

Request for Expedited Hearing Received:

May 23, 2008

Resolution Session waived by parties
in writing:

June 5, 2008

Hearing Date:

June 23, 2008

Date of Decision:

August 19, 2008

Hearing Officer:

Patrick O. Boyle
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ISSUES AND PURPOSE OF THE HEARING

The LEA has requested an expedited due process hearing seeking a forty-five school day alternative educational placement for a dangerous or violent student. This request is made pursuant to the terms of Section 162.961 Missouri Revised Statutes and Part V at Section 9 of the Missouri Regulations Implementing Part B of the Individuals with Disabilities Education Act.

Missouri Statutes and Regulations are based upon the provisions of 20 U.S.C. 1415 (K) as amended by public law 108-446 effective July 1, 2005 and, the regulations appearing at 34 C.F.R. 300.532.

Student's mother and the LEA agreed to a homebound placement for the student starting on May 15, 2008 for the remainder of the 2007-2008 school year. The LEA request for an expedited hearing is an appeal of that placement and, the hearing officer may issue an order returning the student to the placement from which he was removed or, order a change in placement to an appropriate interim alternate educational setting for not more than 45 school days if the hearing officer determines that maintaining the student's current placement is substantially likely to result in injury to the child or to others.

TIME LINE INFORMATION

Petitioner's request for an expedited due process hearing was received by the Missouri Department of Elementary and Secondary Education on May 23, 2008. A hearing on the request was timely conducted on June 23, 2008 within twenty (20) school days from the receipt of the request. A decision is due within ten (10) school days after the hearing which has been determined to be August 26, 2008 in this matter. This decision is timely rendered on August 19, 2008.

FINDINGS OF FACT

Respondent has objected to the testimony of a special education director hired by the LEA as of July 1, 2008 on the basis that his name was not on the list of witnesses furnished on June 19, 2008. Petitioner furnished his name to Respondent on June 20, 2008 and, stated that the omission from the list of June 19, 2008 was inadvertent.

An issue for the hearing is whether the proposed Interim Alternative Educational Placement (IAES) for the student is appropriate. The witness in question has been hired to develop and administer the proposed IAES. He drafted the manual to be used which was furnished to Respondent and has been submitted as Petitioner's Exhibit 36 (P36) and Respondent's Exhibit 2 (R2). The testimony of the new special education director is relevant and, Respondent has not been prejudiced by the inadvertent late disclosure of his name.

Petitioner has attempted to obtain testimony from Russell Hyken, Ed S, a consultant retained by student's mother. The parent has dismissed this consultant and, informed him that any information concerning the student is privileged and not to be disclosed. Petitioner has requested that a negative inference be drawn from the consultant's refusal to testify concerning the student. There is sufficient evidence in the record to render a decision without drawing a negative inference from the mother's assertion of the student's confidentiality privilege.

The Respondent's case consists of the testimony of the student's mother and, the assertion that the Petitioner has not met its burden of proof. The mother's testimony states her belief that the student's version of various incidents has not been heard and, that the LEA's staff is not supportive of the student.

Witnesses called by the Petitioner are found to be credible and, no showing of prejudice against the student on the part of the LEA's staff has been shown.

Based upon the evidence submitted the following facts are found.

1. Student is an eleven year old boy born on (P37)
2. Student is entitled to special education and related services. He is classified as suffering from emotional disturbance (ED) and received his initial individualized education program (IEP) effective as of February 11, 2008. (P9)
3. Student was enrolled in the LEA's fifth grade as a regular education student for the 2007-2008 school year. (P37)
4. Student's parents are divorced and, he lives with his mother. He visits his father but, the father has no involvement with his education. (P7, Tr. 185-187)
5. Student's initial IEP calls for a placement outside the regular class for less than 21 %. Special Education is provided in a resource room on social skills for 30 minutes per day five days a week at the end of the school day. (P9; P30; Tr. 87-91, 94-97, 103, 104, 107 and 108)
6. During the 2007-2008 school year the student had several discipline referrals. (P35 and R1)

