Director of Special Education, Nashua School District.

The following witnesses were called by the Parents:



holds Special Education Teacher certification.

- M.D., Developmental & Behavioral pediatrician, Dartmouth-Hitchcock.

Both parties submitted exhibits, all of which were admitted without objection. Both parties filed post-hearing submissions. All witnesses testified credibly.

II.

FACTS

March of

1. Student (d.o.b. parents and sibling. is eligible for special education and related services under the Individuals with Disabilities Act (IDEA) and has been receiving special education since Student is currently identified as having an intellectual disability, and 2. Student presented with global developmental delays at gee, and carries a number of diagnoses, including disorder, disorder of spectrum disorder, and speech and language disorder. Student's disabilities impact in all academic areas; also has significant challenges in language and communications, and exhibits interfering behaviors. is prescribed a number of medications; according to doctor, dosages cannot be decreased at this time. 3. Student's IEP team has also found eligible for in that would experience substantial regression, likely not make progress toward IEP goals, and exhibit interfering behaviors without such programming. Student's interfering behaviors included, at times, refusal to do work in class or other non-preferred tasks. 4. During the school year, Student was placed in the Nashua School Although the Program is substantially separate, students in the program still have contact with typically developing peers. Applied Behavioral Analysis (ABA) is provided within the program; Student received this support from BCBA. 5. Student attended the Program until March of at that time, New Hampshire schools were required per the Governor's Emergency Orders to move to remote instruction. Since that time, Student has not attended Nashua School and has not had in-person interaction with school staff. 6. When Student attended class in person at Nashua School demonstrated progress toward some of **IEP** goals, and also mastered some goals. 7. According to Student's doctor, Student initially did well with remote learning because there

home as tried to engage in remote learning.

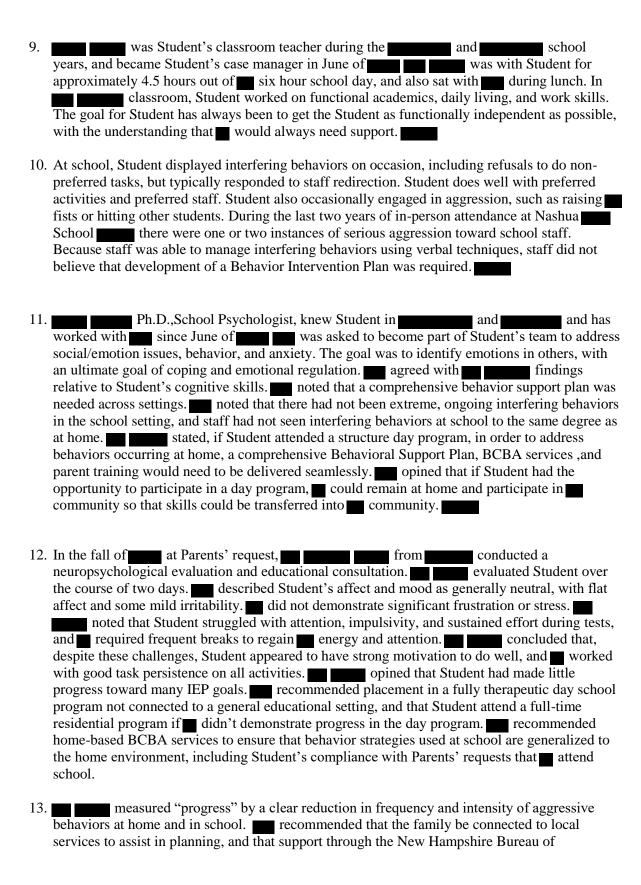
8. Parents have, in the past, contracted with outside agencies, such as

