

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

SADDLEBACK VALLEY UNIFIED SCHOOL
DISTRICT,

v.

PARENT on behalf of STUDENT.

OAH CASE NO. 2008110184

DECISION

Administrative Law Judge (ALJ) Susan Ruff of the Office of Administrative Hearings, State of California (OAH), heard this matter on December 11 and 12, 2008, in Laguna Hills, California.

Student's mother represented the Student (Student) during the hearing. Student was present for much of the second day of the hearing and testified on his own behalf.

Jennifer Brown, Esq., of Rutan and Tucker, LLP, represented Saddleback Valley Unified School District (District) at the hearing. Rona Martin and Susan De Pass also appeared on behalf of the District.

The District's request for an expedited due process hearing was filed on November 3, 2008. During the telephonic Prehearing Conference, Student's mother made a request for a continuance to enable her to obtain counsel to represent her during the hearing. That request was initially granted, but subsequently rescinded on OAH's own motion because of the mandatory time limit for the hearing of an expedited matter as set forth in 20 United States Code section 1415(k)(4)(B). The matter was taken under submission at the close of

the hearing on December 12, 2008.¹

ISSUE

Is maintaining Student's current placement at Los Alisos Intermediate School substantially likely to result in injury to Student or to others?²

FACTUAL FINDINGS

1. Student is a 12-year-old boy, currently in the seventh grade, who is eligible for special education under the category of emotional disturbance (ED). At all times relevant to this proceeding, Student and his mother resided within the jurisdiction of the District.

2. Student is a highly intelligent, articulate and charming young man.

¹ Because the District is on its winter break from December 22, 2008, to January 5, 2009, the due date for this expedited decision is January 9, 2009.

At the close of the hearing, the parties were granted time to file a short statement listing case authorities which discuss the legal definition of the phrase "substantially likely to result in injury to the child or to others" as used in Title 20 United States Code section 1415(k)(3). To make a complete record, the District's statement has been marked for identification as Exhibit 51. The email from Student's mother addressing the issue has been marked for identification as Exhibit D.

² The District also has a pending due process case to determine whether the District's proposed IEP dated March 19, 2008, as amended on June 6 and October 17, 2008, offered Student a free appropriate public education. That case is currently set for hearing in February 2009.

According to his February 2006 assessment, he has a full scale intelligence quotient score of 125, in the superior range of intellectual functioning. However, Student has suffered from attention deficit hyperactivity disorder (ADHD) and behaviors that interfere with his education for years. Because of the severity of his behaviors, he was educated for the past two school years (his fifth and sixth grade years) in a District special day class (SDC) designed for ED children.

3. In early 2006, during Student's fourth grade year, the District staff conducted a functional analysis assessment of Student and developed a behavioral intervention plan (BIP). At that time, Student's problem behaviors included refusal to do work or follow directions, yelling, screaming and crying, self-injurious conduct, destroying and throwing materials, and aggression toward peers and staff.

STUDENT'S FIFTH GRADE YEAR

4. During Student's fifth grade year (the 2006-2007 school year), the ED SDC had approximately eight children in it, a special education teacher, two full-time aides and two part-time aides. While in that class, Student engaged in self-injurious behaviors, including biting himself, pulling his hair, hitting himself, and banging his head on the desk. He did not ever bite himself hard enough to draw blood, but did leave teeth marks. He engaged in these behaviors at least once a week to several times a month. He also tipped desks, threw books on the floor and broke pencils. According to his SDC teacher Melinda Baer, the antecedent to the behaviors seemed to be frustration about assignments which he perceived to be too difficult, particularly writing assignments.

5. Student was also verbally aggressive with staff. When the aggressive episodes would start, he would become tense, clench his fists, and then escalate to yelling and screaming at students and staff.

6. The SDC class had a time-out room with a bean bag chair that the children were permitted to hit and kick if necessary. When in the time-out room, Student would

punch and kick the bean bag chair, scream, bite himself, pull his hair and hit himself. Student utilized the time-out room at least once a month or more during his fifth grade year. Baer believes he would have become physically aggressive if he did not have access to the time-out room.

7. During the later portion of the fifth grade year, Student was mainstreamed into general education classes. Student exhibited behavioral problems in the general education program, including making offensive comments and refusal to do work and homework.

