

New Hampshire Department of Education

Student/ [REDACTED] School District

IDPH FY 24-10-010

**Due Process Decision**

**I. Findings of Fact**

1. The student is 11-years-old and in the 6<sup>th</sup> grade.
2. The student has Down syndrome and a low IQ.
3. The student is eligible for special education under the categories of OHI, speech-language impairments, and intellectual disability.
4. The student's family testified the student has the mindset of a 4-year-old.
5. The student has a history of aggressive behavior at school that includes spitting, biting, kicking, pushing, and hitting.
6. The student's IEP requires one-on-one paraprofessional support throughout the school day.
7. A registered behavior technician (RBT) generally provides the paraprofessional support required in the student's IEP, but they were out on 9/21/23, and a special education teacher filled that role.
8. The student was involved in an incident with the special education teacher on 9/21/23.
9. A video of the incident and a video of the time right before the incident were shown as evidence during the hearing.
10. The angle and distance of the videos made it difficult to see everything that happened but they do show the student lying on the ground, the teacher squatting in front of the student with their back to the student, the student coming up behind the teacher and wrapping [REDACTED] arms around [REDACTED], and the student getting on the teacher's back. They both fell backward, with the teacher on top of the student.
11. From there, the video provides a partial view of the two of them moving around on the floor. The teacher struggled to get up and away from the student, but the student did not allow [REDACTED] to do so. At times, you can see the student's arm around the teacher's neck/throat area in something of a choke-hold. At other times, the student was beside the teacher on the ground, thrusting their groin area into the teacher. At one point, the

teacher appeared to be face down on their stomach, and the student got on top of her and appeared to move a chair into the teacher.

12. The special education teacher testified that during the incident, the student was choking ■■■ and prevented ■■■ from breathing.
13. The special education teacher testified that they thought they were going to die because they could not breathe and could not get away from the student.
14. The special education teacher testified that they were in extreme physical pain during and after the incident.
15. The special education teacher testified that they had bruising after the incident.
16. The school district subsequently conducted a manifestation determination regarding the incident. Some team members believed the student's behavior was a manifestation; others believed it was not. The school district determined that the consensus was that it was not a manifestation.
17. The parent disagreed and requested a due process hearing.
18. At the hearing, school district witnesses testified that the student's behavior was not a manifestation of the student's disability because they had not seen this level of aggression or this kind of behavior in the student's behavior chain before.
19. The student's family members have cared for the student since birth and are all very familiar with the student, the student's disability, and the student's behaviors.
20. The student's family members all testified that the student's behavior in the video was a manifestation of the student's disability and was consistent with the behavior they had seen from the student at home in terms of playing aggressively, getting carried away, and not realizing that they may be unintentionally hurting someone.
21. The student's family members testified that the student was not trying to harm the special education teacher. Instead, it looked like the student was trying to get a piggyback ride and wrestle with the special education teacher because that is what the student does at home.
22. The student's RBT testified that the student gets aggressive with them on a regular basis, particularly during transitions or when they are overstimulated. They also testified that the student's playfulness can quickly change to anger when asked to stop, which could be what happened during the incident.
23. Another parent witness testified that the student's behavior was a manifestation and was consistent with behaviors for students with Down syndrome. They testified that the student likely did not understand exactly what was happening because of their

disabilities and was just determined to keep the teacher on the floor because the student thought that was what they were supposed to be doing in that situation.

24. The student's behavior in the video is consistent with the behavior of a student with Down syndrome and a low IQ in terms of aggressive behavior, inability to regulate themselves, and not realizing that their behaviors were inappropriate or harmful to someone else.
25. After the manifestation determination meeting, the school district did not discipline the student further for the incident. Instead, the school district director of student services decided to place the student in an interim alternative educational placement at home for 45 school days so that the student would not be at school.
26. The school district director of student services testified that they were uncomfortable with the student being at school after the incident and concerned about protecting their staff.
27. The director of student services chose the student's home as the interim alternative placement because they wanted to act quickly, and no other placements were available at the time.
28. The student's IEP team did not decide the student's interim alternative placement setting.
29. The school district notified the parent of the interim alternative placement on 10/5/23.
30. The student's IEP team met after the interim alternative placement was made on October 25<sup>th</sup> and on November 9<sup>th</sup> to discuss interim and long-term placement options, but the team could not reach an agreement.
31. The student has not received all of the services required in the student's IEP during the interim alternative home-based placement.

## **II. Rulings of Law**

### **1. 34 CFR § 300.530(e) states:**

(e) Manifestation determination.

(1) Within ten 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.

(2) The conduct must be determined to be a manifestation of the child's disability if the LEA, the parent, and relevant members of the child's IEP Team determine that a condition in either paragraph (e)(1)(i) or (1)(ii) of this section was met.

