

**ILLINOIS STATE BOARD OF EDUCATION
IMPARTIAL DUE PROCESS HEARING**

[REDACTED] SD [REDACTED]

School District,

Case No: 2023-DP-0127

v.

Janet K. Maxwell-Wickett,
Impartial Hearing Officer

STUDENT¹,

Expedited Hearing

Student.

FINAL DETERMINATION AND ORDER

JURISDICTION

The undersigned has jurisdiction over this matter pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C §1400 *et seq.* and the Illinois School Code, 105 ILCS 5/14-8.02a *et seq.*

BACKGROUND

The Student is an 11-year-old, female who is currently placed in an Interim Alternative Educational Setting (IAES), a nonpublic, special education therapeutic day school that services students with Emotional Disability (ED) and significant social, emotional, and behavioral deficits. (IHO Exhibit #1). The Student is in 6th grade and prior to removal to the IAES, attended a District general education middle school. She is eligible for special education services due to an Emotional Disability (ED). (IHO Exhibit #1.) The District filed its Expedited Due Process Hearing request on January 23, 2023, seeking to maintain the Student in a therapeutic day school for an additional

¹ Personal identification information is provided in Appendix A.

forty-five (45) school days alleging that it is dangerous to return the Student to her prior, general education middle school placement as the Student is a danger to herself or others. (IHO Exhibit #1, 13.) The Parties participated in a resolution session on January 25, 2023, but were unable to resolve the outstanding issue. (IHO Exhibit #8.) Based upon this, the 20-School Day timeline for this Hearing Officer to conduct the hearing began to run on January 23, 2023, with February 21, 2023, being the 20th school day. (IHO Exhibit #4-5.) The 10 School- Day deadline for this Hearing Officer to render a decision is February 27, 2023.² (IHO Exhibit #4-5.)

Parent is self-represented. The Prehearing Conference was held on February 3, 2023, and Parent and counsel for the District both participated in same. The hearing date was scheduled for February 9, 2023, over Parent's objection³, based upon the availability of District counsel, the IHO, and the strict hearing timeline. Parent did not file a response to the District's due process complaint notice. (IHO Exhibit #13.) The Due Process Hearing was held via Zoom video conference and Parent appeared sporadically. Parent was present at the Prehearing Conference when the hearing date was scheduled and was also provided with a Zoom meeting invitation for the hearing date.⁴ (IHO Exhibits #13, 15-18.)

The Parent opted for a closed hearing. The Due Process Hearing was held on February 9, 2023. Ms. Teri Engler of Engler, Callaway, Baasten & Sraga, LLC, represented the District. Dr. [REDACTED], Director of Student Services for [REDACTED] SD [REDACTED] was the District Representative. The Parent was self-represented and her appearance at the Zoom video conference hearing was sporadic. The District presented seven (7) witnesses. (IHO Exhibit #14, 16.) The District

² Based upon the due process hearing date of February 9, 2023.

³ While Parent requested February 21st for the due process hearing and objected to the February 9th date, she did not indicate that she was unavailable on the February 9th date and did, in fact, appear sporadically throughout the proceeding.

⁴ Parent appeared at the hearing after the conclusion of the second District witness' testimony and appeared sporadically thereafter.

presented the following Exhibits: District Exhibits SD# 1-12, 14-16, and 21-26 which were admitted into evidence. The Parent appeared and participated sporadically in the hearing and did not present any witnesses or exhibits. The Hearing Officer's Exhibits are: IHO Exhibits # 1-19. The District submitted a written outline of its closing statement and the case law relied upon. (IHO Exhibit #19.)

ISSUE

The issue raised by the District for determination by this Hearing Officer is:

(a) Whether the District can demonstrate that the Student is substantially likely to injure herself or others if returned to the placement that was used prior to the Student's removal to the interim alternative educational setting (IAES) pursuant to 105 ILCS 5/14-8.02(b), 23 Ill. Admin. Code §226.655(c), and 20 U.S.C. §615(k)(2) and (3), 34 C.F.R. §300.532, §300.507, §300.508.

The Student was placed in an Interim Alternative Educational Setting (IAES) by IHO Mary Jo Strusz pursuant to her Final Determination & Order issued December 1, 2022, for a period not to exceed forty-five (45) school days. The District requests that this Hearing Officer extend the current IAES placement and determine that the Student continues to be substantially likely to injure herself or others if she were returned to the educational placement used prior to her removal which is a District general education middle school. The District further requests that this Hearing Officer order that the Student's placement at the private therapeutic day school be maintained for an additional period, not to exceed forty-five (45) school days.

