

**ARKANSAS DEPARTMENT OF EDUCATION  
SPECIAL EDUCATION SECTION**

[]

**VS. NO. EH-16-29**

**TEXARKANA SCHOOL DISTRICT**

**FINAL DECISION**

Findings of Fact, Conclusions of Law, Decision and Order

The Hearing Officer, after conducting an expedited due process hearing in this matter on February 16 and 17, 2016, issues the following Findings of Fact, Conclusions of Law, Decision and Order:

Findings of Fact

The Hearing Officer makes the following Findings of Fact:

The Parties

1. The Student attends school in the Texarkana Arkansas School District (“TASD” or “District”). At all times relevant to this due process proceeding, the Student has lived with his Parents who reside within the boundaries of the TASD.

2. The Student and his Parents were represented by Theresa Caldwell, Attorney at Law, 8030 Counts Massie Rd., Ste. B, Maumelle, AR 72113.

3. The TASD was represented by Jay Bequette, Attorney at Law, 425 West Capitol Avenue, Suite 3200, Little Rock, AR 72201, and Richard Dodson, Attorney at Law, 2005 Moores Lane, P.O. Box 1877, Texarkana, TX 75504.

4. The Hearing Officer for the expedited due process proceeding was Garry J. Corrothers.

## Procedural Background

5. The Parents filed a due process hearing complaint with the Arkansas Department of Education (“ADE”) on December 4, 2015, seeking compensatory education for a denial of a free appropriate public education (“FAPE”), a Board Certified Behavior Analyst (“BCBA”) approved by the Parents, an appropriate IEP, reimbursement for costs associated with providing FAPE, and a declaration that they have exhausted remedies under Section 504 of the Rehabilitation Act of 1973. The ADE designated this hearing request as H-16-27.

6. The TASD filed a Response to Due Process Complaint and Counter-Complaint and Request for Expedited Hearing on December 15, 2015. The ADE designed this expedited hearing request as EH-16-29. The District was seeking an order to place the Student in an Interim Alternative Educational Setting (“IAES”).

7. On December 16, 2016, the Hearing Officer issued an Expedited Order Setting Preliminary Timelines. The order stated, *inter alia*, that “The Due Process Hearing must occur no later than **January 15, 2016**, and final decision must be mailed not later than **10 days** thereafter, unless extended upon motion for the party for good cause.”

8. On December 18, 2015, this matter was set for hearing on January 7 and 8, 2016, in conjunction with the regular hearing due to concerns of judicial economy.

9. On December 20, 2015, the Parents filed a Challenge to Sufficiency of Notice and District’s Authority for Expedited Hearing.

10. On December 30, 2015, the Parents filed a motion to continue, listing the case number as H-16-27, which is the case number for the regular due process hearing complaint. The Parent’s attorney stated that she was unable to attend as she had previously scheduled due process hearings.

11. On January 26, 2016, the Hearing Officer issued an Order declaring the Counter-Complaint sufficient and allowing the District to go forward on the Counter-Complaint.

12. On February 10, 2016, the District filed a “. . . Motion to Limit Length of Hearing” [to three (3) days]. On February 15, 2016, the Parents filed an objection to the District’s motion.

13. On February 15, 2016, the Hearing Officer granted the District’s motion in part, ruling that four days would be allowed for the two (2) hearings, including the regular due process hearing complaint delineated as H-16-27 and the District’s Counter-Complaint delineated as EH-16-29. The Hearing Officer further ruled that February 16, 2016, would be reserved for the expedited Counter-Complaint and that the Parents would be allowed three (3) days to prosecute the regular due process hearing.

14. The expedited hearing (Counter-Complaint) was held on February 16 and 17, 2016. Although designated to last only one day, the Hearing Officer determined during the course of the proceedings that two days would be necessary. The Hearing Officer determined that the regular hearing covered a time period of approximately three (3) months and ruled that the regular hearing would be set for the remaining two days, which were tentatively determined as March 30 and 31, 2016.

#### Time Line Information

15. The District filed the Counter-Complaint for expedited hearing with the ADE on December 15, 2015. Although federal regulations state that the deadline for holding an expedited hearing is 20 school days after the filing date, ADE regulations specifically allow for the Hearing Officer to extend the Time Lines for good cause, which was done in this matter.

16. The deadline for mailing this decision is 10 school days after the hearing. The

opinion was sent to the attorneys for the parties by e-mail and US Mail on March 4, 2016. The decision was due March 2, 2016, but an emergency existing regarding the family of the Hearing Officer, therefore the mailing of the decision was delayed.

#### Issues

17. The following issues were presented to the Hearing Officer: (a) whether the Student is substantially likely to injure himself and/or others in his current placement and (b) if so, is the District proposal for determining IAES appropriate?

