

BEFORE THE HEARING OFFICER

In the Matter of
The Expedited Due Process Hearing for File No: 16EP-001
The Student and USD # ()

DECISION AND ORDER

Procedural History

On November 11, 2015, the Kansas State Department of Education received a Request for an Expedited Due Process Hearing from _____ Kansas USD #____ (hereinafter referred to as "District"). This request was forwarded to the Hearing Officer and a Hearing was scheduled, pursuant to KSA 72-993, for December 9, 2015 and December 11, 2015.

At the time of the request for an Expedited Due Process Hearing, The Student, born July 27, 2004, was 11years old and in the 6th grade at ____ Middle School in ____ Kansas which is part of the District. The basis for the request was that the District was seeking to change the placement of The Student to an interim alternative educational setting (hereinafter referred to as "IAES") for not more than 45 days on the premise that maintaining the child's current placement is substantially likely to result to injury to the child. Subsequent to that finding, the District was seeking a determination that the proposed IAES, met the requirements of the law. The parents disagreed with the District's recommendation to change The Student's current placement and that the proposed IAES was not appropriate. It should be clearly noted that the District has not placed The Student in the IAES but is seeking authority to do so.

Upon receipt of the Request for an Expedited Due Process Hearing the Hearing Officer contacted the parties to schedule a Scheduling Conference. A scheduling Conference was scheduled for November 23, 2015 by conference call at 2:30 pm. The Hearing Officer initiated the conference call. The School obtained counsel who participated in the conference call along with the building principal for _____ Middle School.

The mother of The Student, also participated. During that call the Hearing and all preliminary dates and deadlines were scheduled.

The Expedited Due Process hearing was scheduled at that time for two days beginning on December 10, 2015 at 9 am and if necessary on December 11, 2015 beginning at 1:30. The An Order was prepared and sent via electronic transmission to both parties on November 23, 2015. The parents obtained legal representation and their entry of appearance was received on December 3, 2015. There was a final Pretrial Conference scheduled on December 8, 2015 whereby counsel for both the parents as well as the District were present and participated via conference call. There was some confusion regarding the complete receipt of some of District's exhibits, so the call was held at two separate times on that day to provide the District an opportunity to resolve the confusion.

Issues Presented

1. Whether maintaining The Student's current educational placement substantially likely to result in an injury to the child or to others pursuant to KSA 72-992a or 34 CFR 300.530(g).
2. Whether placement in the proposed _____ Middle School Therapeutic Learning Classroom (hereinafter referred to as "LMS Therapeutic Classroom") is an appropriate IAES pursuant to KSA 72-992a(4).

Hearing

The Hearing commenced at 9:00 am on Thursday, December 10, 2015 at the Administrative Offices _____ Unified School District #____, _____, Kansas. Appearing on behalf of the District was Keith R. Henry and Mary Curtis of the Disability Rights Center of Kansas appeared on behalf of THE STUDENT by and through his parents. Debbie Brightbill PO Box 1401, Salina, KS 67402 (785) 452-8638 served as our court reporter on December 10, 2015 while in _____ Kansas and Sheila Vogt of Midwest Litigation 1301 Oak Street, Suite B, Kansas City,

MO (816) 221-1160 served as our court reporter on December 11, 2015 while at the Hearing Officer's office.

After being duly sworn in by the Court Reporter, the following witnesses testified, under oath in this case:

- Chief of Police, _____ Kansas;
- Principal, _____ Middle School;
- Special Education Teacher, _____ Middle School and employed by the _____ Kansas Cooperative in Education (hereinafter referred to as "Co-Op");
- Special Education School Coordinator for _____ Kansas Cooperative in Education;
- Autism and Behavioral Specialist for USD ____, _____ and employed with the Co-Op;
- Special Education Teacher at _____ Middle School and employed with the Co-Op;
- Superintendent of schools for USD__;
- Mother of The Student.
- Behavior Analyst and Program Consultant for Project Stay.