7. Student's mother acknowledges that he has problems and needs help but, she does not believe that he is a violent child. (Tr. 195, 196, 200-207, 212, 213)

8. Student's regular class room teacher for the 2007-2008 school year has felt physically threatened by the student. (Tr. 74)

9. Student's special education teacher for his resource room instruction under his IEP believes that there is a likelihood that the student will cause injury. (Tr. 101)

10. Student's regular class room teacher observed the student attempt to trip another teacher walking upstairs on 09/28/2007. (P34 at Page 203; Tr. 34)

11. Student's regular class room teacher made a disciplinary referral on student for pushing another student into hallway lockers on 10/09/2007. (P3 at Page 9; P34 at Page 209; and Tr. 46-48)

12. A class room teacher on recess duty observed the student fighting with another student in line on 10/09/2007. Student's class room teacher made a disciplinary referral for student's fighting. (P3 at Page 10; P34 at Page 209; Tr. 48, 116 and 117)

13. A classroom teacher acting as a hall monitor observed the student in a locker area where he did not belong with a bag of chips. She asked him to turn over the chips but, he refused. He was the same size as the teacher and, was within an inch of her face saying no. The teacher had never had a child do that and, she felt threatened. This occurred on 10/24/07 and, a disciplinary referral was made. (P4 at Page 11; Tr. 79-82)

14. On January 11, 2008 student was given a disciplinary referral by a teacher for smacking a girl in the face with his back pack on the way into an assembly. (P8; Tr. 51, 52, 131 and 132)

15. On March 17, 2008 student was given a disciplinary referral by his special education teacher for mocking her in the hallway while discussing a report that student was yelling at his art teacher and, had shoved paper into the face of another student. (P12; Tr. 97-99, 102)

16. On April 18, 2008 student physically blocked the classroom doorway preventing his regular classroom teacher from exiting the room. A disciplinary referral was made. P17; Tr. 53-55)

17. On April 21, 2008 student was given a ten day out of school suspension from April 29 to May 12 for assaulting two students in the bathroom. There were three other students in the bathroom. He hit one and, pushed one off of a urinal. (P18; Tr. 55-58, 63, 132 -137)

18. The middle school principal was unable to talk with the student on April 21 but, he attempted to schedule a meeting with student and his mother on April 22. They did not attend the meeting and, the student did not return to school for the rest of the school year. (P37; Tr. 132-137)

19. The Special Education Director attempted to set an IEP meeting for April 24, 2008 but, the student's mother was unable to attend. (P19; Tr. 132-137)

20. A manifestation meeting determined that student's behavior was related to his disability and, his mother was advised that he could return to his current placement on May 12, 2008. (P21)

21. Student's mother requested an IEP meeting to be held on May 15, 2008. (P21)

22. Student's placement was changed to homebound for the remainder of the school year at the request of his mother. (P23, P24, P25 and P26)

23. On January 8, 2008 a psychodiagnostic assessment was made of the student by Jewish Family and Children's Service. Based upon the information available, a licensed clinical psychologist diagnosed the student on Axis 1 as suffering from oppositional defiant disorder and depressive disorder NOS (Not otherwise specified). The diagnostic impression on Axis 1 ruled out anxiety disorder (NOS) and Asberger's Disorder. It was recommended that an evaluation by a psychiatrist was warranted and that a highly structured behavior program at home and at school be implemented. (P7)

24. On March 31, 2008 the mother notified the middle school principal that the counseling services by Mrs. Kelley Franklin through Comtrea were no longer needed and, that student was now a patient of Russell Hyken, Ed S, M.A, LPC, CEP, CPE who specializes in boys with the same emotional behavior and academic issues as student. (P34 at Page 233)

25. On March 28 the mother notified student's special education teacher that student had an appointment to see Russell Hyken on April 9. (P34 at p.234)

