

**80 IDELR 146**

122 LRP 3266

**Nashua School District  
New Hampshire State Educational  
Agency**

IDPH-FY-22-08-004

**November 16, 2021**

**Related Index Numbers**

**285.025 In General**

**285.030 Intent/Scope of LRE Requirement**

**285.005 Autism**

**Judge / Administrative Officer**

**Amy Davidson, Hearing Officer**

**Ruling**

A New Hampshire district did not present sufficient evidence to show that the student would achieve meaningful educational progress in a day program in light of all the circumstances. The hearing officer directed the student's IEP team to reconvene and explore residential placement options.

**Meaning**

Sometimes, in comparing all the relevant circumstances, the student's least restrictive placement is residential placement. This district advocated for a day program but could not present sufficient evidence that the student, who was already regressing, would achieve meaningful educational progress there. IEP teams should remain open to the idea that in some instances, students may need to jump more than one step forward on the LRE continuum.

**Case Summary**

Finding that a New Hampshire district did not comply with the IDEA's LRE requirement when designating a day program for a student with multiple disabilities, a hearing officer required a district to reconvene the IEP team to explore all possible residential programs available to the student. The student was placed in a district program that was substantially separate from typically developing

students until COVID, when the student moved to remote instruction. The student began showing signs of aggression at home.. When the student returned to in-person school, the student displayed interfering behaviors, like refusing to perform non-preferred tasks and being physically aggressive. The student was placed at an in-person program for the summer but multiple aggressive events occurred. The IEP team met and, agreed to an alternate program. In the new program, several instances of aggressive behavior were documented, and the student's "demands" were almost totally removed. The student spent most of the day sleeping. The student's doctor opined that the student regressed and required residential placement. The doctor feared that the student would be foreclosed from adult programming and services if the student continued engaging in aggressive behaviors. At the next IEP meeting, the district advocated for an out-of-district day program, but the parents believed residential settings would be more appropriate. The parents requested a due process hearing. The IDEA requires that students be placed in the LRE that meets the requirements of educational benefit, which, for some students, is residential placement. The district argued that the student had not yet had the opportunity to attend an out-of-district day program, and that it should considered before a more restrictive residential placement. The hearing officer determined that, while a day program might confer educational benefits, the district failed to provide sufficient evidence that the day placement would allow the student to achieve meaningful educational progress considering all the circumstances. She pointed out that the less restrictive placements had prevented the student from meaningfully accessing education because the interfering behavior increased. The hearing officer noted the student's age and the fact that time was of the essence to reduce interfering behaviors and increase adaptive behaviors. The current placement was not sufficiently accomplishing these goals, she found. The IEP team was ordered to meet as soon as possible to explore residential programs.

## Full Text

### Due process decision

#### I. Introduction

This due process proceeding was initiated by the Parents on August 12, [ ]. The due process hearing was initially scheduled for September 28 and 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, [ ].

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<sup>1</sup> and 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:

- [ ], Ph.D., [ ]
- [ ], M.Ed., BCBA, LABA, [ ];
- [ ] 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

1. Student (d.o.b. [ ]) resides in the Nashua School District with [ ] 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 [ ]<sup>2</sup>

2. Student presented with global developmental delays at [ ] age, 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 [ ] ([ ] programming, 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 [ ] Program at 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 were no longer the demands of the classroom.. However, Student became more aggressive at 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 [ ] 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 March of [ ]

9. [ ] was Student's classroom teacher during the [ ] and [ ] school years, and became Student's case manager in June of [ ] was with Student for approximately 4.5 hours out of [ ] six hour school day, and also sat with [ ] during lunch. In [ ] classroom, Student worked on functional academics, daily living, and work skills. The goal for Student has always been to get the Student as functionally independent as possible, with the understanding that [ ] would always need support. [ ]