8. At one point when Student was in the fifth grade general education class, Student tied yarn around his neck. The aide working with him noticed that his face was discoloring and attempted to remove the yarn. She was unable to break the yarn and was required to cut it with scissors. Student rested his head on the desk immediately after the yarn was cut, but did not suffer any injury. Baer called Student's mother, but did not file an incident report. If Student had fainted, Baer would have been required to file an incident report.

9. Student was embarrassed by the yarn incident and expressed a desire to remain in his ED SDC rather than going back to the general education class after the incident.

10. Student also had an incident in fifth grade on the school bus in which he engaged in a dispute with another child about possession of a spoon. According to the report filed by the bus driver, one child claimed Student had taken a spoon from him. Another child nearby then tried to take the spoon from Student. As the second child and Student struggled with the spoon, Student (who was still holding the spoon) began punching the second child. The driver separated the children, gave the spoon to the first child and reported the incident to the school.

STUDENT'S SIXTH GRADE YEAR

11. Based on the behavioral incidents in the fifth grade year, Student remained in the ED SDC placement in Baer's class during his sixth grade year. During the sixth grade year, the SDC class implemented a new behavioral program called the "Raise Responsibility System." The program involved a highly structured system designed to teach the children self-monitoring skills for self-discipline, self-reliance, and internal motivation. The system used a point system and various levels (red, orange, yellow and blue) that the children earned based on good behavior. Bad behavior would affect the points the child possessed and prevent the child from moving up to the next level (or would lower the child's level). The children earned certain privileges depending on the level they achieved and sustained.

12. The Raise Responsibility System employed a visual tracking chart to allow each child to see which level the child had currently attained. The system proved very effective for Student. His negative behaviors began to subside during his sixth grade year. Baer explained that Student still engaged in self-injurious behaviors such as head pounding, hair pulling and biting, but the behaviors happened less frequently and mostly in the time-out room. There was also less book throwing and pencil breaking. Student began to monitor his own behavior and would ask to remove himself to the time-out room without needing a prompt. He began learning to deescalate his behavior based on feedback.

13. Student was still verbally aggressive with his peers at times during his sixth grade year and still occasionally ripped up class assignments when he was upset. He still engaged in crying and kicking the bean bag chair. He had one physical altercation with another child at the beginning of the sixth grade school year, but no other physical incidents.

14. At Student's annual IEP meeting held during Student's sixth grade year on March 19, 2008, Student had not met his annual goals regarding following directions and

writing assignments. The IEP noted that Student's behaviors had been better at the beginning of the year, but his resistant behavior had been escalating in February 2008. Student was not on his medication at the time of the meeting because of insurance problems and because he had missed a psychiatrist appointment. The IEP noted that Student was more resistant and inflexible when not on his medication. The present levels of performance in the IEP listed that Student could be argumentative and defiant, had difficulty following directions and rules, and difficulty with peer interactions.

15. In June 2008, the IEP team met to discuss Student's transition to seventh grade intermediate school. The District IEP team members believed that the appropriate placement for Student was an ED SDC at La Paz Intermediate School, a class similar to his sixth grade SDC placement. The team was concerned about the lack of support for Student in a typical intermediate school, where peers going through puberty tend to be more volatile and challenging. Student's mother disagreed and wanted Student placed in a regular education class or in a "GATE" class for children with superior academic ability.

THE CURRENT SCHOOL YEAR (STUDENT'S SEVENTH GRADE YEAR)

16. When school started for the current 2008-2009 school year, Student's mother enrolled him in the general education program at Los Alisos Intermediate School. Student's mother and the District informally modified his IEP to provide resource support in the general education setting.³

17. Since the beginning of the current school year in early September, Student has not engaged in any of the self-injurious behaviors of the previous years. He no longer

³ No written IEP reflecting this change was entered into evidence by either party, so it is unclear whether this modification was memorialized in writing. The details of the modified program were not specified during the hearing, but the program apparently included resource teacher support, counseling, and Student's existing BIP.

bites himself, pulls his hair, hits himself, or bangs his head. There was no evidence during the hearing that he has thrown any books or other objects, ripped any assignments, or broken any pencils during the current school year.