26. On April 3 the mother notified student's special education teacher that she would discuss student's behavior with Russell Hyken. (P34 at p. 236)

27. On April 4 the mother notified student's special education teacher that she was considering removing the student from class but, would wait for the observations and diagnosis of Russell Hyken. (P32 and p. 144)

28. On June 3, 2008 the mother notified the Special Education Director that she had decided to let the Judevine Center for Autism assess the student. (P27)

29. On June 5, 2008 Russell Hyken notified the Special Education Director that the mother revoked his permission to speak with the school and, that he was unable to engage further with the student. (P28)

30. Student's mother testified concerning the changes made in consultants and stated that she wanted Russell Hyken to do a full assessment of student without talking to the LEA or reviewing their assessment. He stated that it couldn't be done until September and, she retained the Judevine Center for Autism to do an assessment in July. She instructed Russell Hyken not to talk to the LEA. (Tr. pp. 207-211)

31. The LEA had been part of a ten District Special Services Cooperative which operated the Emerson School to deal with behaviorally challenged students. (Tr. 142-145, 171).

32. The ten District Special Services Cooperative dissolved as of 06/30/2008 and, the LEA became part of a new five District Special Services Cooperative which will operate the Taylor School to deal with behaviorally challenged students. (Tr. 148-150)

33. The LEA has hired as of 07/01/08 a Special Education Director who was area coordinator for the ten District Special Services Cooperative for the 2007-2008 school year. (Tr. 141-144, 147)

34. The Special Education Director hired by the LEA as of 07/01/08 was a teacher in the Emerson School for 8 years and, will be building administrator of the Taylor School Program. (Tr. 142, 145, 150)

35. An existing building on the LEA campus will house the Taylor School Program and experienced teachers, paraprofessionals and a half-time counselor have been hired. (Tr. 150, 171)

36. The Special Education Director hired by the LEA of 07/1/08 has drafted a manual for the Taylor School Program based upon the Emerson School Program. (P36, R2, Tr. 147)

37. The Special Education Director hired by the LEA has reviewed the student's file and, believes that the student's IEP goals can be achieved in the Taylor Program. (Tr. 165-169)

DECISION AND RATIONALE

The appeal procedure set forth in statute and regulations presents two questions for the hearing officer to determine.

If the current placement of the student is maintained, is there evidence that substantial injury is likely to occur to the child or others, and is the proposed interim alternative educational setting appropriate?

There has been no showing that the student has caused serious injury to date and, it is understandable that the student's mother believes her son that the discipline referrals were not his fault.

There is no answer, however, to the direct testimony of faculty members subject to cross examination of their physical confrontations with the student and, their concerns over the likelihood of his causing injury.

It is also understandable that the student's mother is concerned about the nature of the students referred to the Taylor program and, the lack of history for a program beginning with the 2008-2009 school year.

It must be observed that the Taylor School Program is less restrictive than the homebound placement which the mother has sought since April of 2008. Further, the efforts to date to establish the Taylor School are substantial and credible.

It is imperative that the student's IEP team meet promptly to review the student's IEP and placement. Any assessments which the mother has received should be presented to the IEP team at that time.

ORDER

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

1. Student is ordered placed in an appropriate Interim Alternative Education Setting for a period of forty-five (45) school days;
2. The IAES shall be Student's stay put placement pursuant to 20 U.S.C. Section 1415(k)(4)(A);
3. The Taylor School program is the appropriate IAES placement for Student;
4. Parent is ordered to fully and completely cooperate in this process. Within five (5) business days of this Order, Parent will authorize Student's placement in Taylor School in the LEA.
5. LEA and parent shall promptly convene an IEP team meeting to review the student's IEP and placement.

APPEAL PROCEDURE

Either party has the right to appeal this decision within 45 days to a State Court of competent jurisdiction pursuant to Chapter 536 of the Revised Statutes of Missouri, or to a Federal Court

SO ORDERED this _____ day of August, 2008.

Patrick O. Boyle, Hearing Officer