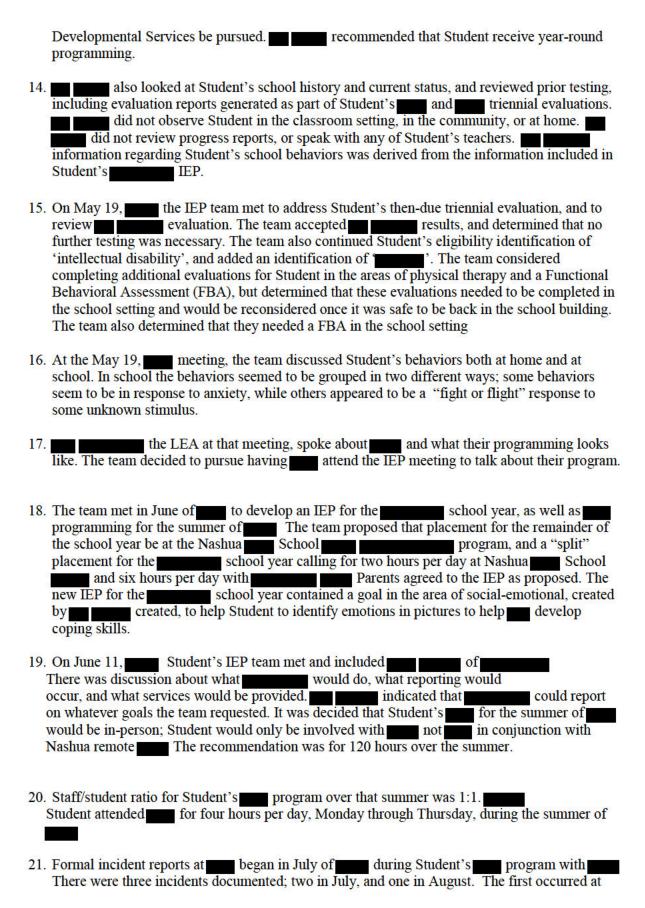
Services, to address behavioral issues in the home and at family activities. In the fall of

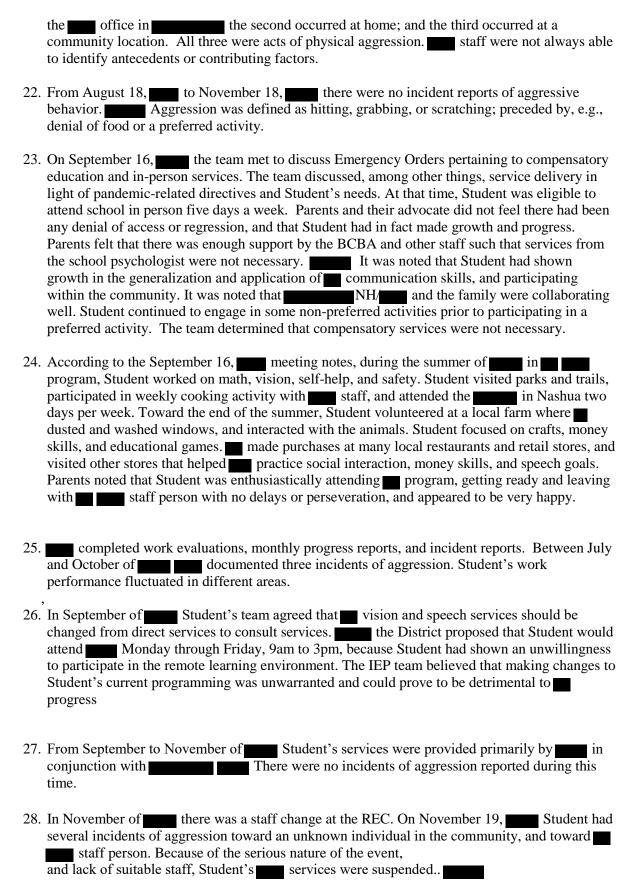
were no longer the demands of the classroom.. However, Student became more aggressive at

Parents hired a employee who worked with Student's ABA team to come to the home each morning to ensure that Student attended school. That service was stopped in

² Over the years, Student has been identified under other IDEA eligibility categories.



