

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
SPECIAL EDUCATION DIVISION  
STATE OF CALIFORNIA

In the Matter of:

FULLERTON JOINT UNION HIGH  
SCHOOL DISTRICT,

Petitioner,

v.

STUDENT,

Respondent.

OAH CASE NO. N 2007040584

DECISION

Richard M. Clark, Administrative Law Judge, Office of Administrative Hearings, Special Education Division, State of California, heard this matter on May 17 and 22, 2007, in Fullerton, California.

Karen Gilyard, attorney at law, represented Fullerton Joint Union High School District (District). Carlos Gonzalez, attorney at law, was present during the hearing, as was Helen Rodriquez, Director of Special Education for the District.

Student's parents (Parents) were present during the hearing and represented themselves. Lori Chuang, a Mandarin interpreter, was also present and interpreted for Parents throughout the entire hearing.

The District filed its request for an expedited due process hearing on April 19, 2007. There have been no continuances. Oral and documentary evidence were received during the hearing. The record remained open for the submission of written closing arguments by May 25, 2007, when the record was closed and the matter was submitted for decision.

## ISSUES

1. Is maintaining the current placement of Student substantially likely to result in injury to Student or to others?
2. If so, is the District's proposed placement at Costa Mesa High School Annex (Annex) an appropriate interim alternative educational setting (IAES) for not more than 45 school days?

## FACTUAL FINDINGS

### BACKGROUND

1. Student is seventeen years old and resides in the District with his family where he attends a special day class (SDC) at Sunny Hills. Student is in the eleventh grade and is eligible for special education under the category of autistic like behaviors. On September 26, 2006, an Individualized Education Program (IEP) meeting was held to implement a settlement agreement that placed Student at Sunny Hills, where he began attending classes on October 2, 2006. Prior to attending Sunny Hills, Student attended Troy High School within the District where he was home schooled from January 2005 through May 15, 2006. Parents are currently keeping Student at home and not allowing him to attend classes at Sunny Hills.
2. Sunny Hills is a comprehensive high school attended by 2,540 students in grades nine through twelve. Student was initially placed in an SDC taught by Michael McGuire with 16 to 17 students and four adults -- the teacher and one aide, plus two aides assigned to Student. At the October 27, 2006 IEP meeting, as an interim placement pending additional assessments, Student was moved from Mr. McGuire's SDC to a separate classroom (Room 147) where Student's behavioral issues and outbursts could be better controlled. Student was the only child in Room 147 and received modified instruction from Mr. McGuire and Cheryl Moran, his case manager.

## SUBSTANTIALLY LIKELY TO RESULT IN INJURY

3. As stated in Legal Conclusion 2, the District may move a student to an appropriate IAES for up to 45 school days when the student's current placement is substantially likely to result in injury to the student or another person. The District contends that Student's current placement at Sunny Hills is substantially likely to result in injury to Student or to another person and that it should be permitted to move Student to the Annex, which is the county's moderate to severe program primarily for students with developmental disabilities with behavioral and emotional components to the disability. The District contends that the Annex meets Student's current needs and is an appropriate IAES for up to 45 school days.

4. Within two weeks of Student enrolling at Sunny Hills, staff found a note written by Student in "code." When the note was folded a certain way and held to the light, the note stated, "I could set the building on fire." Also, during early October 2006, Student became agitated while in the school parking lot waiting to be picked up from school by his mother. A car drove by with loud music playing and Student ran after the car screaming for it to shut up and was almost hit by another vehicle driving in the parking lot.

5. Donald Chansler was an instructional aide who worked with Student when he first transitioned into Sunny Hills until the end of October 2006. Student had behavioral difficulties when he started at Sunny Hills including defiance, scribbling in and tearing pages from books, and being confrontational. Student had frequent outbursts and would be taken to a bathroom, which was then inaccessible to other students or faculty, to calm down and regain his composure. On more than one occasion, Student used paper towels to clog the toilet and sink which caused the bathroom to flood. As part of Student's behavioral interventions, the aides kept a daily notebook that logged Student's conduct every day.

6. Christine Lee is an instructional aide working at Sunny Hills. On October 2,

2006, another aide working simultaneously with Student approached him to ask if Student needed assistance with a class assignment. Student grabbed the wrist of the aide, pushed it away and said he did not need help. Student then became frustrated and got up to leave the room. As he left, he grabbed a trash can and threw it into the room, narrowly missing another student sitting near him. On October 11, 2006, Student became agitated in class and began yelling and screaming while hitting himself in the head and swinging his hands. Student went to the bathroom to calm down. Ms. Lee went inside the bathroom to check on Student and found that Student had flushed a cell phone that belonged to a staff member down the toilet.

