

**ARKANSAS DEPARTMENT OF EDUCATION
SPECIAL EDUCATION DIVISION**

**BOONEVILLE SCHOOL DISTRICT,
Petitioner**

VS.

Case No. EH-23-14

**XXXXXXXXXX, PARENT OF
XXXXXXXXXX, STUDENT,
Respondent**

HEARING OFFICER’S FINAL DECISION AND ORDER

I. ISSUE PRESENTED

The Booneville School District (hereinafter referred to as the “District” or “Petitioner”) seeks an order under the Individuals with Disabilities Education Act (“IDEA”), specifically 20 U.S.C. § 1415(k) and its regulations at 34 C.F.R. § 300.532, for an appropriate alternative education setting for XXXXXXXXXXXX, (“Student”) for not more than forty-five (45) school days if the hearing officer determines that returning Student to on-campus instruction is substantially likely to result in injury to the Student or others.¹

2. PROCEDURAL HISTORY

On September 22, 2022, the Arkansas Department of Education (hereinafter referred to as “Department”) received from the District a request to initiate expedited due process hearing procedures seeking a change of placement for the Student or maintenance of Student’s last placement in a residential facility.² Student’s parent, XXXXXXXXXXXX, (hereafter “Parent” or

¹ Complaint, p. 1.

² Id.

“Respondent”), filed a Response and Counterclaim alleging that the District denied Student a free and appropriate education (“FAPE”) under the IDEA. As discussed at the pre-hearing conference, the Counterclaim will be heard as a separate request for a due process hearing as Case No. H-23-16.

In response to the District’s request for an expedited hearing, the Department assigned the case to an impartial hearing officer. The expedited hearing was scheduled for three (3) days to begin on October 18, 2022. Testimony was heard on October 18, 2022, October 19, 2022, and October 20, 2022.³

Having been given jurisdiction and authority to conduct the hearing pursuant to the IDEA, and Arkansas Code Annotated §§ 6-41-202 through 6-41-223, Cheryl L. Reinhart, J.D., Hearing Officer for the Department, conducted a closed impartial hearing. Present for the hearing were Melissa Haney, LEA Supervisor, and the District’s attorney Teddy Stewart of Bequette, Billingsley, and Kees, P.A., Little Rock, Arkansas, and XXXXXXXXXXXX, Parent , who was represented by Thomas Nichols of Disability Rights Arkansas, Inc., Little Rock, Arkansas.

The following witnesses testified in this matter: Melissa Haney, LEA Supervisor for the District; Jyme Beth Diffie, Tommy McLean, Amber Brasher, Elizabeth Hartz, Angela Kimbrell, Brandy Ezell, Bre’Yunna Williams, Joan Bishop, Melissa Weatherton, and Parent.⁴

Both parties were offered the opportunity to provide post-hearing briefs in lieu of closing statements, but declined and provided closing statements.⁵

³ See Transcript, generally, Vols. I-III.

⁴ Id.

⁵ Transcript, Vol. III, p. 103.

3. FINDINGS OF FACT

1. Student is a nine-year-old male whose 2022 diagnoses are:
 - Posttraumatic Stress Disorder
 - Other Specified Neurodevelopmental Disorder, associated with prenatal substance exposure
 - Attention-Deficit Hyperactivity Disorder, Combined Presentation, Severe
 - Intellectual Disability, Mild
 - Language Disorder
 - Speech Sound Disorder
 - Anoxic Brain Injury
 - Traumatic Brain Injury⁶
2. Student was exposed to Methodone in utero. At birth Student did not breathe properly and aspirated amniotic fluid. Treatment led to anoxic brain injury.⁷
3. Student also suffered a closed skull fracture at age three.⁸
4. Student is developmentally delayed and began speaking at about age four.⁹
5. Student has displayed dysregulated behavior in the form of a lack of impulse control, disruptive behavior, aggression (toward himself and others), hypervigilance, motor restlessness, and conduct disorder.¹⁰
6. Student was enrolled in the Booneville School District from the 2017-2018 school year (pre-kindergarten) through the 2020-2021 school year (third grade). Following an evaluation in 2018, the District placed Student in special education.¹¹
7. Student has not been enrolled in the Booneville School District since the end of the 2020-

⁶ UAMS PRI Discharge Summary, Petitioner's Exhibits, tab 2, pp. 1-4.

