

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE DEPARTMENT OF EDUCATION

In the Matter of [ ] (Parent), on behalf of [ ]  
Student),

and

Independent School District No. 270, Hopkins  
Public Schools (School District).

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER ON EXPEDITED  
HEARING**

The Commissioner of Education assigned this matter to Administrative Law Judge (ALJ) James Mortenson on March 27, 2014.

[REDACTED], appeared on behalf of the Parent. Laura Tubbs Booth, Booth & Lavorato, LLC, appeared on behalf of Independent School District No. 270, Hopkins Public Schools.

**PROCEDURAL HISTORY**

This initial complaint in this matter was filed and served by the Parent on March 26, 2014. The complaint included, among other things, a request for an expedited hearing because the Parent wanted Student returned to school following a disciplinary removal. The first prehearing conference was convened on March 31, 2014. The School District agreed during the prehearing that Student could return the next school day, April 7, 2014. Parent's request for an expedited hearing was resolved. The School District also consented to permitting the Parent to subsequently amend [PARENT'S] complaint.

A second prehearing conference was convened on April 10, 2014. On April 11, 2014, a resolution meeting was held and did not result in resolution of the matter.

On April 15 and April 16, 2014, the Parent filed and served amended complaints. A third prehearing was convened on April 18, 2014. The Parent's issues for hearing were clarified and framed in a prehearing order issued that day. On April 21, 2014, the Parent sent correspondence to the undersigned ALJ objecting to the framing of the issues, asserting an issue had been excluded.

On April 21, 2014, the School District filed and served its response to the Parent's complaint. The School District's filing included a counter-claim and request for an expedited hearing. (The subject of this decision.) A fourth prehearing had been scheduled for April 24, 2014, and, due to the failure of the Parent's Attorney to participate, was rescheduled for and held on April 25, 2014. At the prehearing the Parent's concerns about [PARENT'S] issues were addressed and an issue reframed to include the missing issue. The School District's issue for expedited hearing was also clarified and framed and the expedited hearing was planned.

The matter convened for an expedited hearing at 9:00 a.m. on May 6, 2014, at Eisenhower Education Center, 1001 Hwy 7, Hopkins, Minnesota. The hearing ended approximately 6:30 p.m. that day.

The School District called three witnesses: [REDACTED], Special Education Teacher/Case Manager; [REDACTED], Paraprofessional; and [REDACTED], Special Education Coordinator. The Parent called four witnesses: [REDACTED], Principal of [DISTRICT]; [REDACTED], Special Education Director; [REDACTED], family friend; and Parent. All 41 of the School District's disclosed documents were admitted into the record, as well as three additional documents used to discredit [FAMILY FRIEND]. Twenty of 21 documents disclosed by the Parent were entered into the record, as well as two video recordings and one audio recording.<sup>1</sup>

The due date for this decision is May 16, 2014. This decision is issued on May 16, 2014.

### **STATEMENT OF THE ISSUE**

Whether maintaining the Student's current placement is substantially likely to result in injury to the Student or others?

### **SUMMARY OF CONCLUSIONS**

The School District has not demonstrated that maintaining the Student in [STUDENT'S] current placement is substantially likely to result in injury to the Student or others.

Based on all the proceedings herein, the Administrative Law Judge makes the following:

### **FINDINGS OF FACT<sup>2</sup>**

1. Student is a [REDACTED] grader attending School A.<sup>3</sup> [STUDENT] has attended School A full-time during the 2013-2014 school year.<sup>4</sup> Student first began attending School A part-time in January 2013, for the 2012-2013 school year.<sup>5</sup>

2. Student is eligible for special education and related services because [STUDENT] has conditions that meet the definitions for [DISABILITY].<sup>6</sup> [STUDENT'S] disabilities affect every aspect of [STUDENT'S] day and [STUDENT'S] learning.<sup>7</sup> [STUDENT] demonstrates externalizing problems, anxiety, and withdrawal.<sup>8</sup> Student's disabilities result in needs in the areas of: communication skills; self-advocacy skills; behavior and social skills; academic skills; employment/vocational skills; and independent living skills.<sup>9</sup> In relevant part, [STUDENT] does not always make and maintain eye contact with people during conversations.<sup>10</sup> [STUDENT] struggles with cause and effect relationships and cannot always

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<sup>1</sup> See Appendix A for list of exhibits.