7. On October 19, 2006, Student was in the gymnasium when he began shouting for other students to "shut up" and began hitting himself in the head. Student was taken to Room 147, which shares a common fire door with the girl's locker room, to calm down. While in Room 147, Student heard "faint music" coming from the area of the girl's locker room. Student became annoyed even though the music was barely audible. Student's behavior escalated as he became increasingly agitated at the noise. Student began screaming for the noise to "shut up" and he threw 6 to 8 desks at the metal door while he was making noises and growling. Mr. Chansler and another aide attempted to keep Student in Room 147 even though he was trying to get out of the room. Student began hitting and kicking Mr. Chansler and the other aide, and Student was also hitting himself in the head. It took approximately 10 minutes to calm Student down after the incident, which Mr. Chansler described as a "melee." An IEP meeting was held on October 24, 2006, to discuss the incident. Student was suspended from school for one day due the October 19 incident.

8. On October 26, 2006, a behavioral incident occurred in Mr. McGuire's class when a female student entered with a bottle of water bearing the brand name "Dasani." The word "dasani" is a trigger word for Student. Student jumped from his seat in the

classroom and grabbed the water bottle from the other student and began tearing the label from the bottle. Mr. Chansler attempted to pull the bottle away from Student who became combative and hit and kicked Mr. Chansler several times while screaming that he was going to "fucking kill" him. When Student was being lead from the classroom, he pushed a computer from a table in the back of the classroom that struck another student as it fell to the floor. No injury to the other student was reported. The other students in the class were "wide eyed," scared and nervous and moved desks away from the incident or ran to the other side of the room. Mr. Chansler believed that Student was very unpredictable and other students were afraid of him. An IEP meeting was held on October 26, 2006, to discuss the incident. Student was suspended from school for five days.

9. Linda Ambrosius is an instructional aide who has worked with Student since he began attending Sunny Hills. During Student's badminton class in December 2006, Student began throwing his racquet into the air. When Ms. Ambrosius told him to stop, Student raised the racquet at her and approached as if he was going to hit her. Student got very close to her, but stopped before he hit her. Student then threw the racquet into a basketball hoop that was located close by. Student did not strike or kick her, but she was in fear that he would. Ms. Ambrosius believes that Student's behavior is unpredictable and fears that someone will get hurt soon.

10. On December 21, 2006, Student was in Room 147 when he became frustrated with his school work and began to hit, kick and bite his aide. On December 22, 2006, Student's case manager asked him to write an apology letter regarding the incident the previous day and gave him an Alphasmart to do so. Student wrote obscenities on the Alphasmart. When his case manager took the Alphasmart from him, Student grabbed it and threw it at the case manager. Student then attacked his aide by hitting, kicking and head- butting him. Student tried to bite and spit upon another staff member who was assisting and then ran from the classroom. This incident was discussed at an IEP meeting

held on January 9, 2007. At that meeting, the IEP determined that Room 147 was no longer appropriate for Student and offered him placement at the Annex, but the Parents did not agree.

11. On January 23, 2007, Student pulled a telephone out of the wall, threw it on the floor and pulled the cord out of the phone, breaking it.

12. On March 7, 2007, Ms. Ambrosius was walking with Student to the front of school to meet his mother at the end of the day. Student started to run from his aides, jumped some bushes, and then jumped onto the hood of a car in the parking lot, which had a passenger inside, causing a dent to the hood of the car. Student then fled to his mother's car that was waiting close by, locked himself inside and refused to come out of the car.

13. On March 20, 2007, Student had a behavioral outburst in Room 147, where he threw a desk and ran out of the classroom. Student would not respond to staff and went to the main office where he grabbed the school public address microphone and began yelling obscenities over the loud speaker. When his aide switched off the microphone, Student hit him and kicked a desk. Student's behavior caused the administration office to be shut down for 30 minutes. Secretaries fled to offices and locked themselves inside, other parents who were in the office were sent home, and the school phones went unanswered. Student was eventually coaxed into the teacher's lounge and he eventually calmed down. The March 7 and 20 incidents were discussed at an IEP meeting on March 21, 2007, where Student was again offered placement at the Annex. Parents did not consent to the change of placement.

14. Robert Lexin is another instructional aide who worked with Student. On April 4, 2007, Student became agitated with Mr. Lexin, who was recording data in the daily log, and tried to grab the log. Student then started to write on the desk and was told to stop. Student walked away then turned and threw his shoe at Mr. Lexin who blocked the shoe.

