

Case Number: 2010-0255
[redacted] vs [redacted]
Hearing Officer: Alfred A. Spitzzeri

Illinois State Board of Education
Special Education Services
100 North First Street
Springfield, Illinois 62777

Impartial Due Process Hearing Decision Cover Page

Instructions: Complete this form and return it along with the decision. The information collected on this form will be used for the purpose of indexing the decision by subject matter as required by 23 Illinois Administrative Code 226-695

District Name [redacted]

Phone: 6309378834

Superintendent [redacted]
Address [redacted]
Represented by [redacted]

Parent Name [redacted]

Phone: [redacted]

Address [redacted]
Represented by [redacted]

Date and Timelines

Date of Written Request: 01/22/2010
Date of Pre-hearing Conf:

Date of Hearing: 02/12/2010 to 2/12/2010 12:00:00 AM
Date of Decision:

Summary of Decision

The School's District's request, on an expedited basis, for an interim alternative educational setting for a 7 year old autistic child is granted. The child poses a substantial risk of injury to himself or to others if his current placement were to be maintained.

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ILLINOIS STATE BOARD OF EDUCATION
SPECIAL EDUCATION DUE PROCESS HEARING

IN THE MATTER OF

[REDACTED]

v.

[REDACTED]

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-) ISBE CASE NO. 2010-0255
-)
-) Alfred A. Spitzzeri
-) Impartial Due Process
-) Hearing Officer

ILLINOIS STATE BOARD of EDUCATION
IMPARTIAL DUE PROCESS HEARING

DECISION and ORDER

PROCEDURAL HISTORY

On January 27, 2010, the [REDACTED] ("School District"). forwarded to the Illinois State Board of Education (ISBE) a parental request for an Impartial Due Process Hearing from [REDACTED] (parent), pursuant to 23 Illinois Administrative Code, Section 226.615. At the time of the request for Due Process, [REDACTED] born on November 3, 2002, was a seven (7) year old boy enrolled in the 1st grade at [REDACTED] ("the School"). A cross appeal was also filed by School District #101.

Since the request for an expedited Hearing was received by ISBE on January 22, 2010, the Hearing could not begin before February 6, 2010 and had to be completed by February 19, 2010 [105 ILCS 5/14-8.02B(H)].

The basis for the parental request for an impartial Due Process hearing revolved around disciplinary issues. Specifically, [REDACTED] had been suspended from School and the School District wanted to place him in a special education class elsewhere, in the [REDACTED] alternative.

██████████. The Parent disagreed with the School's placement recommendation.

On or about January 27, 2010, a resolution meeting was held with the Parent, School Principal and the Director of Special Education Services. The resolution session was unsuccessful. According to ██████████, the School District Director of Student Services and Special Education, the Parent declined to pursue mediation at that time.

Prior to coming to this School District, ██████████ was a kindergarten student in ██████████ ██████████. Over a two-month period in the spring of 2009, prior to withdrawing from ██████████ ██████████ was suspended on six (6) occasions for "aggressive behaviors". At that time he was in a self-contained special education instructional program and the School District was considering placing him in a private day school. Reportedly, this is why the Parent transferred out of ██████████ and into ██████████ with only two (2) weeks left in the 2008-2009 School Year.

██████████ is eligible for special education and related services under the category of Autism. His last IEP provided for educational placement in the general education classroom, with resource support, e.g. Occupational Therapy (OT), Social Work Services, a Behavior Intervention Plan (BIP) and a one-to-one aide. The BIP provides an incentive system rewarding good behavior.

The School District filed a cross appeal requesting the following relief:

- 1) An Order allowing the School District to place ██████████ in the ██████████ ██████████ as an interim alternative educational setting (IAES) for up to forty-five (45) days; and if that fails, a private therapeutic day school.

On February 10, 2010, the Hearing Officer attempted to arrange a conference call between ██████████ who is unrepresented, and ██████████ an attorney with the ██████████ ██████████ for the School District. When the Hearing Officer placed the conference call, ██████████ was available to take the call, but the call to ██████████ went into her voice mail. The voice mail message indicated that the voice mail box was full and could not accept the call. Therefore, the Hearing Officer e-mailed an Order to ██████████ and ██████████ that the Hearing

would take place at the Administrative Offices of the School District, [REDACTED] from 10:00AM to Noon, on Friday, February 12, 2010.