<sup>2</sup> Information that may lead to the identification of the Student or Parent has been removed and placed in Appendix B, which is to be removed from the document before publication.

<sup>3</sup> Exhibit (Ex.) S 27.

<sup>4</sup> Ex. S 22, S 27, S 6.

<sup>5</sup> Testimony (Test.) of [Special Education Teacher/Case Manager], Test. of [Paraprofessional].

<sup>6</sup> Ex. S 27, See Minn. R. 3525.1333 and 3525.1348, and 34 C.F.R. § 300.8(c)(6) and (12).

<sup>7</sup> Ex. S 27 at 65.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 62-66.

<sup>10</sup> *Id.* at 62.

predict the appropriate consequence of a particular decision.<sup>11</sup> [STUDENT] struggles with identification of emotions and the associated vocabulary, and has learned basic skills in describing what [STUDENT] might say when experiencing a particular identified emotion.<sup>12</sup> Student is aware [STUDENT] has disabilities and does not fully understand how they impact [STUDENT'S] functioning.<sup>13</sup> [STUDENT] becomes frustrated when expectations exceed [STUDENT'S] abilities.<sup>14</sup> Student sometimes will exhibit off-task behavior and verbal non-compliance when asked to engage in non-preferred activities.<sup>15</sup> [STUDENT] is developing the ability to request a mental/emotional break in order to process and de-escalate or work with a preferred, fun activity.<sup>16</sup> Student can correctly identify personal emotions such as anger, sadness, frustration, and happiness in most communication interactions.<sup>17</sup> Physical and verbal aggressive behavior is significantly reduced, although crowded and unstructured environments, such as the lunchroom, can result in an increase in such behaviors.<sup>18</sup> Student exhibits anxious behaviors, such as being silly/giggly, teasing, and work refusal.<sup>19</sup> Sometimes behaviors are significant, including [BEHAVIORS].<sup>20</sup> The Student is not always able to de-escalate without adult assistance when anxious and exhibiting negative behaviors.<sup>21</sup>

3. Student's individualized education program (IEP) includes a behavior intervention plan (BIP).<sup>22</sup> The BIP states that "[p]hysical aggression has occurred at an intensity and frequency that has required significant interventions, special programs, and supports over the years. [Student] appears to have significant difficulties regulating [STUDENT'S] behavior, particularly under specific environmental conditions."<sup>23</sup> "Physically aggressive behavior includes [BEHAVIORS]."<sup>24</sup> The BIP further states, in pertinent part: "Prior to engaging in physically aggressive behavior, staff has observed that [STUDENT] will often become non-communicative, will quietly and passively refuse staff direction and redirection attempts, and will often display mischievous "smirk" or has laughed before, during, or after the incident."<sup>25</sup>

4. The student's BIP describes four behavior levels.<sup>26</sup> Level four includes: "failing to communicate or respond to verbal prompts, directions or redirection, smirking."<sup>27</sup> Student "has experienced difficulties regulating [STUDENT'S] behavior when . . . [STUDENT] is engaged in community and social activities that include the lunch room (less structure, routine and predictability, high stimulation) and when required to transition away from a stimulating, less structured task (community outings, lunch room), firm, intense directions, or redirections, negative interactions with peers or staff."<sup>28</sup> When the antecedent conditions occur the student

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 63.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Ex. S 6, S 27.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

receives “a degree of stimulation that makes it difficult for [STUDENT] to independently regulate [STUDENT’S] behavior. [Student’s] behavior appears to serve the following functions:<sup>29</sup>

1) Communication/Power-Control. Through [STUDENT’S] physical behavior, [Student] attempts to express [STUDENT’S] desire to continue a particular activity, and to control [STUDENT’S] environment by protesting the transition away from that activity. [STUDENT] may express [ ]self *physically* for two reasons: 1) as [STUDENT] becomes increasingly dysregulated [sic], [STUDENT’S] ability to access the appropriate words and language may be limited (represents a skill and performance deficit), and [STUDENT’S] emotional state is likely to prepare [STUDENT’S] physiology for physical action.

2) Emotional Release. [Student’s] physical expression likely helps release the mounting emotional tension that has developed over the course of the activity. As [Student] becomes increasingly dysregulated [sic] over the course of the activity, verbal prompts that it is time to discontinue the activity appears to contribute to the mounting tension toward a level that pushes [Student] beyond [STUDENT’S] capacity to regulate [STUDENT’S] physical behavior.