#### Background Facts

18. The Student is currently enrolled in the District. He receives special education and related services pursuant to an IEP. (Ex. T ASD0020).

19. The Student has received a number of diagnoses, including: Reactive Attachment Disorder (Emotional Disturbance) and Attention Deficit Hyperactive Disorder. (Ex. T ASD007).

20. Under the Student's IEP developed by the IEP team on October 8, 2015, and revised December 10, 2015, he receives 1700 hours general education and 60 hours special education. He also has a behavior intervention plan ("BIP") that was developed October 8, 2015, and revised December 10, 2015. The BIP describes his behavior that impedes learning as "Explosive behaviors towards peers and staff." The severity is characterized as extreme. Importantly, the BIP provided, among other things, that the Student be allowed ". . . a place and time for him to calm down and regain composure."

21. Sharon Adams, a behavior support specialist with the Dawson Education Cooperative, was retained to work with the Student. Although the Student returned to school on or about October 8, 2015 (T. 153), Adams did not begin work until November, when she received the Student's file. (The Student was involved in another due process proceeding and

pursuant to that matter the Student returned to school in October (see ADE H-15-21)). Right before Christmas, she observed the Student approximately six times, met with staff, including working with them on collecting data. She was working towards developing a Functional Behavior Assessment. She did not observe any problematic behaviors. She observed him in classrooms, at lunch, recess, and in hallway transitions. (T. 37-38).

22. In reviewing the Student's records, Adams learned that the Student's past behavior included pulling a knife on family members, threatening to kill family members, staff, and fellow students, bringing weapons to school, pushing and shoving district staff, and damaging school property. (T. 42).

23. Adams has began working on a draft Functional Behavior Assessment ("FBA" and BIP but it is the IEP team that would complete the FBA and BIP. Through February 17, 2016, these were still not completed. (T. 43). An FBA is needed to develop a BIP. A functional assessment is needed to determine appropriate interventions. (T. 61). If a BIP does not work, adjustments can be made. (T. 180 and 224).

24. Adams learned that the Student got a six (6) school day suspension for an incident that happened on December 2, 2015. She was told that the Student was suspended for threatening to kill the Principal. (T. 69).

25. Adams learned that the District was concerned with whether the school setting was best for the Student, whether is was structured enough, and whether they could have done things differently. She advised that they could have done things differently regarding the December 2 incident. (T. 72).

26. The Student was involved in an incident on November 4, 2015. Initially, on the playground he "grabbed" another student and pushed him down. A teacher had the other student

go to the office. The Student followed and the teacher got Shedrich Franklin, another teacher, because he had more experience dealing with the Student. The Student followed (with Franklin close behind) the other Student into the office and started slapping and kicking him. In order to get into the office, the Student had to be “buzzed in” by the receptionist, who thought he was going to see the Principal, J.R. Arnold. Several employees intervened in order to stop the assault, including Arnold, Franklin, and Ms. Clark, one of the school counselors. The Student’s Parents were called and he eventually de-escalated. He was eventually given three (3) days in school suspension (“ISS”) (T. 115-117). After the November 4 incident, the Student was allowed a “shadow person” during lunch and recess. (T. 250). There is nothing in the record to indicate that this was not successful.

27. On December 2, 2015, the Student was involved in another incident. During the course of this incident he made several serious threats to kill staff and others. He also slapped, hit, bit and kicked Franklin. (T. 118). This incident began in the classroom of the Student’s art teacher and purportedly started when she pulled on his backpack when he was trying to self-report to his “cooling off” place as designated in his BIP. (T. 142). A Manifestation Determination Review was held and it was determined that this behavior was a manifestation of his disability. Even so, the Student was given six (6) days suspension. (T. 145).

28. The District recommended an IAES of residential placement or homebound placement due to its concerns regarding the Students aggression, outbursts, threats, and damage to property. (T. 152 and 162). The District would not recommend a self-contained placement. The District does not believe it can provide the type of structure that the Student needs, even in self-contained. placement (T. 167). The District considers this a unique situation with a unique set of circumstances. They are looking at the appropriate placement. (T. 177).

29. Sherry Young, the Director of Special Services for the District, made the recommendation for homebound or residential. She considered the entire range of placement options. (T. 197).

#### Conclusions of Law

1. The Student is an individual with a disability within the purview of the IDEA. 20 USC Section 1400 et seq. The IDEA insures that all children with disabilities receive a Free Appropriate Public Education (“FAPE”) that includes special education and related services that are designed to meet their unique need, prepare them for further education, employment and independent living. *Board of Education of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 US 176, 203 (1982). In this matter, neither the Student’s eligibility under the IDEA nor his entitlement to a FAPE is in dispute.