⁷ Testimony of XXXXXXXXXXXX, Transcript, Vol. III, pp. 65-67.

⁸ Id.

⁹ Petitioner's Exhibits, p. 6

¹⁰ Transcript, Vol. I, pp. 34-36.

¹¹ Psychoeducational Report by Tiffany Poor, M.Ed., CCC-SLP, dated May 1, 2018, Petitioner's Exhibits, tab 4, p. 126.

2021 school year, and at the time of the expedited hearing in this case, was not enrolled in school.¹²

8. Student's 5/8/20 to 5/7/21 annual review IEP¹³ (the "Booneville IEP") noted some progress in Student's academic and social skills, but stated:

[Student] was on a half day schedule for a lot of this [2019-2020] school year due to continued social aggression towards others. He should continue to receive special education services in the self-contained setting to address social skill and academic needs [Student's] delays in cognition and communication (articulation, expressive and receptive language) adversely affect his ability to understand, process, and use presented information which impacts his acquisition of age level benchmark skills. Additionally, his noted behaviors adversely impact his ability to acquire age level benchmark skills.¹⁴

9. The Booneville IEP further noted that Student struggled to "stick[] to one activity for more than a brief period of time," and that he "requires supervision due to how quickly his behavior can change."¹⁵

10. The Booneville IEP recorded Student's placement in general education at 19% of his educational time per week.¹⁶ There is no mention of a need or recommendation for placement in a residential facility in this IEP.

11. Until July 20, 2020, Student lived with both parents, where he witnessed domestic violence at home between his parents.¹⁷

¹² Transcript, Vol. I, p. 62.

¹³ This IEP covers the statutory two-year period for consideration of a due process complaint, which for this case is 9/22/20 to 9/22/22.

¹⁴ Student's Annual IEP for 5/8/20 to 5/7/21, Petitioner's Exhibits, tab 3, p. 63.

¹⁵ Id. p. 64.

¹⁶ Id. p. 71.

¹⁷ Transcript Vol. III, pp. 67-69. Mother was charged with felony aggravated assault against a family member (later dismissed as self-defense). Transcript Vol. III, pp. 67-69.

12. In July 2020, after both parents were arrested for domestic violence,¹⁸ Student and his sister were removed from their parents' home and placed in DHS custody. DHS designated XXXXXXXXXXXX, student's grandmother, as Student's foster parent.¹⁹
13. Student's dysregulated behavior increased during the period of separation from his mother, and the District reported incidents in October, November, and December, 2020,²⁰ in which Student engaged in aggressive behaviors such as headbutting (staff members and the wall), chair throwing, hitting, pinching, kicking, biting, and pushing of staff and students, some of which resulted in bodily injuries to staff.²¹
14. A District staff member filed workers' compensation claims on October 22, 2020, and November 3, 2020, reporting that Student had head-butted her in the chest, causing "pain in the chest, hard to breathe, and left arm tingling." In October, the diagnosis was "contusion of left front wall of thorax, initial encounter." Treatment consisted of two Tylenol plus two Ibuprofen together, as needed for pain. She was released to return to work without restrictions the next day.²² The November injury was diagnosed as "contusion of left front wall of thorax, subsequent encounter," and she received no medical treatment. The staff member was released to return to work without medical treatment.²³

¹⁸ Id. p. 69.

¹⁹ Petitioner's Exhibits, Vol. I, p. 6

²⁰ For purposes of this expedited hearing on placement, school records prior to September 2020 were not considered.

²¹ Complaint, p. 4.