5. The BIP includes many preventative environmental modifications and steps to take to help reduce the occurrence of behavior before it occurs.<sup>30</sup> Some of those steps, in relevant part, include the use of visual timers that the Student can control and that can prepare [STUDENT] for imminent transitions, cueing the Student to all transitions by reviewing [STUDENT’S] visual schedule, limiting verbal directions, and speaking to [STUDENT] in a calm, neutral, and supportive manner.<sup>31</sup> Additional techniques specified in the BIP at various behavior levels include, in relevant part: Level II – minimize talking and limit all verbal directions to Student; Level III – limit verbal directions to Student; and Level IV – limit verbal stimulation, remove objects within reach that could be thrown or used to injure others, hold up a card that displays “1 minute” to allow for a break and, following the one minute, pulling two preferred activities from [STUDENT’S] backpack and allowing the Student to choose and proceed with the activity, and allowing Student to be in a quiet space with calming activities with no directions, talking or demands.<sup>32</sup>

6. Since Student began attending School A in January 2013 [STUDENT’S] behavior has been largely positive and [STUDENT] has been making good progress.<sup>33</sup> Student has engaged in [BEHAVIORS].<sup>34</sup> The incidents occurred as follows:

**2012-2013 School Year**

- a. April 12, 2013 – [BEHAVIORS].<sup>35</sup>
- b. April 29, 2013 – [BEHAVIORS].<sup>36</sup>

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> Ex. S. 38, Test. of [Special Education Teacher/Case Manager], Test. of [Paraprofessional], Test. of Parent.

<sup>34</sup> Only evidence that conclusively shows the Student was involved with specific behavior of the nature described has been relied upon.

<sup>35</sup> Ex. S 38, p. 2395.

<sup>36</sup> *Id.* at 2406.

- c. May 13, 2013 – [BEHAVIORS].<sup>37</sup>
- d. May 22, 2013 – [BEHAVIORS].<sup>38</sup>

**2013-2014 School Year**

- a. September 9, 2013 – [BEHAVIORS].<sup>39</sup>
- b. October 8, 2013 – [BEHAVIORS].<sup>40</sup>
- c. November 12, 2013 – [BEHAVIORS].<sup>41</sup>
- d. December 17, 2013 – [BEHAVIORS].<sup>42</sup>
- e. January 22, 2014 – [BEHAVIORS].<sup>43</sup>
- f. February 26, 2014 – [BEHAVIORS].<sup>44</sup>
- g. March 12, 2014 – [BEHAVIORS].<sup>45</sup>

7. On February 26, 2014, Student was throwing snowballs with other students outside in gym class.<sup>46</sup> When the students were told to stop, Student continued.<sup>47</sup> The teacher then yelled for Student to stop and Student again refused.<sup>48</sup> The teacher approached Student and the Student continued throwing snowballs at the teacher.<sup>49</sup> When the teacher arrived within Student’s reach, [INCIDENT DETAILS].<sup>50</sup>

8. On March 12, 2014, the Student went to [COMMUNITY EVENT].<sup>51</sup> Student’s outing was highly planned and resulted in no negative behaviors during the outing.<sup>52</sup>

9. Following Student’s return to school from the [COMMUNITY EVENT], [STUDENT] had lunch in the lunchroom with [STUDENT’S] paraprofessional and another staff person.<sup>53</sup> When [STUDENT] finished [STUDENT’S] lunch, [STUDENT] cleaned up [STUDENT’S] space and sat back down.<sup>54</sup> [STUDENT] then started squeezing [STUDENT’S] plastic water bottle and pointing it at the other staff person.<sup>55</sup> [INCIDENT DETAILS].<sup>56 57 58 59 60 61</sup>

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<sup>37</sup> *Id.* at 2414, Ex. S 15, P 11, p.92. (Student was suspended for this incident.)

<sup>38</sup> Ex. S 38, p. 2421.

<sup>39</sup> Ex. P 11, p. 89.

<sup>40</sup> Ex. S 38, p. 2560.

<sup>41</sup> Ex. S 14, S 38, p. 2599.

<sup>42</sup> Ex. S 13, Test. of [Paraprofessional].