Both the District and the parents introduced exhibits that had been previously stipulated to as well as admitted into evidence which were:

- District Exhibit 4: Individualized Education Program (hereinafter referred to as "IEP") dated 11/10/15 for THE STUDENT;
- District Exhibit 6: _____ Middle School Therapeutic Learning Classroom Emotional/Behavioral Disorder 2015-12016
- Parents Exhibit B:
- Parents Exhibit C: Veridian Behavioral Health - Confidential Psychological Evaluation
- Parents Exhibit G: IEP dated 03/25/15 for THE STUDENT;

Findings of Facts

The District is part of a Co-Op in which the Co-Op provides services, resources and employees to the District pursuant to a contract. This Co-Op is made up of 12 different school districts and is done to help the various school districts pool resources and meet the needs of the special education students and staff in those districts. Every teacher and Paraprofessional (hereinafter referred to as "Para") is employed through the Co-Op but is sent to the 12 different school districts that they serve including _____ Middle School. The Co-Op has many resources to provide to the school districts including the services of a separate entity entitled to Project Stay. Project Stay brings the services of experts in special education and behavior spectrum to consult and provide assistance to "teams" in the Co-Op. Teams are made up of district teachers, staff and administration within the school building including special education teachers and paras that work at the school building as well as consultants and other professionals that are employed by the Co- Op but provide contracted services and resources monthly or whatever amount of time is necessary to the school buildings. This team works individually and collaboratively to address the needs of The Student. Some of the team members work directly and others indirectly. Most to all of the team members are present and participate in IEP and other meetings related to The Student. Each school district is allocated a certain amount of hours per month and resources but in this matter the Co-Op has increased the number of hours and support that it normally provides to a district to provide assistance directly to the team that serves THE STUDENT. This support has included additional hours from the Autism Consultant as well as the Behavior Analyst and Program Consultant from Project Stay.

The Student is currently a 6th grade student in the District attending _____ Middle School. He is diagnosed with Anxiety Disorder NOS and Autism Spectrum Disorder and ADHD, Combined Type. Prior to beginning school at _____ Middle School, The Student was a student at _____ Elementary School where he had a behavioral plan in place.

Since approximately 4th grade and continuing into 5th grade, The Student had what was referred to as an "extreme" program implemented to address aggressive behaviors.

The Behavior Analyst and Program Consultant from Project Stay testified that beginning as early as the 2013-2014 school year, he had been consulted on and off and had made significant recommendations and suggestions to the IEP team regarding The Student that included compliance training, removing stressors/triggers, modifying his school day, providing a room away from others. Project Stay does not work with students but with the team that serves the students. It was reported that by the end of The Student's 5th grade school year (2014-2015), he had made significant improvements in his behavior from being in a room by himself to being in mostly general education classes by the end of the school year.

The Student's March 25, 2015 IEP revealed that The Student had had 2 occasions of aggression during that 2014-2015 school year, specifically on 10/13/14 and 12/4/14 and had eloped from the classroom without permission on 2 occasions on 10/13/14 and 11/3/14. The IEP also revealed that the data showed that when there was an interruption in his medications, he was more irritable, argumentative, and oppositional. The recommendation was to use intervention strategies (social narratives, rule cards, motivational systems, structured tasks, behavior maps, 5 point scales, et.) when he was being disruptive. It was reported that at the end of the 2014-2015 school year, The Student 's medications were 2mg of Abilify and 75mg of Zoloft at night.

THE STUDENT began attending 6th grade at _____Middle School at the beginning of the 2015-2016 school year. On March 25, 2015, prior to The Student beginning _____ Middle School, there was a "transition" meeting at the elementary school with the IEP team members from his elementary school as well as the building principal, the Special Education School Coordinator for _____ Kansas Cooperative in Education, some of the special education teachers, and others that either had been or would be in the future providing special education support for The Student.