²² Petitioner's Exhibits, tab 6, p. 172

²³ Id. p. 166

15. Tommy McLean, Student's special education teacher, also suffered an exacerbation of a prior back injury while attempting to restrain Student during an outburst.²⁴ McLean also observed an occupational therapist with a bloody nose after Student had hit her in the nose.²⁵
16. McLean testified that Student's foster parent, XXXXXXXXXXXX, also reported to him that Student was exhibiting some of the same behaviors at home and that she needed help.²⁶
17. In January 2021, at the request of XXXXXXXXXXXX, Student was admitted to the University of Arkansas for Medical Sciences Psychiatric Research Institute ("UAMS PRI") Child Diagnostic Unit.²⁷
18. UAMS PRI identified Student's developmental levels as follows:
- Chronological age: 8.3 years old
 - Intellectual/cognition/mental age: 6 years old
 - Full Scale IQ of the Wechsler Intelligence Scale for Children-5th Edition: SS = 60; Mildly Impaired
 - Motor: 4 years and 3 months
 - Language: 5 years, 6 months old (receptive); 4 years old (expressive)
19. UAMS PRI referred Student for psychological testing, speech and language evaluation, occupational therapy assessment, and recommended "residential placement in a facility targeting neurological disorders (i.e. Timber Ridge)."²⁸
20. Student was discharged from UAMS PRI on March 1, 2021.²⁹

²⁴ Transcript, Vol. II, pp. 60-62.

²⁵ Id. p. 51.

²⁶ Id. pp. 58-60.

²⁷ UAMS Child Psychiatry Initial Psychiatric Evaluation and Physical Examination, Petitioner's Exhibits p. 94.

²⁸ Id. p. 4.

²⁹ Petitioner's Exhibits, Vol I, p. 1.

21. For a short period after Student's discharge from UAMS PRI on March 1, 2021, he returned to school and completed the school year.³⁰
22. During the month of March 2021, after Student's discharge from UAMS PRI and before he entered Timber Ridge, the District reported that Student had four significant behavioral incidents in which he screamed, hit, kicked, spat on, bit, and pushed other students and staff, banged on and threw furniture, and threw multiple other items.³¹
23. A staff member filed a workers' compensation claim reporting that on March 31, 2021, while restraining and lifting Student she injured her lower back. On April 6, 2021 she was diagnosed with strain of the lower back area and low back pain. Treatment consisted of x-rays, rest, muscle relaxers, and a physical therapy referral. She was released to return to work on April 13, 2021, with no lifting until after April 15.³²
24. It is uncontested that Student's behaviors were a manifestation of his disabilities. District has never used disciplinary measures with Student for violations of the code of conduct.³³
25. In June 2021, at his foster parent's request, Student was admitted to the Timber Ridge Neurodevelopmental Center ("Timber Ridge"), a residential facility located within the Bryant School District.³⁴
26. Student was treated at Timber Ridge for fourteen months and was discharged on August 22,

³⁰Instead of being immediately transferred to Timber Ridge, Student returned to school due to a recommendation for a tonsillectomy needed for his obstructed airway. Exhibits, Vol. I, Petitioner's Exhibit 1, UAMS PRI Discharge Summary p. 6.

³¹ Petitioner's Exhibits, Vol I, p.4.

³² All three claims were from the same staff member and involved Student.

³³ Transcript Vol. I, p. 21.

³⁴ Exhibits, Vol. I, Petitioner's Exhibit 2, NeuroRestorative, Timber Ridge Discharge Summary, p. 51.

2022.³⁵

27. The Timber Ridge Discharge Summary for Behavior included the following about Student's

behavior and progress at Timber Ridge:

- He “requires intensive supervision ... to ensure safety during waking hours ...”³⁶
- He “displayed problem behaviors both in the residence and during the school/therapy day that placed his peers, staff, and himself at a significant safety risk.”³⁷
- “He now socializes with peers and engages in conversations and games.”³⁸
- “He has increased using his words to get what he wants or needs.”³⁹
- “He has been successful in taking [self timeouts] on several occasions when he first starts to get frustrated.”⁴⁰
- He uses stickers as positive reinforcements, a Prbble calming kitty, and “a helmet protocol for when he is unsafe.”⁴¹
- His maladaptive behaviors decreased, as seen in the following counts of behaviors that were measured over the 30 days after admission and compared to the 30 days prior to discharge:

<u>Behavior</u>	<u>Admission</u>	<u>Discharge</u>
Physical aggression	949	545
Property destruction	321	220
Verbal aggression	32	133
Noncompliant	402	107
Self-injurious	2557	822
Helmet worn	all waking hours	as needed for safety ⁴²

- The following maladaptive behaviors were indicated as “frequent”:

Verbal disruptions/outbursts

³⁵ Exhibits, Vol. I, Petitioner's Exhibit 2, p. 51.