<sup>43</sup> Ex. S 38, p. 2629.

<sup>44</sup> Ex. P 10, S 12, S 38, p. 2593. (Student was suspended for this incident.)

<sup>45</sup> Ex. S 9, S 10, S 11, P 10, Test. of S. [Paraprofessional]. (Student was suspended for this incident.)

<sup>46</sup> Ex. P 10, S 12.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> Test. of [Paraprofessional].

<sup>52</sup> *Id.*

<sup>53</sup> Test. of [Paraprofessional], P 10.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*, Ex. S 10.

<sup>56</sup> Ex. S. 10.

10. A manifestation determination meeting was held regarding the March 12, 2014 incident on March 19, 2014.<sup>62</sup> The Parent met with Case Manager, Special Education Director, the Principal, and the teacher who was involved in the February 26, 2014, incident. The team determined that the Student's behavior on March 12, 2014, was a manifestation of [STUDENT'S] disability.<sup>63</sup> The team discussed possible changes to the Student's IEP and placement and did not reach any conclusions.<sup>64</sup> The School District attempted to set up another IEP team meeting to further discuss programming and placement and Parent refused to meet.<sup>65</sup> The IEP team did not meet without Parent following the manifestation determination meeting.<sup>66</sup> The Student has had no significant behavior problems involving [BEHAVIORS], or otherwise causing injury to [ ]self or others since the March 12, 2014, incident.<sup>67</sup>

11. The School District proposes that Student's placement be changed so that [STUDENT] spends the first half of [STUDENT'S] day at School A, until after lunch, and then attend an [DISTRICT] transition program in the afternoon.<sup>68</sup>

Based on the above Findings of Fact, the Administrative Law Judge makes the following:

### CONCLUSIONS OF LAW

1. The Administrative Law Judge and the Commissioner of Education have jurisdiction in this matter.<sup>69</sup>

2. The burden of proof is on the School District.<sup>70</sup>

3. A school district may appeal a refusal of a parent to change the placement of a child if the school district "believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others."<sup>71</sup> If the School District demonstrates that maintaining the child in his current placement is substantially likely to result in injury to himself or others, the hearing officer may change the placement of the child to an appropriate interim alternative educational setting for not more than 45 school days.<sup>72</sup> Further it must be

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<sup>57</sup> *Id.*

<sup>58</sup> Test. of [Paraprofessional], P 10.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> Test. of Parent.

<sup>63</sup> Ex. P 22.

<sup>64</sup> Ex. P 22.

<sup>65</sup> Ex. P 13.

<sup>66</sup> Test. of [Special Education Director].

<sup>67</sup> Ex. S 38, pp. 148 and 152, S 39. (The most severe behaviors noted, since the March 12, 2014 incident, were the Student being unresponsive to staff. This occurred twice in April, and did not involve the Student harming [ ]self or others.)

<sup>68</sup> Ex. S 3, Test. of [Special Education Coordinator], Test of [Special Education Director].

<sup>69</sup> Minn. Stat. § 125A.091, subd. 12.

<sup>70</sup> Minn. Stat. § 125A.091, subd. 16., *Schaffer v. Weast*, 546 U.S. 49 (2005).

<sup>71</sup> 34 C.F.R. §§ 300.530(f)(2), 300.532(a)

<sup>72</sup> *Id.* at 300.532(b)(2)(ii).

determined whether “the school district has done all that it reasonably can to reduce the risk that the child will cause injury.”<sup>73</sup>

4. The School District has not demonstrated that maintaining the Student in [STUDENT’S] current educational placement is substantially likely to result in injury to [ ]self or others. The Student has made general progress at School A. The Student has a history of behavior problems that have been well analyzed and planned for by the School District. The Student’s comprehensive BIP shows the School District knew how to manage the Student on March 12, 2014. The School District failed to adhere to the BIP. On both February 26, 2014, and March 12, 2014, school district staff acted contrary to the BIP and predictably exacerbated the Student’s behavior. On February 26, 2014, when the Student was throwing snowballs, the teacher repeatedly ordered [STUDENT] to stop. According to the BIP, Student required redirection with visual cues. The teacher’s commands to stop and then approaching Student resulted in predictable behavior by Student. Similarly, on March 12, 2014, the BIP predicted that the Student would be full of energy following the community outing and would need to have time and space to calm down. When the Student did begin to exhibit [STUDENT’S] anxiousness by squeezing [STUDENT’S] water bottle, visual cues were required. However, visual cues were not used to redirect [STUDENT]. [STUDENT] was not removed to a space to deescalate. Instead, verbal commands were used. While the staff removed the water bottle from Student, this action combined with the verbal triggers resulted in the predicted lashing-out behavior. These two unfortunate events demonstrate the seriousness of the Student’s condition and the need for the BIP, but they do not show the Student is substantially likely to cause injury to [ ]self or others in the current placement. Further, failure to follow the BIP shows the School District did not do all it reasonably could to reduce the risk that the Student would cause injury. Finally, in the time since the behavior on March 12, 2014 occurred, no additional significant behaviors have occurred.