The purpose of this meeting was to "transition" The Student from the elementary school into the middle school. It was explained that this type of meeting takes place with all special education students transitioning from elementary to middle school due to the drastic change in the programming and scheduling changes from being in one main class to having multiple classes that rotate throughout the day. The Student did not have any academic needs but only a behavioral plan. It was discussed, at that meeting, that The Student had made significant progress on his IEP in that he was currently participating in most of all of his general curriculum classes; his day at school, although shortened had increased; and he was having lunch and attending non-academic activities with his peers. It was also discussed, at the time of meeting, what was necessary to be added to his IEP as The Student transitioned to the middle school. It was decided that physical education would be added, since he did not have it at the elementary school, and that he would be given complete privacy to dress by himself and that he would have physical education by himself rather than with other students. It was also discussed that to address his needs as they related to his Autism, he would be given a locker away from other students, have a separate area in a classroom for him, as well as to assign someone to be with him all day.

The Student began the school year in regular general curriculum classes with the exception of the one-on-one physical education class. The Student appeared to be doing well on all accounts until approximately the end of September. It was reported that The Student made honor roll the first quarter of the first semester. All school personnel reported beginning to see The Student get more "ramped up" toward the end of September, such as being more argumentative and progressing to being more agitated with his peers and irritable over all. It was reported that prior to October, The Student could handle himself better by leaving on his own but by October he needed to be asked to leave and would sometime comply but on most other times he would become aggressive towards himself by hitting his hand on the wall on the way out of the room.

Due to health concerns, The Student's medication was being changed from weaning him off Abilify, beginning in mid-September and placing him on Kapvay. The Student was completely weaned off Abilify and taking Kapvay in October 2015. It was at this time that a series of events began to take place at school. The Student's team members all reported that it is their belief that the medication change significantly affected The Student's behavior as they all point to the correlation between removing him from the Abilify to the new medication. This was also a similar observation of what The Student's elementary IEP team had found.

On another instance, while in a science general education class, The Student became upset over a project and turned over a desk and the room had to be cleared of the other students and staff present. At that point when the building principal attempted to speak with him and set the desk back up The Student became more upset and turned the desk back over and the building principal left the room according to the IEP. The Student's father was called and The Student complied with his father's request and they left. The Student received a 2-day out of school suspension for that behavior. The following week while in music, another general education class, The Student was having difficulty listening and doing the work and became upset and would not leave the room as requested by the teacher. the building principal was called to the room and in compliance with his IEP, did not speak with The Student, but rather cleared the room of the other children and contacted The Student's father. The Student was compliant with his father and left. The Student received another suspension for this incident and missed a pre-planned field trip. Following The Student's return from this suspension, he was moved from the general education classroom to the resource room due to the increase in his behavior and the aggression that he had demonstrated. The resource room was designed as an alternative room when The Student's behavior dictated him not being in the general education classroom for a period of time. He could use one of his "cards" to indicate that he needed to go there or a teacher could send him there.

And on yet another instance, The Student had wrapped a cord from the window blinds around his neck and refused to remove it. Staff had to intervene to have The Student remove the cord and this incident resulted in physical injury to 3 staff members and again, the room had to be cleared. After The Student had refused to work in the resource room he was moved to a one-on-one setting, which was referred to as the "isolation room". In this room The Student is alone without any other students and just a teacher or Para. All distractions and stimulus are removed and the doors are removed from the cabinets. Project Stay was informally consulted on suggestions after the increase in behaviors and it was suggested that maybe rotating different teachers in the special education setting with The Student would help, but it has not.

On November 6th another incident occurred while The Student was in the "isolation" room with his special education teacher and became defiant to her instructions and attempted to leave without permission. When the teacher blocked the door, The Student began to elbow her in the stomach and then when told to stop he walked away. While a few feet away from the teacher, he began swinging his bag and snapping his jacket in a whip like fashion at the teacher and making contact hitting her in the eye and striking her with the jacket. He was also saying "this should work just fine". The Student also hit, kicked and kneed a Para that had also entered the room. The police were called in this incident. Immediately prior to the physical altercation by The Student, he had stopped working at his assigned table and was observed scraping the inside of cabinets with some sort of object in his possession, trying to pry the thermostat cover off with that same object, attempting to pick various locks, and even attempting to open and play with an electrical box. The Student was suspended for this incident as well. The IEP team had previously scheduled a meeting for November 10, 2015 and decided that they would address the recent behavior and what to do regarding his discipline at that time.