³⁶ Discharge Summary of Angela Kimbrell, Behavior Tech, Petitioner's Exhibits, tab 2, p. 39. The exhibit indicates approval of the Discharge Summary by Haley Layton, PhD, but does not contain signatures.

³⁷ Id.

³⁸ Id.

³⁹ Id.

⁴⁰ Id.

⁴¹ Id.

⁴² Id.

Physical aggression
Property destruction
Self-injury⁴³

28. The Timber Ridge Discharge Summary for Behavior contained in detail recommended strategies and protocols for Student, that emphasized consistency of routines, familiarity with staff (one to one recommended), pre-teaching, helmet protocol, and constant supervision.⁴⁴

29. The Timber Ridge Discharge Summary of Speech-Language Pathologist Destiny Harrington M.S., CCC-SLP provides the following clinical impressions:

[Student] is curious and enjoys learning. He has the capability to continue to learn and improve, when provided the right supports. Currently, he continues to require a high level of supports. He has demonstrated continued improvement through his time at TimberRidge [sic], learning new skills to require less outside support and greater ability to understand and support his own needs. [Student] is eager to please and thrives off of positive reinforcement such a [sic] verbal praise. He regularly asks during task “am I doing good?” or “am I being good?” ... When [Student] is upset, he with [sic] state “I’m upset” but is not always able to identify why he is upset, although this has gotten much better. In the last reporting period, he has started being able to identify trigger [sic] such as “I’m confused” “I’m tired” and “this is really hard.” When [Student] starts to become frustrated it is best to provide him with expectations and allow him breaks as needed.⁴⁵

30. The Timber Ridge Discharge Summary for Speech-Language also notes Student’s progress in the following areas:

- Speech
- Social skills
- Expressive language/communication
- Cognition⁴⁶

⁴³ Id. p. 40.

⁴⁴ Id. pp. 41-50.

⁴⁵ Timber Ridge Discharge Summary (Speech-Language), Petitioner’s Exhibits, tab 2, p. 53-54.

⁴⁶Id. pp. 51-55.

31. While Student was a resident at Timber Ridge, the Bryant School District developed Student's IEP for 9/20/21 to 9/19/22 (the "Bryant IEP"), which is Student's last IEP.⁴⁷
32. The Bryant IEP identifies Student's placement as Timber Ridge "Residential Placement- services are delivered year round," and describes his behavior while there as follows:

Since transitioning to Timber Ridge, [Student] has increase [sic] his stamina in the classroom. He is able to sustain his attention for up to 45 minutes of instruction in the mornings. By afternoon he is very fatigued and less successful. [Student] is in a highly structured individualized or small group instruction setting. He has been able to engage in preferred and non-preferred tasks with fewer cues, but continues to require maximum support with frequent verbal and tangible [edible] reinforcers.

...

His behavior is often violent and requires physical assistance when tantruming. At this time the antecedent is difficult to identify past it being any demand or his unwillingness to comply. In highly structured and predictable settings, [Student] can follow instructions in a highly structured setting with clear expectations and familiar staff. He is aggressive towards unfamiliar staff (hitting, spitting) in his environment even if they are not engaging with him. [Student] is currently wearing a helmet due to the frequency of his self-injurious behavior (SIB). When he is able to reduce the frequency and intensity of his SIB the helmet will be discontinued.

He enjoys and benefits from "Story time" during the instructional day. Due to the cognitive and physical demands placed on [Student] during his one on none sessions with therapists and teachers, [Student] is fatigued during the instructional day. He has Story Time with staff each school day at 1 pm. He understands that this is a time that he will hear a story, and that it is ok for him to rest his body and mind. He most often falls asleep during this time.⁴⁸

33. Before discharging Student, Timber Ridge contacted the District to discuss his possible discharge.⁴⁹

⁴⁷ Bryant Public School District IEP for 9/20/21 to 9/19/22, Petitioner's Exhibits, tab 4, pp. 83-87

⁴⁸ Id. p. 84

⁴⁹ Petitioner's Exhibits, tab 4, p. 80.