On Thursday, February 11, 2010, the School District attempted to follow-up with [REDACTED] to make sure she received the e-mail and knew about the Hearing. On February 11, 2010, at approximately 3:30PM, the Hearing Officer received an e-mail from [REDACTED] claiming she could not attend the Hearing. Her reason for not being available was vague and non-specific. At approximately 6:00PM the same day, [REDACTED] forwarded a second e-mail to this Hearing Officer again stating she could not attend the Hearing, requesting time to retain an attorney and requesting that the Hearing date be pushed back until sometime in March. The Hearing Officer responded to [REDACTED]'s e-mails by stating that the Hearing would go forward on Friday, and suggesting that she appear. The rationale for the Hearing Officer's decision to go forward with the Hearing is set forth later in this Opinion.

ISSUES PRESENTED

- 1) Is maintaining [REDACTED] current educational placement substantially likely to result in an injury to the student or to others pursuant to Section 615(K) (3) (A) of the Individuals with Disabilities Education Act (IDEA)?
- 2) Whether placement in a public, self-contained program or private therapeutic program is an appropriate interim alternative educational setting (IAES) for the Student pursuant to 105ILCS 5/14-8.02B (f)?

HEARING

The Hearing commenced at 10:00AM on Friday, February 12, 2010, at the [REDACTED]. Appearing on behalf of the School District were Attorneys [REDACTED] and [REDACTED]. No one appeared on behalf of [REDACTED]. [REDACTED] served as the Court Reporter. The Reporter's phone # is [REDACTED].

[REDACTED] moved on behalf of the School District to strike the Parent's request for Due Process for failing to appear. The Motion to strike was granted.

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

[REDACTED], [REDACTED] 1st grade teacher at [REDACTED]

[REDACTED], [REDACTED] 1st grade aide;

[REDACTED] a special education teacher, known as an inclusion facilitator;

[REDACTED] an occupational therapist from [REDACTED] a special education cooperative, assigned to [REDACTED] 4 days a week;

[REDACTED], the [REDACTED]
[REDACTED]

The District introduced into evidence a spiral bound notebook containing 29 tabs, pp.1-483 and a tab 30 (unpaginated) with updates. SD Ex. 1.

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FINDINGS of FACT

[REDACTED] 7, attended kindergarten for most of the 2008-2009 school year in [REDACTED]
[REDACTED] At that time he was in a self-contained instructional program, with a diagnosis of

Autism. Toward the end of the 2008-2009 school year, an IEP Conference was scheduled for ██████ to transfer to ██████. According to ██████ an administrator from ██████ ██████ told her that the reason the Parent transferred, with just a couple of weeks left in the school year, was to avoid ██████ decision to place ██████ in a private day school. At the IEP Hearing, ██████ insisted that they "give ██████ a chance" at a general education 1st grade classroom, with support and related services. ██████ personnel conceded to ██████'s request. (See IEP of August 27, 2009, and IEP's of May 26th and June 4th, 2009 at School District pages 291-306, 308-318).

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At the Hearing, the School District introduced a spiral bound notebook of exhibits, including tabs #1-30 which included student records and data as current as the week of the Hearing. The School District Exhibit Book was extremely well organized, including all relevant data. The School District Employees who testified at the Hearing, without exception, made excellent witnesses. They appeared to be well-trained, caring, competent professional in their respective fields, who care very much personally for ██████

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CONCLUSIONS of LAW

An expedited Hearing may be requested by a parent or a student who is at least eighteen (18) years of age, if there is a disagreement with regard to a determination that the student's behavior was not a manifestation of the student's disability; or if there is a disagreement regarding the School District's decision to move the student to an interim alternative educational setting for behavior at school and a School District, if school personnel believes that maintaining the current placement of the student is "substantially likely to result in injury to the student or others pursuant to Section 615(K)(3)(A) of IDEA". 105 ILCS 5/14-8.02b. Also see Honig v. Doe, 484 U.S. (1988).