Student then punched Mr. Lexin three times in the back of his head. Student also sprayed a cleaning product on one of the aides.

15. On April 16, 2007, Student jumped on the hood of a pick-up truck parked in the school's parking lot and kicked the windshield with his foot until the windshield shattered. The hood of the truck was also dented. The April 4 and 16 incidents were discussed at an IEP meeting held on April 16 where the Annex was again offered as placement, but the Parents did not consent.

16. Student's brief time at Sunny Hills has been characterized by unpredictable violent outbursts and combative, assaultive behavior primarily aimed towards staff. The overwhelming weight of the evidence and testimony offered at the hearing demonstrated that if Student continues to attend Sunny Hills, there is a substantial likelihood that injury would result to himself or to another. Accordingly, the District may move Student to an appropriate IAES.

#### EDUCATIONAL SERVICES AND BEHAVIORAL PROGRAMS AT THE ANNEX

17. Cheryl Moran has been Student's behavioral intervention case manager (BICM) since Student started at Sunny Hills. Ms. Moran has worked at Sunny Hills for over six years and has a bachelor's degree in psychology, a master's degree in Applied Behavioral Analysis (ABA) and Early Childhood Development, and holds a teaching credential for moderate to severely disabled students. Ms. Moran is familiar with Student's IEPs, his unique needs, his educational program, and the multitude of behavioral incidents that have occurred at Sunny Hills. She believes that Student has needs greater than his behavioral intervention plan could deal with. Ms. Moran is familiar with the Annex and the programs and services available there. She believes that Student's entire program could be implemented at the Annex.

18. Dr. Jose Fuentes is an independent neuropsychologist hired by the District to conduct an assessment of Student in October 2006. Dr. Fuentes believes that Student

poses a substantial danger to himself and others in the Sunny Hills setting. When Student was at Dr. Fuentes's office for the assessment, Student heard a dog barking which caused Student to begin screaming profanities, yelling for the dog to shut up and banging on the office windows. Dr. Fuentes observed that there was no change in Student's affect or body language that would indicate that he was becoming agitated or was otherwise about to have a significant outburst. As part of his assessment, Dr. Fuentes also observed Student in his SDC class at Sunny Hills and found him compliant, but not on task. Student kicked a banner that was hanging in the classroom and kicked the wall. Dr. Fuentes believed it was because Student knew that Dr. Fuentes was present and observing him. Within two days of his observation, Dr. Fuentes learned that Student kicked one of his instructional aides in the groin.

19. Dr. Fuentes also had occasion to observe the Annex. Dr. Fuentes believed that the Annex was the best possible placement for Student because it had the best mix of his peers, had an integrated curriculum, and had staff trained to work with Student's behavior. The Annex offered a better program to work on Student's behavior without disrupting the learning of other students. Sunny Hills is bigger and has a more open campus so it is not conducive to working with Student's behavioral outbursts, and the risk of injury to Student or others in that environment is high. Dr. Fuentes believes that Student's behavior is escalating and becoming more assaultive and physical and is likely to continue. The District cannot control the antecedents to Student's behavior at Sunny Hills, but will have more control at the Annex.

20. The Annex is the county's moderate to severe program primarily for students with developmental disabilities with behavioral and emotional components to the disability. Student as a whole is considered a moderate student. His academic needs are mild, but his behavioral needs are severe. The Annex offers a full day program with credentialed teachers and approximately 40 total students, with a student to instructor



ratio of 3-to-1, and on occasion, 4-to-1. The Annex is a completely separate campus located on the grounds of a comprehensive high school but has a separate entrance and a fenced, separate parking lot, and is located on the far side of the campus grounds. The academic program follows state standards but is modified for each individual IEP. The Annex has a social skills component built into the program and also provides community based instruction opportunities to its students.

21. Gregory Endelman is the North Orange County SELPA coordinator and is familiar with the placement options available to Student, including the Annex and Sunny Hills. Mr. Endelman has a bachelor's degree in psychology and two master's degrees in education and in counseling. He has four credentials, is a BICM, and a critical incident responder for the District. Mr. Endelman is familiar with Student, his unique needs and the requirements of his IEPs and has attended multiple IEP meetings for Student. At the October 26, 2006 IEP meeting, Mr. Endelman agreed that Room 147 was an appropriate setting for Student because many of the triggers that caused Student's behavioral outbursts could be controlled in Room 147. However, Mr. Endelman now believes that Room 147 is no longer appropriate because the District cannot completely desensitize the system, Student's disruptive and violent behavior is escalating and Student is still engaging in serious behavioral incidents. Mr. Endelman believes that the Annex would allow Student's educational program to be implemented while providing the necessary support to control Student's disruptive, violent behavior.