34. The telephone conference took place on August 22, 2022, among District employees and Timber Ridge employees.
35. District first communicated with Parent on August 29 when Parent and Student came to school expecting to enroll. During that meeting, District informed Parent (in Student's presence) that Student would not be allowed to return to campus.⁵⁰
36. Parent obtained custody of Student and his sister in September 2022, and reports that now that he is on appropriate medication and had therapy, Student's behavior at home is "better than it has ever been."⁵¹
37. Student is entitled to services provided at his home under the Provider-Led-Arkansas Shared Savings Entity (PASSE) program.⁵²
38. District filed a Due Process Complaint and Request for an Expedited Hearing on September 1, 2022, which was subsequently dismissed without prejudice. On September 21, 2022, the District filed this Due Process Complaint and Request for an Expedited Hearing.

6. DISCUSSION AND CONCLUSIONS OF LAW

The IDEA was enacted "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs...."⁵³. "Implicit" in the IDEA's guarantee is "the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child."⁵⁴ The U.S. Supreme Court, in 2017, refined that *de minimus*

⁵⁰ Transcript, Vol. III, pp. 86-88.

⁵¹ Transcript, Vol. III, p. 79

⁵² Testimony of Melissa Weatherton, DHS, Transcript, Vol. III, p.10.

⁵³ 20 U.S.C. § 1400(d)(1)(A)

⁵⁴ *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 200, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982).

standard to require that an “IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances.”⁵⁵ To receive special education funding under the IDEA, school districts must ensure that children with disabilities or children who are reasonably suspected of having disabilities are identified, located, and evaluated, regardless of their severity ...⁵⁶ When a student transfers from another school district in the state who has been receiving special education services under an IEP transfers to a different school district, and enrolls in a new school within the same school year, the new school district (in consultation with the parents must provide FAPE to the student (including services comparable to those described in the child's IEP from the previous school district), until the new school district either adopts the current IEP or develops a new one.⁵⁷

Under the IDEA, a school district must also adopt procedures to ensure appropriate educational placement of disabled students.⁵⁸ The IDEA establishes a process by which a school may remove and/or discipline a child with a disability who violates a student code of conduct.⁵⁹ If the student with a disability violates the school district code of conduct, the district must make a determination as to whether or not the behavior resulting in the violation was a manifestation of the student’s disability.⁶⁰ However, the IDEA also permits a district to “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, in cases**

⁵⁵ *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 197, L. Ed. 2d 335 (2017).

⁵⁶ 20 U.S.C. § 612(a)(3); 34 C.F.R. §300.111; Rules of the Arkansas Dept. of Education, Special Education and Related Services, 3.0 Child Find, 3.01.1.

⁵⁷ 34 C.F.R. § 300.323(e).

⁵⁸ See 20 U.S.C. § 1413.

⁵⁹ *Id.* §§ 1415(j)-(k).

⁶⁰ 20 U.S.C. §§ 1415(k)(1)(E)

where a child ... (iii) has inflicted serious bodily injury upon another person while at school...."⁶¹ For determining if a student has inflicted "serious bodily injury," the IDEA uses the definition of "serious bodily injury" found at 18 U.S.C. § 1365(h)(3):

(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;⁶²

The IDEA specifically provides that "[t]he interim alternative educational setting in subparagraphs (C) and (G) of [§1415(k)(1)] shall be determined by the IEP Team."⁶³ The IDEA defines the term "IEP Team" to include the student's parents, teachers, other educational specialists, and if appropriate, the student.⁶⁴

The IDEA and its regulations provide for the continuation of educational services when a student with a disability is removed from his current placement:

(1) A student with a disability who is removed from his current placement shall—(i) continue to receive educational services ... 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, behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.⁶⁵

The IDEA further provides that a school district may request a hearing when "maintaining the current placement of the child is substantially likely to result in injury to the

⁶¹ 20 U.S.C. § 1415(k)(1)(G) (emphasis added). The same provision is mirrored in regulations implementing the IDEA, at 20 C.F.R. § 300.530(g).