10. At school, Student displayed interfering behaviors on occasion, including refusals to do non-preferred tasks, but typically responded to staff redirection. Student does well with preferred activities and preferred staff. Student also occasionally engaged in aggression, such as raising [ ] fists or hitting other students. During the last two years of in-person attendance at Nashua [ ] School [ ] there were one or two instances of serious aggression toward school staff. Because staff was able to manage interfering

behaviors using verbal techniques, staff did not believe that development of a Behavior Intervention Plan was required. [ ]

11. [ ] Ph.D., School Psychologist, knew Student in [ ] and [ ] and has worked with [ ] since June of [ ] was asked to become part of Student's team to address social/emotion issues, behavior, and anxiety. The goal was to identify emotions in others, with an ultimate goal of coping and emotional regulation. [ ] agreed with [ ] findings relative to Student's cognitive skills. [ ] noted that a comprehensive behavior support plan was needed across settings. [ ] noted that there had not been extreme, ongoing interfering behaviors in the school setting, and staff had not seen interfering behaviors at school to the same degree as at home. [ ] stated, if Student attended a structure day program, in order to address behaviors occurring at home, a comprehensive Behavioral Support Plan, BCBA services ,and parent training would need to be delivered seamlessly. [ ] opined that if Student had the opportunity to participate in a day program, [ ] could remain at home and participate in [ ] community so that skills could be transferred into [ ] community. [ ]

12. In the fall of [ ] at Parents' request, [ ] from [ ] conducted a neuropsychological evaluation and educational consultation. [ ] evaluated Student over the course of two days. [ ] described Student's affect and mood as generally neutral, with flat affect and some mild irritability. [ ] did not demonstrate significant frustration or stress. [ ] noted that Student struggled with attention, impulsivity, and sustained effort during tests, and [ ] required frequent breaks to regain [ ] energy and attention. [ ] concluded that, despite these challenges, Student appeared to have strong motivation to do well, and [ ] worked with good task persistence on all activities. [ ] opined that Student had made little progress toward many IEP goals. [ ] recommended placement in a fully therapeutic day school program not connected to a general educational setting, and that Student attend a full-time residential program if [ ] didn't demonstrate progress in the day program. [ ] recommended home-based BCBA services to ensure that behavior

strategies used at school are generalized to the home environment, including Student's compliance with Parents' requests that [ ] attend school.

13. [ ] measured "progress" by a clear reduction in frequency and intensity of aggressive behaviors at home and in school. [ ] recommended that the family be connected to local services to assist in planning, and that support through the New Hampshire Bureau of Developmental Services be pursued [ ]. [ ] recommended that Student receive year-round programming.

14. [ ] also looked at Student's school history and current status, and reviewed prior testing, including evaluation reports generated as part of Student's [ ] and [ ] triennial evaluations. [ ] did not observe Student in the classroom setting, in the community, or at home. [ ] did not review progress reports, or speak with any of Student's teachers. [ ] information regarding Student's school behaviors was derived from the information included in Student's [ ] IEP.

15. On May 19, [ ] the IEP team met to address Student's then-due triennial evaluation, and to review [ ] evaluation. The team accepted [ ] results, and determined that no further testing was necessary. The team also continued Student's eligibility identification of 'intellectual disability', and added an identification of '[ ]'. The team considered completing additional evaluations for Student in the areas of physical therapy and a Functional Behavioral Assessment (FBA), but determined that these evaluations needed to be completed in the school setting and would be reconsidered once it was safe to be back in the school building. The team also determined that they needed a FBA in the school setting

16. At the May 19, [ ]-meeting, the team discussed Student's behaviors both at home and at school. In school the behaviors seemed to be grouped in two different ways; some behaviors seem to be in response to anxiety, while others appeared to be a "fight or flight" response to some unknown stimulus.

17. [ ] the LEA at that meeting, spoke about [ ] and what their programming looks like. The team

decided to pursue having [ ] attend the IEP meeting to talk about their program.