The Parent maintains that the Student is not substantially likely to injure herself or others if she is returned to her prior educational placement, a general education middle school setting, and requests that this Hearing Officer order same.

FINDINGS OF FACT

This Hearing Officer did not have the benefit of a transcript when writing this decision. Therefore, the following is based upon this Hearing Officer's personal notes and recollection. This Hearing Officer carefully considered the testimony of all witnesses presented and all documents introduced and admitted into evidence whether or not specifically referred to or cited when making her final determination. To the extent that a Finding of Fact adopts one version of a matter on which the evidence is in conflict, the evidence adopted has been determined more credible than the conflicting evidence. After considering all the evidence, as well as the arguments of District counsel, this Hearing Officer's Findings of Fact are as follows:

1. The Student is an 11-year-old, female who is currently in 6th grade. The Student qualifies for special education and related services under the disability category of Emotional Disability (ED). She attended a District general education middle school prior to her removal to an Interim Alternative Educational Setting (IAES), a private therapeutic day school in December 2022. (Testimony of Dr. P⁵, SW2⁶, PSY⁷; SD #1-3. 26.)

⁵ Dr. P is the District Director of Student Services. She has been employed by the District since July 1, 2022, but has been employed as a Director of Student Services for approximately ten (10) years. She was a school psychologist prior to becoming an administrator. (Testimony of Dr. P.)

⁶ SW2 is employed by the District as a school Social Worker. He has been so employed since August 2020. (Testimony of SW2.)

⁷ PSY is employed by the District as a school psychologist. He has been employed in public education for the past twelve (12) years and was previously both a general education and special education teacher. (Testimony of PSY.)

2. The Student has been diagnosed with Disruptive Mood Dysregulation Disorder (DMDD). (Testimony of Dr. P, PRIN⁸, PSY, Dr. M⁹, SW1¹⁰, SW2, BCBA¹¹; SD #26.)

3. On October 22, 2022, the District filed an expedited due process complaint notice seeking to remove the Student from her District general education middle school and place her in an appropriate Interim Alternative Educational Setting (IAES). The hearing in that matter was held on November 14 & 16, 2022. (Testimony of Dr. P, SW2, PSY; (SD #1-3.)

4. On December 1, 2022, after the conclusion of the expedited due process hearing, IHO Mary Jo Strusz issued her Final Determination & Order. The Final Determination & Order granted the District's requested relief and ordered that the Student be placed in an IAES, specifically, ██████████ (MAN) for a period not to exceed forty-five (45) school days. (Testimony of Dr. P; SD #3.)

5. IHO Strusz determined the following: that maintaining the Student's placement in the general education middle school was substantially likely to result in injury to the Student or to others. The Student engaged in the following behaviors while in the general education setting: eloping – running around the school; running outside of the school building including wooded areas; climbing staircases; climbing school building gutters; attempting to climb down 8-foot-deep window wells; physical aggression – including kicking, biting, choking, punching, hitting – toward

⁸ PRIN is the Principal at MAN. She has been so employed for the past six (6) years. She has been employed in public education for twenty-five (25) years and is a certified general education teacher, special education teacher, and school principal. (Testimony of PRIN.)

⁹ Dr. M holds a PhD in psychology. She is licensed as both a school and clinical psychologist. She has been in public education and private practice for twenty years. She is a private psychologist who provides consulting services to MAN as needed. (Testimony of Dr. M.)

¹⁰ SW1 is employed as a school social worker at MAN. Prior to her employment at MAN, she worked in the juvenile justice system, with Northwestern University's Legal Clinic, in a neighborhood counseling center, and as a hospital discharge planner. (Testimony of SW1.)

¹¹ BCBA is an Organizational Behavior Analyst for the ██████████ Group. He holds a Master's Degree in Applied Behavior Analysis and is a Board Certified Behavior Analyst. He has been so employed for five (5) years. (Testimony of BCBA.)

school staff and other students, police and paramedics; throwing things (using standard items as weapons: sanitizer, metal water bottles and asphalt); vulgar language, and stealing. These behaviors increased during the Spring 2022 and Fall 2022 semesters. Despite numerous modifications to the Student's IEP and BIP, the District was unable to address the Student's behavioral needs. The Student's behaviors were substantially likely to result in injury to the Student or others. (Testimony of Dr. P; SD #3.)