## ORDER

The School District has not demonstrated that maintaining the Student in [STUDENT’S] current educational placement is substantially likely to result in injury to [ ]self or others. The School District’s appeal under 34 C.F.R. § 300.532 is hereby **DENIED**. This decision, and the record created as part of the expedited hearing will remain part of the record in the subsequent due process hearing initiated by the Parent.

Dated: May 16, 2014

s/James R. Mortenson  
JAMES R. MORTENSON  
Administrative Law Judge

## NOTICE

Pursuant to Minn. Stat. § 125A.091, subd. 24, and 34 C.F.R. § 300.516, a party may seek review of this decision in the Minnesota Court of Appeals or in United States District Court,

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<sup>73</sup> *Light v. Parkway C-2 Sch. Dist.*, 41 F.3d 1223, 1228 (8th Cir. 1994).

consistent with federal law. A party must appeal to the Minnesota Court of Appeals within 60 days of receiving the hearing officer's decision.

## **MEMORANDUM**

This matter stems largely from the discipline of Student as a result of a behavior incident on March 12, 2014, where the Student [INCIDENT DETAILS]. As a result of that behavior incident, occurring two weeks following another incident where the Student [INCIDENT DETAILS], the School District is seeking to change the Student's placement from being largely in the mainstream setting at School A to part-time at School A combined with a segregated program in another building. The discussions about this change led the Parent to object and she filed a due process complaint which altered the course of the discussion. That complaint has been amended and is pending. The School District, in the interim, filed this appeal of Parent's rejection of any change of placement resulting in an expedited hearing and this determination.

The School District has not shown that keeping the Student in [STUDENT'S] current placement is substantially likely to result in harm to [ ]self or others. The School District has argued that due to the approaching end of the school year, Student's response to anxiety and environmental stimuli is unpredictable. This is based on statements of staff. However, Student's IEP, including [STUDENT'S] BIP, and the specific facts known about the two most serious recent behavior incidents, do not align with staff perceptions.

Student engaged in two incidents that did or could have resulted in harm to others. The evidence shows those incidents were the result of the BIP not being followed. The staff interactions with the Student immediately prior to [STUDENT'S] escalation of behavior were exactly contrary to that required by the plan, and the resulting behavior was clearly predicted. In the February incident in which the Student [INCIDENT DETAILS], the teacher was yelling at the Student and approaching [STUDENT], in order to stop Student from throwing snowballs. The BIP requires visual cues and backing away from Student to de-escalate [STUDENT]. Verbal commands are one of the clearly defined triggers of escalating behavior.

In the second and much discussed incident on March 12, staff claim they did not see the Student's behavior coming. However, they also testified, and the evidence shows, they saw [STUDENT] escalating when [STUDENT] began squeezing [STUDENT'S] water bottle in the lunchroom. The environment and behavior are both clearly described in the BIP as antecedents to additional behavior. It was at that point that staff did not adhere to the plan. While [STUDENT'S] paraprofessional correctly moved away from [STUDENT], two other paraprofessionals engaged [STUDENT] verbally, contrary to the BIP. Visual cues to aid [STUDENT] in deescalating were not used, also contrary to the BIP. The resulting behavior should not have been unanticipated.

What the evidence shows is that the Student can behave in ways that could result in injury to [ ]self or others. The evidence also shows that the plan to prevent that kind of behavior is in place. The evidence does not show that the plan is not working. To the contrary, the Student has been largely successful in [STUDENT'S] current placement. However, when the plan is not followed, predictable behavior happens. This is not a basis to change the Student's placement to a more restrictive setting.

**J.R.M.**