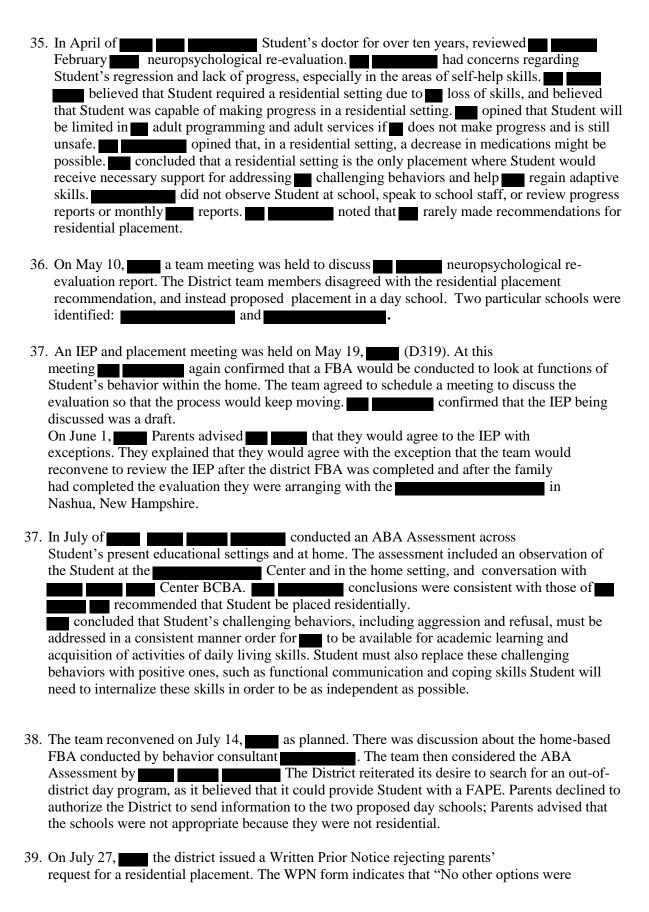




Director, attended that 29. The IEP team met on December 18, meeting, and noted that the program was without an assigned staff member for Student. noted that, since the departure of Student's prior staff member with whom worked well, Student had not successfully engaged with successor staff. also noted that, prior to returning to Student should work within a program that offered BCBA support, focusing on any underlying behavior or aggression issues. The team agreed to look for an alternate program, and it was decided that would reach out to the program in , New Hampshire, and that the District would contract with to provide services to Student. 30. On January 14, at a team meeting was held to introduce the program, and discuss Student's IEP services, extended school year services, and transportation. The team agreed that Student would start at the on January 19, The purpose of this placement was to provide Student with support, with a BCBA, to get into a program, to help be successful, to get out into the community, and to work through interfering behaviors. The parents raised concerns regarding consistent programming for Student, and the team discussed Student's increased anxiety, decreased willingness to do tasks, and increased behaviors at home. 31. At the _____, Student works on communication skills, following routines, setting a schedule, and doing arts and crafts. 32. On February 2, the team met via Zoom per Parents' request from the January 14, meeting to discuss Student's progress since starting programming at the noted concerns about an increase in aggression seen in the home, and requested an increase in programming. staff noted that staffing levels precluded increasing programming at that time, but would continue to look for staffing that would permit increased time. staff was also willing to open their facility for use by 33. From February to June of Student had one other peer in the room with During the spring of there were several instances of aggressive behaviors documented. The staff removed all demands on Student, which, according to BCBA, was effective in reducing behaviors and was implemented to provide a safe environment. Removing demands meant that Student controlled, for the most part, what activities could or would participate in. Student was also allowed to sleep during a significant portion of day. 34. In February of conducted a second evaluation of Student, at Parents' request. noted that Student was irritable, non-compliant and aggressive toward during the evaluation process, compared test results to those of her assessment in to determine progress. found that Student had declined in academic, emotional, and behavioral skills, and this time recommended residential placement. As in did not observe the Student in other than the clinical setting, and did not review school progress reports or

From that point, the goal of getting Student back into the community was not achieved.

monthly reports and work evaluations, or speak with District staff.



considered and rejected".