6. IHO Strusz determined that the Student's general education placement was not appropriate. Despite numerous evaluations and modifications to the Student's IEP, FBA, and BIP, from Spring 2022 through Fall 2022, and significant interventions by the District administration and staff, the Student's behaviors increased in frequency. The District was unable to support and manage the Student's unsafe and dysregulated behaviors in her general education middle school. (Testimony of Dr. P, SW2. PSY; SD #3.)

7. IHO Strusz determined that the District made reasonable efforts to minimize the risk of harm to the Student and to maintain the Student's general education placement. However, it was ultimately unable to do so. The Student entered the District in August 2021 with a 504 Plan. From August 2021 through Fall 2022, the District evaluated the Student, added Tier 2 supports, and after receipt of the psychological evaluation, found the Student eligible for special education and related services and provided her with an IEP, FBA, and BIP in March 2022. Since March 1, 2022, the District consistently refined and revised the Student's intervention services, monthly, in an effort to contain and assist the Student's dysregulation. However, efforts to provide additional related service minutes, accommodations, and behavioral supports were unsuccessful. The District made reasonable efforts to maintain the Student's general education placement but was unsuccessful. (Testimony of Dr. P; SD #3.)

8. IHO Strusz determined that the IAES, specifically, MAN, can fully implement the Student's IEP including the goals and related services designed to prevent the undesired behaviors from recurring. (Testimony of Dr. P; SD #3.)

9. The Student began attending the IAES placement, specifically, MAN, on December 7, 2022. (Testimony of Dr. P; PRIN; SD #1-5.)

10. During the period December 7, 2022, through February 6, 2023, the Student only attended MAN for eleven (11) days. (Testimony of Dr. P, PRIN, BCBA, SW1, Dr. M; SD #6-12, 14-15, 21.)

11. The Student has not attended MAN since January 17, 2023. (Testimony of Dr. P, PRIN; SD #21.)

12. On the days the Student has been in attendance, her behavior has not improved, remains highly dangerous and disruptive, and requires intensive social, emotional, and behavioral interventions. The Student's dangerous behaviors include the following: shoving and kicking staff members; frequent elopement attempts – including leaving the classroom and running through the hallways and attempting to leave the building; breaking the cover off of an electrical outlet and attempting to pull out the electrical wires from the inside of the outlet; grabbing and pulling staff member's hair; hitting peers; attempting to punch staff members in the face; pouring water on peers; verbally threatening peers; attempting to physically fight peers; attempting to pull the fire alarm; and attempting to stab a staff member with a pencil. (Testimony of Dr. P, PRIN, BCBA, SW1, Dr. M, SW2, PSY; SD #1-2, 7-12, 14-16, 25-26.)

13. While at MAN, the Student has refused to complete academic work. She has less than 50% academic work completion. (Testimony of Dr. P; PRIN; SD #25.)

14. During her eleven (11) attendance days, between December 7, 2022, and February 6, 2023, the Student had thirteen (13) Crisis Intervention Behavior Stabilization (CIBS) referrals. (Testimony of Dr. P, PRIN, BCBA, SW1, Dr. M; SD #7-10, 12, 14-16, 21, 25.)

15. The Student's lack of attendance at MAN has impeded its ability to provide services and assist the Student to modify her behavior. The Student had made improvement at MAN, however, that improvement will be lost as she has not attended since January 17, 2023. (Testimony of Dr. P, PRIN, BCBA, SW1, Dr. M; SD #25.)

16. Parent has not cooperated with MAN and is refusing to send the Student to school. (Testimony of DR. P, PRIN, BCBA, SW1, Dr. M; SD #25.)

17. On January 23, 2023, the District filed a second expedited due process hearing request seeking a continuation of the IAES for another forty-five (45) school day period. (Testimony of Dr. P; SD #22-24.)

18. A resolution meeting was held on January 25, 2023. However, the parties were unable to resolve the outstanding issue. (Testimony of Dr. P; SD #25.)

19. The Student remains substantially likely to injure herself or others if returned to her prior general education middle school. Further, the Student remains substantially likely to injure herself or others at MAN. (Testimony of Dr. P, PRIN, BCBA, SW1, SW2, Dr. M, PSY; SD #1-12, 14-16, 21, 25-26.)

20. The Student engages in self-harm behaviors including biting and repeatedly pinching herself. (Testimony of SW1, SW2, BCBA, Dr. M; SD #25-26.)

21. An updated FBA and BIP were developed by BCBA and an IEP meeting was held on February 6, 2023, to review same. The IEP team and Parent all agreed to the contents of same. (Testimony of Dr. P, PRIN, BCBA, SW1, SW2, PSY, Dr. M; SD #26.)