22. The Annex is appropriate for Student because it offers a low student to staff ratio, a staff trained and knowledgeable about different disabilities including autism, and that is also trained to handle and teach modification of behavioral issues, and places the focus on de-sensitizing, re-acclimating, and re-integrating students into a public school setting. The Annex decreases the opportunity for behavioral incidents because of the increased supervision. The Annex has the staff and programs available to implement

Student's IEP while helping to better control Student's significant behavioral issues. All staff and teachers have been trained in the requirements of the Hughes Bill, de-escalation of behavior, self defense, and are trained in B.A.S.I.C., which is a program designed to deal with students who have significant behavioral problems. The principal at the Annex is one of the primary B.A.S.I.C. trainers for the entire district. Further, each student's program and B.A.S.I.C. strategies are reviewed weekly and there is a psychologist on site who acts as the behavioral case manager for the students. In addition, trained instructional assistants will fully review and evaluate Student's program and triggers before integrating him into the Annex daily routine. The Annex staff is also familiar with transitioning students into the Annex program.

23. Parents contend that the Annex is not an appropriate placement for Student because of a prior incident in which he was injured and because restraints were used on him when he attended the Annex in 2005. According to Student's father, on July 18, 2005, Student returned home from the Annex complaining of a shoulder and knee injury and refused to go back to the program. According to Mr. Endelman, Student reported being injured and scraped during an incident at the Annex, but staff did not see any injury. Student continues to have anxiety to this day about going back to the Annex, which Parents fear will lead to more behavioral problems. Parents want Student to remain at Sunny Hills and if he cannot remain there, they want him to be home schooled.

24. Amy Detwiler testified on behalf of Student. She is a supervisor and program director at a program called ACES, Inc. that works closely with the Regional Center. Ms. Detwiler has a master's degree in education, a Pupil Personnel Services credential and is scheduled to take the Board Certified Behavior Analyst examination. Ms. Detwiler conducted an assessment of Student and issued a report dated May 14, 2007. She observed the Annex for about one hour and spoke to the classroom teacher and determined that it was not appropriate to meet Student's needs. Ms. Detwiler assessed

Student but did not conduct a functional analysis assessment. Ms. Detwiler opined that Student needs replacement behaviors in order to re-direct and modify his behavioral outbursts that were not being provided at Sunny Hills and, as well as an ABA home program. She never spoke to Mr. Endelman and only reviewed reports provided by Parents.

25. Mr. Endelman reviewed the report prepared by Ms. Detwiler and was highly critical of report. Mr. Endelman believed that Ms. Detwiler was not qualified to make the findings she did, which are outside her area of expertise. According to Mr. Endelman, Student has negatively enforced behaviors, and the changes she proposed would increase Student's bad behaviors. Ms. Detwiler did not consider Student's unique needs or the program requirements of his IEP. Further, an ABA program is not appropriate for Student who has the prerequisite skills for basic functioning. To the extent that there is a conflict in the testimony between Mr. Endelman and Ms. Detwiler, the ALJ is persuaded by the testimony of Mr. Endelman. He was much more credible, knew more about Student, had more thoroughly reviewed the entirety of Student's program and his opinions were corroborated by other witnesses, including Dr. Fuentes.

#### HOME SCHOOLING

26. From January 2005 to May 15, 2006, Student was home schooled by Cindy Smalley, a District substitute teacher. There was no typical day with Student. On good days, Student was attentive and receptive to learning. On bad days, Student would scream, throw tantrums, tear pages from books, and run upstairs, lock himself in the bathroom and scream. Student's progress was marginal to good while he was home schooled. Often, Student's mother and grandmother would sit at the table while Ms. Smalley was instructing Student. On no less than ten occasions, Ms. Smalley would go to Student's house to provide home school instruction, but would find that no one was home. Student had trouble sitting for the one hour that home schooling lasted. From April to the

middle of May 2006, Student's behavior was becoming increasingly violent and unpredictable. Student touched Ms. Smalley on at least three occasions with his fists in an angry and threatening manner. Student placed his fist on her chin and on her arm, without striking her, but Ms. Smalley was scared and felt threatened by his conduct. Student is a "strong boy" and she could not handle a violent outburst. After the second incident when Student placed his fist on her chin in a threatening manner, Ms. Smalley left and did not return. She feared she was at risk and did not want to wait to get hit by Student.