⁶² See also 20 U.S.C. § 1415(k)(7)(D).

⁶³ 20 U.S.C. § 1415(k)(2); 34 C.F.R. § 300.530(d)(5).

⁶⁴ 20 U.S.C. § 1414(d)(1)(C).

⁶⁵ 20 U.S.C. § 1415(k)(5)(D); 34 C.F.R. § 300.530(d)(1).

child or to others...”⁶⁶ A hearing officer shall hear, and make a determination regarding the requested order for change of placement and may:

(i) return a child with a disability to the placement from which the child was removed; or

(ii) order a change in placement of a child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of such child is substantially likely to result in injury to the child or to others.⁶⁷

From birth, and even in utero, Student (now 9 years old) has had significant barriers to his childhood development leading to multiple disabilities that make him eligible for special education and related services under the IDEA. His most recent diagnoses include: Post-traumatic Stress Disorder; Other Specified Neurodevelopmental Disorder, associated with prenatal substance exposure; Attention-Deficit Hyperactivity Disorder, Combined Presentation, Severe; Intellectual Disability, Mild; Language Disorder; Speech Sound Disorder; Anoxic Brain Injury; Traumatic Brain Injury. He has dysregulated behaviors that include headbutting (staff members and the wall), furniture throwing, hitting, pinching, kicking, biting, and pushing of staff and students, some of which resulted in bodily injuries to staff. His dysregulated behaviors escalated after DHS removed him from his home and his mother. XXXXXXXXXXXX, grandmother/foster parent, experienced some of the same behavior at home, and placed Student at UAMS PRI, and subsequently Timber Ridge, to obtain correct diagnoses, medication, and plan for managing his dysregulated behavior. Through his 14-month treatment at Timber Ridge, Student was able to reduce dysregulated behaviors as follows:

⁶⁶ 20 U.S.C. § 1415(k)(3).

⁶⁷ Id.

- Physical aggression was reduced by more than 40%;
- Property destruction was reduced by approximately one-third;
- Noncompliant behavior was reduced by over 70%; and
- Self-injurious behavior was reduced by over 60%.

After his discharge from Timber Ridge, Student was returned to his mother's (Parent's) custody and once again lives within the jurisdiction of the District. Parent testified at this hearing that now that Student is home, "he is happy, he is with his family, he's a different child."⁶⁸

After the phone call with Timber Ridge concerning Student's discharge and return to school, the District did not contact Parent, XXXXXXXXXXXX, or DHS about the discharge, or the Bryant School District about the IEP.⁶⁹

It is uncontested that Student is eligible to receive special education and related services under the IDEA due to Student's considerable disabilities. The District provided special education and occupational therapy to Student through the end of the 2020-2021 school year, at which time he was in a self-contained special education classroom. Student's 5/8/20 to 5/7/21 IEP developed by the District provided for continuing the self-contained setting and did not provide for residential facility placement. Yet, Student entered Timber Ridge in June 2021 only a few weeks after the IEP was approved.

Student's last educational placement was at Neuro-Restorative, Timber Ridge. Student entered Timber Ridge at the request of his foster parent after the 2020-2021 school year had ended. Student's last IEP was developed by the Bryant School District, Bryant, Arkansas, where Timber Ridge is located. As Student now resides in the District and has attempted to transfer

⁶⁸ Id. p. 80.

⁶⁹ Transcript Vol. I, pp. 180-181.

back to the District, he is eligible for special education and related services under the Bryant IEP. The Bryant IEP states that Student is in a “residential placement – services are delivered year round.”⁷⁰ Under the IDEA, when Student moved back into the District’s jurisdiction, the District was once again obligated to provide services under the IDEA to Student. Student’s Bryant IEP continues as the current IEP until the District’s IEP team either adopts the Bryant IEP or develops and approves a new IEP. Although the Bryant IEP indicates placement as a residential facility, that facility has discharged Student without a change in the Bryant IEP. Subsequent to the discharge, Parent regained custody of her children. As Parent had not at the time of the hearing enrolled Student in any school, this effectively establishes the home as Student’s current placement, as a unilateral placement made by Parent. Therefore, Student’s current placement until the District’s IEP team, including Parent, meets and determines Student’s placement under the IDEA is Parent’s home.