22. MAN can fully implement the Student's IEP and updated BIP. (Testimony of Dr. P, PRIN, BCBA, SW1, SW2, PSY, Dr. M; SD #26.)

23. MAN is a small, highly structured, private therapeutic day school which serves students with emotional disabilities. It provides intensive social, emotional, and behavioral supports using therapeutic modalities that a general education setting cannot provide. (Testimony of Dr. P, PRIN, BCBA, SW1, SW2, PSY, Dr. M.)

24. The Student continues to exhibit the dangerous and self-harming behaviors that she exhibited while at her District general education middle school. Return to the general education setting is not appropriate as the Student's dangerous and unsafe behaviors continue and have increased in severity. She remains substantially likely to injure herself or others. (Testimony of Dr. P, PRIN, BCBA, SW1, SW2, Dr. M, PSY; SD #1-12, 14-16, 21, 25-26.)

25. The testimony of all District witnesses was uncontroverted at hearing. (Testimony of Dr. P, PRIN, BCBA, SW1, SW2, Dr. M, PSY,)

26. The documentary evidence presented by the District at hearing was uncontroverted. (Testimony of Dr. P, PRIN, BCBA, SW1, SW2, Dr. M, PSY; SD #1-12, 14-16, 21-26.)

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of District counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

The IDEA and the Illinois Administrative Code provide as follows: Requests for expedited due process hearings shall be made in accordance with 34 C.F.R. §300.532 and §300.533 and Section 14-8.02(b) of the Illinois School Code. 105 ILCS 5/14-8.02(b).

(a) The hearing officer shall determine:

- 1.) whether the child shall be placed in the proposed alternative educational setting; or
 - 2.) whether the local school district has demonstrated that the child's behavior was not a manifestation of the child's disability.
- (b) The hearing officer shall consider the following factors in determining whether an interim alternative placement is appropriate:
- 1.) Whether the local school district has demonstrated by substantial evidence (i.e., beyond a preponderance of the evidence) that maintaining the current placement of the child is substantially likely to result in injury to the child or to others;
 - 2.) Whether the child's current placement is appropriate;
 - 3.) Whether the district has made reasonable efforts to minimize the risk of harm in the child's current placement, including the use of supplementary aids and services; and
 - 4.) Whether the interim alternative educational setting will permit full implementation of the student's IEP and includes services and modifications designed to prevent the undesired behavior from recurring.
- (c) If all conditions set forth in subsection (b) of this Section are met, the hearing officer shall order a change in the child's placement to an appropriate interim alternative educational setting for not more than 45 school days. **If the district demonstrates that the student is substantially likely to injure himself or herself or others if returned to the placement that was used prior to the student's removal, the hearing officer may order that the student remain in the interim setting for subsequent periods of up to 45 school days each.**

23 Illinois Administrative Code §226.655(c). See also 20 U.S.C. §1415(k)(3), 34 C.F.R. §300.532.

In the District's first expedited due process hearing, IHO Strusz found that the District met its burden of showing by substantial evidence (i.e. beyond a preponderance of the evidence) that maintaining the current placement of the Student, in her general education middle school setting, was substantially likely to result in injury to the Student or others. She further found that all of the required elements of 23 Ill. Admin. Code §226.655 had been proven by substantial evidence and

ordered a change of the Student's placement to an appropriate IAES, specifically MAN, for not more than forty-five (45) school days. (FF #3-8.)

In the current, second expedited due process hearing request, the only issue before this Hearing Officer is whether the District can demonstrate that the Student is substantially likely to injure herself or others if returned to the placement that was used prior to the Student's removal to the interim alternative educational setting (IAES) pursuant to 105 ILCS 5/14-8.02(b), 23 Ill. Admin. Code §226.655(c), and 20 U.S.C. §615(k)(2) and (3), 34 C.F.R. §300.532, §300.507, §300.508.

The U.S. Court of Appeals for the 8th Circuit held that the phrase "substantially likely to result in injury to the child or others" does not require intent to harm or actual infliction of serious harm. *Light v. Parkway C-2 School District*, 41 F.3d 1233 (8th Cir. 1995). In the *Light* case, the Court held that the substantially likely test does not require actual injury but rather "the objective likelihood of injury." *Id.* at 1228. "We reject the proposition that a child must first inflict serious harm before that child can be deemed substantially likely to cause injury." *Id.* at 1230. Several impartial due process hearing officer decisions from California and Illinois have also held that the District was not required to wait until injury was actually inflicted in order to remove the student to an IAES. *See Acadia Unified School District*, 119 LRP 3402 (SEA CA 2019); *El Segundo Unified School District*, 117 LRP 41962 (SEA CA 2017); ISBE Case No. 2019-DP-0199 (SEA IL 2019).