27. Student needs a higher level of behavioral support than can be offered at Sunny Hills. The overwhelming weight of the testimony and evidence established that the Annex is an appropriate IAES for Student, and that home schooling would not be appropriate due to his prior behavioral outbursts and problems while being home schooled. The Annex offers the services required by Student's IEP and the trained staff necessary to work with Student's significant behavioral issues. The Annex is an appropriate IAES that would meet Student's educational needs for not more than 45 school days.

## APPLICABLE LAW

1. The District bears the burden of persuasion in this matter. (*Schaffer vs. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528].)

2. A local educational agency (LEA) may request an expedited due process hearing when it believes that maintaining the current placement of the child is substantially likely to result in injury to the child or to others. (20 U.S.C. § 1415(k)(3)(A); 34 C.F.R. § 300.532(a).) The hearing officer may return the child to the placement from which he was removed, or may order a change in placement to an appropriate IAES for not more than 45 school days if the hearing officer determines that maintaining the current placement of such child is substantially likely to result in injury to the child or to others. (20 U.S.C. § 1415(k)(3)(B)(i); 34 C.F.R. § 300.532(b)(2).) The expedited due process hearing must occur within 20 school days of the date the complaint requesting the hearing is filed and the

hearing officer must make a determination within 10 school days after the hearing. (34 C.F.R. § 300.532(c)(2).)

3. The IDEA and the Code of Federal Regulations do not define IAES for purposes of the District's request to change placement when the current placement is substantially likely to result in injury to the child or to others.<sup>1</sup> However, other disciplinary provisions provide guidance to determine what an appropriate IAES is. (20 U.S.C. § 1415(k)(2); 34 C.F.R. § 300.530.) The IAES must enable the child to continue to receive educational services so as to enable the child to continue to participate in the general curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP. (34 C.F.R. § 300.530(d)(1)(i).) Further, the IAES must enable the child to receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications that are designed to address the behavior violation so that it does not recur. (34 C.F.R. § 300.530(d)(1)(ii).) The IEP Team determines the IAES under the disciplinary provisions referred to above. (34 C.F.R. § 300.531.)

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<sup>1</sup> The California Education Code (Ed. Code) also does not define IAES and does not have a similar provision for changing placement when there is a substantial likelihood of injury. However, the Ed. Code does provide that an individual with exceptional needs may be suspended or expelled from school in accordance with subsection (k) of section 1415 of title 20 of the United States Code, the discipline provisions contained in sections 300.519 through 300.529 of part 34 of the Code of Federal Regulations, and other provisions that do not conflict with federal law and regulations. (Ed. Code, § 48915.5, subd. (a).) The suspended or expelled Student must still receive a free appropriate public education in accordance with paragraph (1) of subsection (a) of section 1412 of title 20 of the United States Code and subsection (d) of section 300.121 of part 34 of the Code of Federal Regulations. (Ed. Code, § 48915.5, subd. (d).)

## DETERMINATION OF ISSUES

1. As stated in Factual Findings 3 to 16 and Legal Conclusion 2, maintaining Student's current placement at Sunny Hills is substantially likely to result in injury to him or to others.

2. As stated in Factual Findings 17 to 27 and Legal Conclusions 1 to 3, the Annex offers the necessary programs and interventions to implement Student's IEP while providing more control and structure to address Student's behavioral needs. As stated in Factual Finding 26, home schooling is not appropriate for Student because of the violent outbursts and behavioral difficulties that occurred when Student was home schooled in the past. The Annex is an appropriate IAES for Student for not more than 45 school days. Accordingly, the District may change Student's placement to the Annex.

## ORDER

The District may change Student's placement to the Annex for a period not to exceed 45 school days.

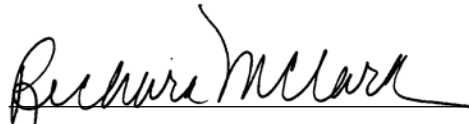
## PREVAILING PARTY

The hearing decision shall indicate the extent to which each party has prevailed on each issue heard and decided. (Ed. Code, § 56507, subd. (d).) The District prevailed on all issues heard and decided.

## RIGHT TO APPEAL THIS DECISION

The parties have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within ninety (90) days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

DATED: June 6, 2007

A handwritten signature in black ink, reading "Richard M. Clark". The signature is written in a cursive style with a horizontal line underneath the name.

RICHARD M. CLARK

Administrative Law Judge

Special Education Division

Office of Administrative Hearings