District has requested an order under the IDEA either changing or maintaining Student’s educational placement for special education on the basis that Student has inflicted seriously bodily injury upon another person while at school. Serious bodily injury is defined as “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[.]”

Student’s behavior has not reached the level of aggression identified in the definition of “serious bodily injury.” The evidence shows has inflicted injuries leading to contusion, bruising, bleeding, or pain. In those situations, treatment consisted of rest, time off from work, and over-

⁷⁰ Petitioner’s Exhibits, Volume I, p. 87.

the-counter medications or prescribed pain medication taken “as needed.” However, there is no evidence of a substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protract loss or impairment of a bodily function. In *Patrick v. Success Acad. Charter Sch., Inc.*, the court held that there was not “serious bodily injury” where “tantruming” could have caused injury to the student but did not, and a report that the student “stabbed” a paraprofessional in the eye was not credible.⁷¹ Upholding a determination that a student had inflicted “serious bodily injury,” a District of Columbia court found that the determination was supported by evidence that the injured person (a student) “had to be transported to the hospital in an ambulance, and suffered a seizure, significant bruising, and memory loss.”⁷² As Student’s behaviors did not rise to the level of inflicting “serious bodily injury,” this hearing officer finds that the District was not entitled to seek a change of placement (or maintenance of placement) at a residential facility.

However, this hearing officer finds that Student is substantially likely to cause injury to himself or others if he is placed on-campus at this time. All discharge summaries have indicated that Student still experiences aggression that manifests in hitting, biting, pushing, furniture throwing, which can and in the past have led to bodily injuries. Based on discharge recommendations, it is important for Student to have consistency of routine and familiarity with the staff or adults around him. It is also substantially likely that Student could injure himself, and needs constant supervision and the use of a helmet for his safety. As Student’s dysregulation has improved or at least been maintained at discharge level since he has been at home, this hearing officer finds that the Student’s placement should be his home while the District develops a new

⁷¹ *Patrick v. Success Acad. Charter Sch., Inc.*, 345 F. Supp. 3d 185 (E.D.N.Y. 2018).

⁷² *Olu-Cole ex rel. M.K. v. E.L. Haynes Pub. Charter Sch.*, 292 F. Supp. 3d 413, 421 (D. D.C. 2018).

IEP. Furthermore, the District's actions (or inactions) with respect to Student returning to school portend an unwelcoming and uncertain environment at the District, which weighs against the Student receiving special education services on campus until a functional behavior assessment, IEP, and a behavior plan are developed.

ORDER

IT IS, THEREFORE, ORDERED that:

1. The District's request for a change of or maintenance of Student's placement in a residential facility is DENIED;
2. Parent's home is the current placement for Student, and shall remain Student's placement for not more than forty-five (45) school days following the date of this order;
3. The District shall assemble an IEP team for Student that meets within the next thirty (30) days to discuss Student's IEP including placement and, if appropriate develop a behavioral intervention plan;
4. The IEP team shall endeavor to schedule IEP meetings at which the Parent can attend in person as a member of the IEP team; and
5. District shall ensure that a functional behavior assessment is conducted, and provided to the IEP team for their consideration in developing the IEP.

FINALITY OF ORDER AND RIGHT TO APPEAL

The decision of this Hearing Officer is final. A party aggrieved by this decision has the right to file a civil action in either federal district court or a state court of competent jurisdiction,

pursuant to the Individuals with Disabilities Education Act, within ninety (90) days after the date on which the Hearing Officer's Decision is filed with the Arkansas Department of Education.

Pursuant to Section 10.01.36.5, Special Education and Related Services: Procedural Requirements and Program Standards, Arkansas Department of Education 2008, the Hearing Officer has no further jurisdiction over the parties to the hearing.

IT IS SO ORDERED.

/s/ Cheryl L. Reinhart

Cheryl L. Reinhart
HEARING OFFICER

DATE: 11/2/22