The overwhelming, uncontroverted testimony and documentary evidence presented by the District clearly establishes that the Student remains substantially likely to injure herself or others if returned to her prior general education middle school. Further, the Student remains substantially likely to injure herself or others at MAN. (FF #19.) The Student engages in self-harm behaviors

including biting and repeatedly pinching herself. (FF #20.) She continues to engage in dangerous behaviors including: shoving and kicking staff members; frequent elopement attempts – including leaving the classroom and running through the hallways and attempting to leave the building; breaking the cover off of an electrical outlet and attempting to pull out the electrical wires from the inside of the outlet; grabbing and pulling staff member’s hair; hitting peers; attempting to punch staff members in the face; pouring water on peers; verbally threatening peers; attempting to physically fight peers; attempting to pull the fire alarm; and attempting to stab a staff member with a pencil. (FF #12.) Her lack of attendance at MAN, and Parent’s refusal to cooperate with the IAES, has impeded its ability to provide the Student with necessary supports and services to assist her in modifying her behavior. (FF #9-16.) As a result, she remains substantially likely to injure herself or others if returned to her prior general education placement. (FF #19, 24-26.)

The Student continues to require a highly structured therapeutic day school setting specifically designed to serve students with emotional disabilities, such as MAN, by providing intensive social, emotional, and behavioral supports using therapeutic modalities. MAN continues to be able to fully implement the Student’s IEP and updated BIP. (FF #21-24.)

The District has met its burden will respect to the requirement for continued placement of the Student in an interim alternative educational setting pursuant to IDEA, the Illinois School Code and its implementing regulations pursuant to 20 U.S.C. §1415(k)(3), 34 C.F.R. §300.532 and §300.533, 105 ILCS 5/14-8.02(b), and 23 Ill. Admin Code §226.655(c) for not more than forty-five (45) additional school days.

Parent is directed to comply with the continued interim alternative educational placement process, including signing necessary releases, touring the facility, making the Student available and facilitating the Student’s continued placement in the interim alternative educational setting.

District's request is hereby granted.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ordered:

The District's requested relief to maintain the Student's placement in an appropriate interim alternative educational setting, a therapeutic day school, specifically MAN or a substantially similar therapeutic day school, for not more than an additional forty-five (45) school days is granted.

Parent is ordered to comply with the IAES placement process including signing all necessary releases, touring the facility, making the Student available for evaluation, and facilitating the Student's continued placement at the IAES.

In accordance with 105 ILCS 5/14-8.02a(h), within 45 calendar days of receipt of this Order, the school district must submit proof of compliance to:

Illinois State Board of Education
Program Compliance Division
100 North First Street
Springfield, IL 62777-0001

NOTICE OF RIGHT TO REQUEST CLARIFICATION

Pursuant to 105 ILSC 5/14-8.02a(h) either party may request clarification of this decision by submitting a written request to the Hearing Officer within five (5) days of receipt of the decision. The request for clarification shall specify the portions of the decision for which clarification is sought. A copy of the request shall be mailed to all other parties and the Illinois State Board of Education, Program Compliance Division, 100 North First Street, Springfield, IL 62777. The right to request 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.

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Pursuant to 105 ILCS 5/14-8.02a(i), any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within one hundred and twenty (120) days from the date the decision is mailed to the party.

Dated: February 11, 2023

[REDACTED]

/s/: Janet K. Maxwell-Wickett
Janet K. Maxwell-Wickett,
Impartial Hearing Officer

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APPENDIX A

████ SD ███ v. ██████
Case No: 2023-DP-0127

Student	██████████ (Student)
Attending School	██████ ██████████ (MAN)
Child's Parent	██████████ (Parent)
District Witnesses:	
Director of Student Services SD 37	Dr. ██████████ (Dr. P)
Principal, ██████ ██████████	██████████ (PRIN)
Board Certified Behavior Analyst, ██████	██████████ (BCBA)
School Social Worker, ██████	██████████ (SW1)
Psychologist, Consulting, ██████	Dr. ██████████ (Dr. M)
School Social Worker SD ███	██████████ (SW2)
School Psychologist SD ███	██████████ (PSY)
Parent Witnesses:	
None.	
Therapeutic Day School:	██████ ██████████ (MAN)