Further, a School District shall make a request, in writing, to the State Board of Education, and promptly mail a copy of said request to the Parent. The request for an expedited Hearing initiated by a School District for the sole purpose of moving a student from his current placement to an interim alternative educational setting because of dangerous misconduct must be accompanied by all documentation that substantiates the District's positions that maintaining the student in his current placement is "substantially likely to result in injury to the student or to others"

105 ILCS 5/14-8.02b (e). Said documentation shall include written statements, whether the School District is represented by legal counsel, the matters the District believes to be in dispute and the specific relief being sought and the names of all witnesses the District intends to call to testify at the Hearing. (See subparagraph (e) above)

An expedited Hearing requested by the Parent to challenge the removal of the student from his current placement to an interim alternative educational setting shall include a written statement as to the reason the Parent believes that the action taken by the District is not supported by "substantial evidence" and all relevant documentation in the Parent's possession. Said documentation shall include written statements of whether the Parent is represented by legal counsel, the matters the Parent believes to be in dispute and the specific relief being sought, and the names of all the Parent's witnesses. (See subparagraph (f) above)

In this case, the School District fully complied with the above statute in providing notification that it would be represented by the Law Firm of [REDACTED]. The School District also provided a copy of its witness list, identifying nine (9) witnesses and its document/exhibit list, consisting of items # 1-25. (See Hearing Officer Exhibits A and B dated 2-12-10.) In contrast, [REDACTED] failed to comply with the above statute. She provided no additional documentation in support of her position disagreeing with the School District's decision to transfer [REDACTED] to a self-contained instructional program at the [REDACTED], other than a brief description of the dispute contained in her Parental Request for an Impartial Due Process Hearing. (See Hearing Officer Exhibit C, dated 2-12-10)

At the Resolution Meeting held at the District, on or about February 7, 2010, [REDACTED] testified that [REDACTED] declined to pursue mediation. However, after receiving Notice of the expedited Hearing from the Hearing Officer, [REDACTED] in an email, claimed that she wished to pursue mediation. In any event, although the parties may request mediation, "the mediation shall not delay the timeline set by the Hearing Officer by conducting the expedited Hearing." 14-8.02A of the School Code, subparagraph (h)

In the same e-mail, [REDACTED] requested time to find an attorney to represent her at the Hearing. While it is clear that any party to the Hearing shall have the right to be represented by counsel, in this Hearing Officer's opinion, this was just another means for [REDACTED] to delay the inevitable. [REDACTED] received a letter from [REDACTED] dated January 25, 2010, acknowledging her

receipt of her request for a Due Process Hearing on January 22, 2010. At that time, [REDACTED] was also provided with a list of seven (7) different low cost legal or advocacy assistance groups. SD page 7, tab 2). In other words, had [REDACTED] truly intended to obtain an attorney for this case, she had three (3) weeks to do so, from the time she initiated her Due Process request, which was plenty of time. [REDACTED] was also provided with a *Notice Of Procedural Safeguards For Parents Of Students with Disabilities*, at that time.

The burden of persuasion is on the party filing the request for due process, in this case, the district (the parent's request having been stricken). Schaffer v. Weast, 546 U.S. 49 (2005).

The unanimous opinions of the School District Employees who testified at the expedited Hearing was that maintaining the current placement for [REDACTED] at [REDACTED] is substantially likely to result in injury to [REDACTED] or to others. This Hearing Officer agrees. In this regard, the School District introduced substantial evidence, not only as to the future likelihood of [REDACTED] injuring himself or others, but as to the fact that he had indeed already injured others and engaged in other high-risk behaviors, such as putting himself at substantial risk of injury. The District has met its burden.

Particularly relevant and compelling testimony in this regard was provided by [REDACTED] a special education inclusion specialist. Over the past school year, she has worked with [REDACTED] teacher, [REDACTED] and [REDACTED] to facilitate his inclusion in the general education 1st grade classroom at [REDACTED]. During this time, she has been subjected to repeated verbal and physical abuse by [REDACTED].

Although there have been many such incidents, none were perhaps more dramatic than that which occurred on December 9, 2009. This was a very intense situation in which [REDACTED] ran into the hall outside of his classroom and [REDACTED] was contacted in her office to assist with the situation. The School is shaped in a circular fashion and eventually she caught up with him. At this time, he barricaded himself under a table. When she got down to his level and asked him to "calm down" he responded by putting his fist up to her face and repeatedly punching her in the face. She is Crisis Prevention Intervention (CPI) trained and had no choice but to put him in a CPI restraint. For most students this is a calming situation, but in [REDACTED] case, it only escalated his behavior. Up to eight (8) staff members were called in to assist in this situation.

He responded by screaming "what the fuck" and "I'll kill all you fuckers". He kicked ██████ in the knee, bit her in the thigh, and spit in her face with a full mouth of saliva, making her nauseous and eventually causing her to leave school early and go home because she was sick to her stomach. ██████ was contacted by the School, but responded that she could not come to School to pick up ██████ and instead sent his grandfather to pick him up. At that time, he apologized to the Staff as he left the School with his grandfather, and asked him whether he could have some candy and go to a movie.