2. The IDEA authorizes an LEA (“Local Education Agency”) to request an expedited hearing when the LEA “believes that maintaining the current placement of a child is substantially likely to result in injury to child or to others.” 20 USC Section 1415(k)(1)(G)(3); 34 CFR Section 200.532(a); (b) & (c).

3. Under IDEA, the burden of proof falls on the party seeking relief. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49 (2005).

4. The District has met its burden of proof under 20 USC Section 1415(k)(2) that the Student is substantially likely to injure himself or others. 34 CFR Section 200.352(b). See also 20 USC Section 1415(k)(3).

#### Decision

In seeking the removal of a the Student from his current placement and transferring him to an IAES for 45 days, the District’s position is that his behavior presents a significant risk of

injury to the Student and others. The Student's Parents oppose the proposed removal to an IAES. Parents believe that the District is at largely or completely at fault for the Student's behaviors. For example she testified that of her concerns that "portions of the IEP were not followed, in [her] opinion, of close supervision, even in the recess time." She also testified that the Student was not properly supervised at recess, at lunch time, or outside on the playground. However, the record does not indicate that there was any provision for more close supervision until after the November 4, 2015, incident. (Ex. TASD0110).

The evidence indicates that the District was diligently working on getting an FBA completed prior to the formulation of a new BIP. For reasons beyond the District's control, the completion of the FBA and BIP were delayed. (T. 157-158). It is incontrovertible that a BIP must be modified and adjusted if it does not work. (T. 180). However, the safety of the Student, staff and other students should not be jeopardized while the Student's BIP is being modified and adjusted.

Credible testimony and reports from TASD staff concerning the Student's behavior in his current placement are persuasive and substantiate that, in his current placement the Student's problematic and anti-social behavior continues. The records substantiate that the Student's episodes of aggressive behavior involve very obscene language, hitting, kicking, spitting, and biting, all directed at staff or other students. (T. 113-116).

The most serious incident happened almost immediately upon his return to a full time schedule at school. He returned to school full time on November 2, 2015, and serious assaultive conduct occurred on November 4, 2015. (T. 153-154). Again, the health and safety of other students should not be put at risk while his educational placement is modified and adjusted.

Again the Parent's position is that the Student's conduct if the fault of the District. The



December 2, 2015, is portrayed as starting in the art class and precipitated by the art teacher pulling on his backpack and not allowing the Student to go to his cooling off place. Although there were numerous questions asked regarding this purported incident, no first hand testimony was presented that this actually happened and the Parent appears to be getting her information from the Student. (T. 241-243). In any event, presuming that he was not allowed to initially leave the art class, the Student left and was purportedly on his way the cooling off space. The records indicate that the teacher in charge was missing for the day and Franklin would not let the Student down the hall with the teacher not present and other students present. Franklin had been involved in the November 4, 2015, incident where the Student committed either an assault or battery on another Student. Franklin was justifiably concerned with the safety of the other students. (T. 26-29).

Finally, the evidence presented at the hearing does not show a pattern of serious, continuous, assaultive conduct. There were incidents in November and December. In fact, while the Student was being observed by Adams, she reported that she could not tell the difference between him and other students. (T. 37-38). However, this indicates that the Student's unpredictability makes procedures difficult to establish without constant modifying and adjusting while dangerous risk factors exist.

#### Order

For the reasons set forth above, the Hearing Officer issues the following Order:

1. The Student is ordered removed from his current placement to an appropriate Interim Alternative Educational Setting for a period of forty-five (45) days. The IAES shall be homebound placement. The period of 45 days is reduced by six (6) days because the Student was suspended from school for 6 days subsequent to the December 2, 2015, incident.

2. The IAES shall be Student's stay put placement pursuant to 20 USC Section 1415(k)(4)(A).

3. Finally, based on the evidence adduced at the hearing and in the record, and as guidance for the Student's IEP team, but not as an order to do so, the Hearing Officer suggests that the IEP team consider a placement less restrictive than homebound while incorporating some of the Parents's recommendations. For example, after the November 4 incident, she suggested a shadow person at lunch and recess.

#### Appeal Procedure

The decision of this Hearing Officer is final and shall be implemented unless a party aggrieved by it shall file a civil action in either federal court or a state court of competent jurisdiction pursuant to the Individual with Disabilities Education Act within ninety (90) days of the date on which the Hearing Officer's Decision is filed with the Arkansas Department of Education.

IT IS SO ORDERED.

S/ Garry J. Corrothers  
Garry J. Corrothers, Hearing Officer  
March 3, 2016