On November 10, 2015, members of the Co-Op including special education teachers, the parents, the building principal, school social worker and other general education teachers met and modified The Student's IEP as well as conducted a Manifestation Determination meeting. During that meeting it was agreed to modify The Student's IEP to his current placement, which is 100% of his time, spent in a special education setting with various teachers and Para's cycling in and out and without any interaction with his peers. He will have to earn the ability to have interaction with his peers by maintaining a consistent amount of time with no physical aggression towards himself or others and 80% task completion. The team having tried this model prior to was not persuaded that this approach would be feasible given The Student's escalating aggressive behavior. The team then discussed the availability of the LMS Therapeutic Classroom, which is within the _____ Middle School building. With the exception of The Student's parents, the team believed that given The Student's recent and aggressive behavior that was not only resulting in injury to himself but also to others, LMS would be the best and appropriate placement for The Student given its intent, purpose and focus.

The LMS Therapeutic Classroom is a part of the Co-Op of which the District is part. LMS has extensive resources of professionals in the program equipped, better trained and prepared to assist and address the behaviors for students with emotional and behavioral disorders, including mental health professionals that will meet and work with The Student on a regular and consistent basis. Although The Student may not be specifically diagnosed with an emotional or behavioral disorder, his actions were dictating the focus and not the label that was being placed on his diagnosis. The Student would be entitled to attend and receive all of the benefits at LMS pursuant to the District's partnership with the Co-Op. The Student would remain a student in the District although attending the LMS classroom. If deemed appropriate by The Student's IEP team, he would still be allowed to participate in any extra-curricular or after school activities in the District since LMS has an earlier dismissal time than the District.

All members of The Student's IEP team, except his parents, but including employees of the Co-Op have agreed and determined that LMS would be appropriate for The Student to address the behavior and receive the services and modifications necessary including those described in his current IEP to enable him to meet the goals set out in the IEP.

Although the IEP team agreed that LMS would be the appropriate placement for The Student, his parents requested that the team consult with Behavior Analyst and Program Consultant from Project Stay again to discuss other suggestions and recommendations. The team agreed to contact Project Stay again and made some additional modifications to The Student's IEP at the conclusion of this meeting. Immediately following this meeting, the District consulted once again with Project Stay to acquire some assistance regarding The Student.

The Behavior Analyst and Program Consultant from Project Stay once again participated in a meeting on November 17, 2015 with the IEP team. Once again he provided the team with suggestions and recommendations regarding The Student's behavior. The Behavior Analyst and Program Consultant from Project Stay's suggestions involved the necessity of obtaining a baseline assessment on The Student's behavior and then having that data analyzed to determine how to devise a program for him. His recommendations were very similar to that which he had recommended during The Student's 4th grade school year and what has been referred to as "extreme" programming. It required The Student to remain in a setting by himself and have the professionals conduct themselves, just as what the District was currently doing, and then The Student would have to earn his way to other rewards. The Behavior Analyst and Program Consultant from Project Stay did not weigh in on the placement for The Student but was clear that Project Stay's purpose is not to make placement recommendations but only suggestions and recommendations to teams regarding programming.

Since the District was already following the Behavior Analyst and Program Consultant from Project Stay's recommendations of Project Stay regarding the isolation room, they simply added the data collection portion regarding the baseline assessment. To date of the hearing, The Student was still choosing not to work or earn any rewards.

On November 19, 2015, 2 days following the meeting with Project Stay, another incident occurred in which a Para had become uncomfortable with The Student's behavior while in the "isolation room" and opted to sit in the hallway outside of The Student's room where she could observe him. While observing, The Student pulled a chair to the doorway and sat down as well. While sitting there, The Student began pulling another chair that had previously been in the hallway to himself and threw it at the Paraprofessional. The Para had not been speaking to him and was following the recommendations from Project Stay and his IEP. It was her opinion that the lack of her speaking to him was ramping him up. It was also believed that his irritation might have come from his misuse of his 20 minutes of free time as he had spent that in the restroom and was frustrated with himself.