(3) If the LEA, the parent, and relevant members of the child's IEP Team determine the condition described in paragraph (e)(1)(ii) of this section was met, the LEA must take immediate steps to remedy those deficiencies.

2. 34 CFR § 300.530(f) states:

(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.

3. 34 CFR § 300.530(g) states:

(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)–(4), 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; or
- (D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty;

(4) the term “bodily injury” means—

- (A) a cut, abrasion, bruise, burn, or disfigurement;
- (B) physical pain;
- (C) illness;
- (D) impairment of the function of a bodily member, organ, or mental faculty; or
- (E) any other injury to the body, no matter how temporary.

5. 34 CFR § 300.531 states:

§ 300.531 Determination of setting.

The child's IEP Team determines the interim alternative educational setting for services under § 300.530(c), (d)(5), and (g).

6. The preponderance of the evidence presented established that the student’s behavior was a manifestation of their disability because it was caused by, or had a direct and substantial relationship to, the student’s Down syndrome and intellectual disability.

7. The preponderance of the evidence presented established that the student inflicted serious bodily injury on the special education teacher, even if they did not intend to do so or did not realize they were doing so. Intent to harm is not required under the legal definition.

8. Since the student inflicted serious bodily injury, school officials were permitted to remove the student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior was a manifestation of the child's disability

9. The school district’s director of student services determined the interim alternative placement setting and not the IEP team as required by 34 CFR § 300.351.

10. The school district has the burden to prove that the interim alternative placement is appropriate and provided the student with FAPE.

11. The school district did not meet its burden to prove that the interim alternative placement was appropriate and provided the student with FAPE.

12. The student has not received FAPE in the interim alternative placement because some of the services required by the student's IEP were not provided.

### **III. Decision**

While the school district members who testified raised valid points about the extent of the student's behavior not being part of the typical behavior chain they have witnessed before, new or different behaviors can still be caused by or have a direct and substantial relationship to the student's disability. The parent's evidence established that the student's behavior at issue was caused by or had a direct and substantial relationship to the student's Down syndrome and intellectual disability. Parent witnesses noted that the student was demonstrating behavior that they had seen at home with the student thinking that they were getting a piggyback ride and wrestling and getting carried away and determined to keep the teacher on the floor without realizing they were hurting the teacher, which is common for students with Down syndrome and low IQs.

Additionally, the student's RBT stated that the student often displayed aggressive behavior and that the student's behavior could escalate rapidly from play to anger when they were told to stop doing something, so it may also be that some of the student's actions were out of anger when the teacher told the student to stop. Either way, the evidence established that the behavior was directly related to the student's Down syndrome and low IQ.

The student's actions harmed the special education teacher in a way that meets the statutory and regulatory definition of serious bodily injury. The video and testimonial evidence established that the teacher feared for their life because they were being choked, could not breathe, and could not get away from the student. The teacher was also in extreme physical pain, bruised, and injured. These facts meet the statutory requirements of serious bodily injury, which requires bodily injury with a substantial risk of death or extreme physical pain. The definition does not require intent to harm, so it is met regardless of whether the student intended to harm the teacher or even realized that they were harming the teacher.

As a result, 34 CFR § 300.530 permitted school officials to remove the student to an interim alternative placement for not more than 45 school days "without regard to whether the behavior is determined to be a manifestation of the child's disability." However, the IEP Team was supposed to determine the setting for the interim alternative educational placement under 34 CFR § 300.351 and that did not happen here. Instead, the school district's director of student services made the decision regarding the setting of the placement. The school district addressed this issue by meeting on November 9<sup>th</sup> to discuss interim and long-term placement options.

Additionally, the interim alternative placement needs to be appropriate for the student and provide the student with the services noted in their IEP so that they receive FAPE, which has not happened here. The placement was made based on expediency and concerns over staff safety. While safety is a valid concern, the student still must receive FAPE.

#### **IV. School District's Requests for Findings of Fact and Rulings of Law**

Granted: 1-26, 29-31,35-37

Denied: 11-12, 27,28, 32,33,34

#### **V. Order**

1. The student's behavior was a manifestation of their disability under 34 CFR § 300.530(e).
2. The student's IEP team shall determine if an additional FBA is required and review the student's behavior intervention plan to determine if modifications are necessary to address the behavior as required by 34 CFR § 300.530(f).
3. The student is awarded compensatory education for the IEP services not provided during the interim alternative placement. The IEP shall meet to determine the amount and type of services to be provided. Either party may request mediation or due process over that issue if the parties cannot agree on the amount and type of services to be provided.

So ordered.

11/25/23  
Date

/s/ Scott F Johnson  
Scott F. Johnson

#### **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.