18. On September 19, 2008, the incident underlying this expedited case occurred. While on the school bus, Student took out a knife and pointed it at the child sitting behind him. The child told him to stop, and he pulled the knife away, but pointed it at the child at least two more times. He also either put the knife in his mouth or pretended to do so. Richard Freda, the assistant principal who interviewed the children about the incident, explained that the knife ended up on the floor and Student poked the child sitting next to him in the leg with it as he was putting the knife in his bag. (The bag was also on the floor.) The "poke" did not injure the other child or tear the child's clothing. Student thought the situation was funny, but one of the other children reported the incident.

19. The next day, Freda escorted Student to the office. Student admitted to having a knife in his pocket. Freda searched Student's backpack and found two more knives. Freda described the knives as being retractable, in excess of two and one-half inches long, with a push-button to open. Deputy Joe Mauga of the School Mobile Assessment Resource Team (SMART) conducted a formal investigation of the incident. Between the time Freda confronted Student about the knives and the time Mauga arrived, Student was extremely upset. When the principal told Student that he would get in a lot of trouble for having knives on the bus, Student began crying hysterically and the adults had to stop questioning him to allow him to catch his breath. When they let him take a break, he curled up in a fetal position on the couch and sucked his thumb.

20. Student was suspended from school. On September 25, 2008, his IEP team met for a pre-expulsion IEP team meeting. The team determined that the incident was a manifestation of his disability and was due to his improper placement in the general

education program. The District members of the team recommended that Student be placed immediately in the ED SDC at La Paz Intermediate School. Student's mother refused to agree to the change of placement because she did not want Student in an SDC.

21. During the pre-expulsion meeting, the team conducted a review of Student's behavior intervention plan. The team noted that Student had engaged in no incidents of the targeted behaviors in his plan during the first three weeks of school. Until the knife incident, the teachers had reported that Student "has had very good behaviors in class..." During the meeting, the team modified his BIP by taking away his school locker and forbidding him from bringing a backpack to school.

22. Because Student's violation of the school rules involved a weapon, the District decided to remove Student from his general education classes to an interim alternative educational setting (IAES) for 45 days. The District also filed a request for a "mediation only" due process case. The parties agreed that Student would be home schooled for the 45 days of his interim placement.

23. On October 8, 2008, Student wrote an apology letter for his conduct. His letter stated that he had not realized the seriousness of his conduct at the time and that he had brought the knives with him because of his concerns about coyotes in the neighborhood. Student's mother testified that the family dog had been killed by coyotes earlier in the year.

24. On October 17, 2008, the IEP team met and discussed Student's placement after the 45-day interim placement ended. The District recommended a change of placement to the La Paz Intermediate School ED SDC. Student's mother did not agree to the proposed IEP.

25. At the end of the 45 days, Student returned to his general education placement. Student had been back in his general education placement for about three to four weeks at the time of this expedited due process hearing.

26. Student has not engaged in any other conduct which resulted in formal discipline during this school year. However, during the hearing, his teachers and administrators reported other conduct which caused them concern, including the following:

27. About two weeks prior to the hearing, Student got into a physical altercation with another child on the school grounds. Student was annoying the other child by poking him with a pencil. The other child became angry and knocked Student down. Student hurt his leg and was limping when he went to Freda's office. Dean Schwartz, Student's physical education teacher who observed the end of the incident, did not see any injuries on the two boys at the time.⁴

28. On the day before this hearing began, an incident occurred in Student's math class. Student was concerned that he would get a "zero" on an assignment because he had not followed directions. Another boy and Student got into a verbal dispute about the grade, and Student threatened to pull out the boy's earrings and rip his neck off. Student spoke quietly, and the teacher Robert Ray did not realize anything had been said until the other child responded loudly that Student would do no such thing. Student had been a well-behaved child in the classroom prior to that time, and Ray was not even certain that Student had made the threat until the other children in the class were questioned later. There was no physical contact between the two boys and no further verbal dispute. Aside from that incident, Ray described Student as a "model student" who participated in class and knew what he was doing even after missing 45 days of school.

29. Julianne Pappas, Student's English teacher for the first three weeks of school,

⁴ There may have been a third boy involved in the scuffle, but the evidence supporting that was admitted solely as administrative hearsay. Therefore, no findings are made in that regard.

reported that Student engaged in an “ice-breaking” activity on the first day of school in which another child interviewed him and made an oral presentation about him to the class. During the presentation, the other child stated that Student “likes to blow things up.” The class laughed and Student smiled. The other child repeated, “No seriously, he likes to blow things up.” Pappas did not ask for any clarification about the comment, but reported it to the principal’s office. When Freda spoke with Student about the comment, Student said he would never blow anything up, but he liked the idea of blowing things up.