On December 10, 2015 another incident took place where The Student became upset and began flipping over a table and chairs. The Para exited the room where she remained until another team member arrived. Shortly after the other team member arrived and remained outside of the room observing The Student, he poked his head out of the door and after being asked if he needed anything, he returned inside the room and picked up the tables. A while later The Student came to the window where the teacher was watching and she asked if he was ready for lunch. Since he stated that he could not hear her, she opened the door and asked him and he said yes and sat down at the table. Lunch was brought to him and he ate and went on with his day.

The team appears lost for the cause of what is prompting the behavior as they have consulted and implemented all suggestions and recommendations from every expert at their disposal. The team does agree that the medication change could definitely be a factor just as it was during The Student's 2013-2014 and 2014-2015 school years. The District is currently following the recommendations of Project Stay, which are very data driven and could take a significant amount of time to measure. The Student's current behavior is a refusal to comply and presents as aggressive and is left in a room all day by himself, as is being dictated by his IEP. The incidents that have taken place from September to the most recent, clearly demonstrate that The Student's behavior has resulted in injury to himself and others and the District must address this behavior for the safety and well being of The Student as well as others. Given the escalation of the number of the incidents, the continuance of the incidents as well as the recent nature, it is this Hearing Officer's determination that maintaining The Student in his current placement is substantially likely to continue to result in injury to himself or others. The District has worked diligently and has done all that they can reasonably do to minimize the risk of harm to The Student and others in modifying his IEP and having him in a room by himself, without any distractions, stimulus or other students for which he could become frustrated. It is this Hearing Officer's position that based upon The Student's history and the testimony, his behavior must be addressed to try to avoid the aggression that The Student has been demonstrating.

The District has tried to do everything that has been recommended and suggested. There was no evidence presented that the District was not compliant in following the recommendations or have in some way, been the cause of the behavior. Everyone on The Student's IEP team has also expressed a concern that The Student's behavior is impeding his ability to learn and that the LMS Classroom would allow him to receive the necessary services while addressing the behavior.

The only evidence presented regarding the inappropriateness of LMS was that it would be approximately a 30-35 minute bus ride for The Student. There was no evidence to indicate how this bus ride would or could affect The Student. Although this Hearing Officer can understand the parents' reluctance to want their son to have to be 30-35 minutes away in another city to attend school, the District must consider the liability of injury to The Student as well as others by maintaining The Student in his current placement. LMS is in no way intended to be punitive. It is a setting for students with emotional and behavioral disorders to receive all of the services, resources and assistance that they may need to be successful in the general education classroom. The fact that the LMS setting is not a "program" per se, but rather a placement intended to meet a goal and not a "time-frame", the District as well as the IEP team may need to re-assess the long term plans for The Student should this placement prove to be successful. The testimony was clear that most students spend well beyond 45 days in the LMS Therapeutic Classroom.

Order

1. The relief requested by the District in its petition for an Expedited Due Process Hearing is granted. The District is authorized to place The Student at the _____ Middle School Therapeutic Learning Classroom Emotional/Behavioral Disorder in Salina Kansas as an interim alternative educational setting for up to forty-five (45) days, beginning January 4, 2016 (since school breaks for the Winter Break beginning December 18, 2015 and does not resume until January 4, 2015).
2. Since the District is being authorized to place The Student in this IAES setting without parental consent, the District is directed to develop a behavior intervention plan to be tried and used as a basis specifically for The Student. The BIP may and can include the measures that are being used at LMS. This BIP may be useful when The Student is returned back to his school building.

THE EFFECTIVE DATE OF THIS DECISION IS THE DATE OF RECEIPT.

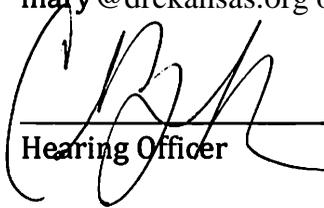
Date: 12/16/15
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Hearing Officer

Certificate of Service

I certify that I served a copy of the above order by electronic transmission as well as US mail upon Keith Henry, attorney for USD ___ at krhenry@wearydavis.com and Mary Curtis, attorney for The Student and parents at mary@drckansas.org on December 16, 2015.



Hearing Officer