18. The team met in June of [ ] to develop an IEP for the [ ] school year, as well as [ ] programming for the summer of [ ] The team proposed that placement for the remainder of the school year be at the Nashua [ ] School [ ] program, and a "split" placement for the [ ] school year calling for two hours per day at Nashua [ ] School [ ] and six hours per day with [ ] Parents agreed to the IEP as proposed. The new IEP for the [ ] school year contained a goal in the area of social-emotional, created by [ ] created, to help Student to identify emotions in pictures to help [ ] develop coping skills.

19. On June 11, [ ] Student's IEP team met and included [ ] of [ ] There was discussion about what [ ] would do, what reporting would occur, and what services would be provided. [ ] indicated that [ ] could report on whatever goals the team requested. It was decided that Student's [ ] for the summer of [ ] would be in-person; Student would only be involved with [ ] not [ ] in conjunction with Nashua remote [ ] The recommendation was for 120 hours over the summer.

20. Staff/student ratio for Student's [ ] program over that summer was 1:1. [ ] Student attended [ ] for four hours per day, Monday through Thursday, during the summer of [ ]

21. Formal incident reports at [ ] began in July of [ ] during Student's [ ] program with# [ ] There were three incidents documented; two in July, and one in August. The first occurred at the [ ] office in [ ] the second occurred at home; and the third occurred at a community location. All three were acts of physical aggression. [ ] staff were not always able to identify antecedents or contributing factors.

22. From August 18, [ ] to November 18, [ ] there were no incident reports of aggressive behavior. [ ] Aggression was defined as hitting, grabbing, or scratching; preceded by, e.g., denial of food or a preferred activity.

23. On September 16, [ ] the team met to discuss Emergency Orders pertaining to compensatory

education and in-person services. The team discussed, among other things, service delivery in light of pandemic-related directives and Student's needs. At that time, Student was eligible to attend school in person five days a week. Parents and their advocate did not feel there had been any denial of access or regression, and that Student had in fact made growth and progress. Parents felt that there was enough support by the BCBA and other staff such that services from the school psychologist were not necessary. [ ] It was noted that Student had shown growth in the generalization and application of [ ] communication skills, and participating within the community. It was noted that [ ] NH/[ ] and the family were collaborating well. Student continued to engage in some non-preferred activities prior to participating in a preferred activity. The team determined that compensatory services were not necessary.

24. According to the September 16, [ ] meeting notes, during the summer of [ ] in [ ] program, Student worked on math, vision, self-help, and safety. Student visited parks and trails, participated in weekly cooking activity with [ ] staff, and attended the [ ] in Nashua two days per week. Toward the end of the summer, Student volunteered at a local farm where [ ] dusted and washed windows, and interacted with the animals. Student focused on crafts, money skills, and educational games. [ ] made purchases at many local restaurants and retail stores, and visited other stores that helped [ ] practice social interaction, money skills, and speech goals. Parents noted that Student was enthusiastically attending [ ] program, getting ready and leaving with [ ] staff person with no delays or perseverance, and appeared to be very happy.

25. [ ] completed work evaluations, monthly progress reports, and incident reports. Between July and October of [ ] documented three incidents of aggression. Student's work performance fluctuated in different areas.

26. In September of [ ] Student's team agreed that [ ] vision and speech services should be changed from direct services to consult services. [ ] the District proposed that Student would attend [ ] Monday

through Friday, 9am to 3pm, because Student had shown an unwillingness to participate in the remote learning environment. The IEP team believed that making changes to Student's current programming was unwarranted and could prove to be detrimental to [ ] progress

27. From September to November of [ ] Student's services were provided primarily by [ ] in conjunction with [ ] There were no incidents of aggression reported during this time.

28. In November of [ ] there was a staff change at the REC. On November 19, [ ] Student had several incidents of aggression toward an unknown individual in the community, and toward [ ] staff person. Because of the serious nature of the event, [ ] and lack of suitable staff, Student's [ ] services were suspended.. From that point, the goal of getting Student back into the community was not achieved.