There are repeated incidents in the record of ██████ either attempting to run through a glass door or put his fist through a glass window. Obviously, if he had succeeded in either regard, he could have caused serious injury to himself. e.g. incident of January 5, 2010.

Another incident was when ██████ ran into the gym and took a lacrosse stick and swung it so close to ██████ face, just missing her, that she could hear the swish. At this time he was hiding in the physical education teacher's office, and had refused ██████ request to take him back to class. (January 5, 2010 incident).

██████ misconduct is not limited to engaging the staff. Instead there was repeated testimony about his efforts at provoking other students and instances, for example, of pushing them or striking them with his chair. There were multiple witnesses' corroborating almost every one of these reported incidents. The OT, ██████ testified that ██████ was not a safe place for ██████ and she concurred with the recommendations for the ██████ ██████. The benefits of this program would be a specially trained, special education teacher, assisted by several aides, in a classroom with a smaller teacher-pupil ratio and more organization and structure. She has personally observed this Program, and also pointed out the importance of having the quiet areas, both inside and outside of the classroom, which would address his sensory needs. The Program also has available supplemental and related services which ██████ could benefit from. In other words, they could fully implement his IEP there.

Finally, there was a situation as recently as February 11, 2010, the day before the expedited Hearing, in which ██████ kicked and hit and spit on ██████. He also punched her file cabinet, causing his hand to become swollen and red. He refused her offer of an ice pack and then hit the glass window of her office and lay under the table, pushing it up with his feet. According to ██████ her biggest concern was that his misconduct had intensified. His behavior

was becoming worse and worse and she was very concerned for his safety, citing as an example, his provocation of other students and the possibility that they might strike back at him as a result.

The School Staff did an excellent job in objectively documenting [REDACTED] behavior. Data collected on a daily basis by his aide, [REDACTED] is reflected in the charts at SD 15-17, showing an increase in both the frequency and intensity of his behavior. Additional charts at SD 19-20 show the intensity of his behavior increasing.

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ORDER
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1. The relief requested by the School District in its petition for an expedited Due Process Hearing is granted. [REDACTED] is authorized to place [REDACTED] at the [REDACTED] in [REDACTED], part of the [REDACTED] as an interim alternative educational setting for up to forty-five (45) days, beginning Tuesday, February 16, 2010 (February 15th being President's Day, a school holiday). Should the [REDACTED] be found not to provide [REDACTED] with FAPE at the conclusion of forty-five (45) days thereof, April 9, 2010, the School District is thereafter authorized to find a private therapeutic day school for [REDACTED]
2. An IEP meeting shall be held within 7 days hereof, on or before February 24, 2010, to facilitate the transfer of [REDACTED]
3. The Parent's request for relief in her impartial Due Process Hearing is denied.

RIGHT TO REQUEST CLARIFICATION

Either party may request clarification of this decision by submitting a written request for such clarification to the undersigned Hearing Officer within five (5) days of receipt of this decision. The request for clarification shall specify the portions of the decision for which clarification is sought and a copy of the request shall be mailed to the party and to the Illinois State Board of Education, Program Compliance Division, 100 North First Street, Springfield, Illinois 62777. The right to request such a clarification does not permit a party to request reconsideration of the decision itself and the Hearing Officer is not authorized to entertain a request for

reconsideration. THE EFFECTIVE DATE OF THIS DECISION IS THE DATE OF RECEIPT OF ANY CLARIFICATION OF THIS DECISION.

RIGHT TO FILE A CIVIL ACTION

This decision shall be binding upon the parties unless a civil action is commenced. Any party to this hearing aggrieved by this decision has the right to commence a civil action with respect to the issues presented in the hearing. Pursuant to ILCS 5/14-8.01(i), that civil action shall be brought in any court of competent jurisdiction within 120 days after a copy of this decision was mailed to a party.

Very truly yours,

By Alfred A. Spitzzeri,
ISBE Impartial Due Process Hearing Officer

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CERTIFICATE AND AFFIDAVIT OF DELIVERY BY MAIL

The undersigned hereby certifies that a copy of the Decision and Order was emailed at the parent's request on February 17, 2010, to the following:

[REDACTED]
Due Process Coordinator
Illinois State Board of Education
aeulass@isbe.net

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

on February 17, 2010

Alfred A. Spitzzeri, Esq.
Due Process Hearing Officer

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