- 40. One of the primary goals of placing Student at the with and and staff was to get Student back into the community. However, that has not yet happened, and there is no plan for achieving this goal.
- 41. At the due process hearing, District witnesses testified that they disagreed with the recommendations for residential placement. Director of Special Education Marcia Bagley stated that, generally, students are placed residentially when their behaviors are so impactful that they cannot transition from one program to another, resulting in inability to learn, disruption of other students, and regression in skills.
- 42. Ms. Bagley testified that residential programs are not least restrictive, do not teach transferable skills, and would not offer the same opportunities to be with typically developing peers and accessing the community in which the student lives.

III. DISCUSSION

Under the IDEA, students must be educated in the least restrictive environment that meets the requirements of educational benefit. <u>Kathleen H. v. Mass. Department of Education</u>, 154 F.3d 8 (1st Circuit 1998). For some students a residential placement may well be the least restrictive. <u>Board of Education v. Diamond</u>, 808 F.2d 982 (3rd Cir. 1986).

Where the level of services provided by a residential treatment center is needed for a student to access a FAPE—that is, when the residential placement is 'considered necessary for educational purposes' and not merely 'necessary quite apart from the learning process'—it is appropriate for the student's IEP to reflect the need for residential placement. M. S. by & through R.H. v.Los Angeles Unified School. District., 913 F.3d 1119 (9th Cir. 2019).

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

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

The question is whether Student requires residential programming in order to achieve meaningful educational progress in light of all the circumstances. <u>Endrew F. v. Douglas City School District R.E.-1</u>, 580 U.S. _____, 137 S. Ct. 988 (2017). The IDEA provides that if placement in a public or private residential program is necessary to provide special education and related services to handicapped child the program, including nonmedical room and board, must be at no cost to the parents of the child. 34 CFR 300.104.

The District staff emphasized the progress that Student made while attending self-contained program at Nashua School school, and points out that Student's long-term absence from the structure of classroom is a contributing factor in regression. The District notes that it has offered to have Student return to school in order to benefit from the structure of in-person programming. The District maintains that Student has not yet had the opportunity to attend an out-of-district day program, and that a

day placement should be considered before a more restrictive residential placement. If the Student was younger, and time were not of the essence, this argument might have been more persuasive. In any event, the IDEA does not require that each placement on the continuum be tried before residential placement can be considered. Seattle Sch. Dist., No. 1 v. B.S., 82 F.3d 1493, 1501 (9th Cir. 1996). ³

The essential components of Student's placement are not in dispute. Student requires at least a substantially separate program utilizing ABA and with BCBA support; consistency across settings, home-based support, home to school services, and opportunities for community participation and generalization of skills across settings. Reduction of interfering behaviors and replacing them with adaptive behaviors is a priority. The parties agree that Student's current placement at REC for 27 hours per week is not sufficient to accomplish this. There is also no dispute that time is of the essence. Given the appropriate setting, Student can make progress despite challenges.

IV. FINDINGS OF FACT AND RULINGS OF LAW

Both parties have submitted proposed findings of fact and rulings of law. Both parties' submissions have been carefully considered, and portions of those submissions have been incorporated into this Due Process Decision. To the extent that proposed findings and rulings are inconsistent with this Decision, they should be deemed denied.

V. CONCLUSION

While the District's proposed placement in a day program *might* confer educational benefit, there is insufficient evidence on this record to conclude that it would enable this Student to achieve meaningful educational progress *in light of all the circumstances*.

The IEP team should convene as soon as practicable to explore residential programs, giving due consideration to proximity to Student's home.

Date: November 16,	
	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.

³ Parents contend that the IEP team did not consider harmful effects of not placing Student in a residential program. It is of some concern that, aside from simply disagreeing on placement, there is scant evidence of meaningful discussion or consideration of the appropriateness or inappropriateness of either the day program proposed by the District, or the residential placement requested by the Parents.