29. The IEP team met on December 18, [ ], [ ] Director, attended that 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, [ ] 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 [ ]. Parents 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 monthly [ ] reports and work evaluations, or speak with District staff.

35. In April of [ ] Student's doctor for over ten years, reviewed [ ] February [ ] neuropsychological re-evaluation. [ ] had concerns regarding Student's

regression and lack of progress, especially in the areas of self-help skills. [ ] believed that Student required a residential setting due to [ ] loss of skills, and believed that Student was capable of making progress in a residential setting. [ ] opined that Student will be limited in [ ] adult programming and adult services if [ ] does not make progress and is still unsafe. [ ] opined that, in a residential setting, a decrease in medications might be possible. [ ] concluded that a residential setting is the only placement where Student would receive necessary support for addressing [ ] challenging behaviors and help [ ] regain adaptive skills. [ ] did not observe Student at school, speak to school staff, or review progress reports or monthly [ ] reports. [ ] noted that [ ] rarely made recommendations for residential placement.

36. On May 10, [ ] a team meeting was held to discuss [ ] neuropsychological re-evaluation report. The District team members disagreed with the residential placement recommendation, and instead proposed placement in a day school. Two particular schools were identified: [ ] and [ ].

37. An IEP and placement meeting was held on May 19, [ ] (D319). At this meeting [ ] again confirmed that a FBA would be conducted to look at functions of Student's behavior within the home. The team agreed to schedule a meeting to discuss the evaluation so that the process would keep moving. [ ] confirmed that the IEP being discussed was a draft.

On June 1, [ ] Parents advised [ ] that they would agree to the IEP with exceptions. They explained that they would agree with the exception that the team would reconvene to review the IEP after the district FBA was completed and after the family had completed the evaluation they were arranging with the [ ] in Nashua, New Hampshire.

37. In July of [ ] conducted an ABA Assessment across Student's present educational settings and at home. The assessment included an observation of the Student at the [ ] Center and in the home setting, and conversation with [ ] Center BCBA. [ ] conclusions were consistent with those of [ ] recommended that Student be placed residentially. [ ] concluded that

Student's challenging behaviors, including aggression and refusal, must be addressed in a consistent manner order for [ ] to be available for academic learning and acquisition of activities of daily living skills. Student must also replace these challenging behaviors with positive ones, such as functional communication and coping skills Student will need to internalize these skills in order to be as independent as possible.

38. The team reconvened on July 14, [ ] as planned. There was discussion about the home-based FBA conducted by behavior consultant [ ]. The team then considered the ABA Assessment by [ ] The District reiterated its desire to search for an out-of-district day program, as it believed that it could provide Student with a FAPE. Parents declined to authorize the District to send information to the two proposed day schools; Parents advised that the schools were not appropriate because they were not residential.

39. On July 27, [ ] the district issued a Written Prior Notice rejecting parents' request for a residential placement. The WPN form indicates that "No other options were considered and rejected".

40. One of the primary goals of placing Student at the [ ] with [ ] 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. *Kathleen H. v. Mass. Department of Education*, 154 F.3d 8 (1st Circuit 1998). For some students a residential placement may well be the least restrictive. *Board of Education v. Diamond*, 808 F.2d 982 (3<sup>rd</sup> 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 [ ] Program, and with [ ]. 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. *Andrew F. v. Douglas City School District R.E.-I* , 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 [ ], 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).<sup>3</sup>

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.

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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.

<sup>1</sup>[ ] holds Special Education Teacher certification.

<sup>2</sup>Over the years, Student has been identified under other IDEA eligibility categories.

<sup>3</sup>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.

#### **Cases Cited**

154 F.3d 8 (1st Cir. 1998) -- Followed  
808 F.2d 982 (3d Cir. 1986) -- Followed  
913 F.3d 1119 (9th Cir. 2019) -- Followed  
137 S. Ct. 988 (2017) -- Followed  
82 F.3d 1493 (9th Cir. 1996) -- Followed