30. On another occasion in Pappas’s class, Student walked back and forth with his fists clenched, repeating, “My stomach hurts.” The conduct lasted about a minute, and then Student sat down and continued in class without incident.

31. On a third occasion, Student was supposed to write a poem about himself. He explained that he did not have a computer at home and could not type it. He refused the teacher’s offer to type it for him or to have the resource teacher type it. Pappas reported that Student seemed a little upset, but nothing out of the ordinary.

32. Pappas testified that she was later informed during a casual conversation with Freda that one of the reasons Student brought the knives to school was because he could not type his poem. At that point Pappas became afraid of having Student in her class.

33. Besides Pappas’ testimony about the hearsay statement that was made to her, there was no other evidence that the knife incident had anything to do with typing the poem. Neither Freda nor Student testified to that. The evidence does not support a finding that the knife incident was related to Student’s English class or the poem he was supposed to write for that class.

34. Aside from these incidents, Pappas reported that Student’s behavior in her class was fine.

35. Jennifer Frisk, a guidance counselor at Los Alisos, testified that on the day

Student returned from his 45-day interim placement Student learned that his class schedule had been changed. He became very upset, clenched his hands and screamed three times, "This is unacceptable!" Frisk told him to calm down and take some deep breaths. She learned that Student was worried because he thought the change in teachers would prevent him from taking a trip to Italy with the class later that year. He remained upset for about five to 10 minutes, but once he learned that the change in teachers would not stop him from taking the trip, he started to calm down. They took a walk and Frisk showed him his new classes. After that, he was fine. On all other occasions when Frisk spoke with Student, he was always very pleasant and well behaved.

36. Freda testified about an incident after Student returned from the 45-day interim placement in which Student was on the bus, but did not have a pass. When Freda escorted him off the bus, Student was very agitated and angry. Student clenched his fists and looked like he would explode. He said, "It's a good thing I can control myself." When Freda asked why, Student replied, "Because right now I feel like hitting...something." Freda was afraid that staying with Student would escalate Student's anger, so he instructed another staff member to check on Student and left the area. Freda was concerned that Student might hit him in the back as he walked away. However, Student did not do so.

37. Freda escorted Student off the bus for lack of a pass on other occasions, but Student did not grow angry. Student also got in trouble once for sending a text message during class. Although Student was reluctant to admit his wrongdoing on that occasion, he remained relaxed while talking to Freda and did not become angry.

38. After the knife incident, Freda did not think Student would be a danger to others if he stayed in school. Deputy Mauga contacted Freda about a week after the incident and told Freda that he believed Student could return to school. Mauga did not believe Student was a threat or a danger. Freda explained that Student had shaved his head the night before the knife incident and, to Freda, the knife incident seemed to involve

a middle-school child who is trying to be different and acts without thinking.⁵ Student's hysterical conduct when he was confronted after the incident gave Freda concern, but he felt the conduct could have been the result of hormonal changes of a typical middle-school child. But as time went on and Freda saw Student escalate into a very angry state again (and heard from others that Student exhibited that state), Freda became more concerned. He now thinks Student possibly is a threat to the safety of the other students and himself. He believes that Student gets angry when he is confused and things do not go his way.

39. Student's other teachers testified as to his good behavior in class. Steven Blohm, who had Student in class for three weeks prior to the knife incident, testified that he saw nothing out of the ordinary regarding Student's behavior during the time Student was in his class. Based on what he observed, he would have no concerns about Student coming back to his class or going on the Italy trip in April. Student behaved better in his class than he had expected based on his knowledge of Student's past.

40. Jeff Houston, Student's current world history teacher, and Dean Schwartz, Student's physical education teacher, both testified that Student has exhibited good behavior in their classes.

41. Tia Shields, who has been Student's science teacher for the entire school year, both before and after the knife incident, testified that she observed him to be agitated on either the first or second day back after his 45-day interim placement. He

⁵ Freda discussed Student's head-shaving to explain why he thought Student's conduct in bringing knives to school was the act of an immature adolescent. There was no evidence presented during the hearing that Student was a "skin-head," or belonged to a gang. The evidence indicated that Student's various behavioral incidents arose from emotional immaturity, not from gang-activity or a cold, calculated desire for wrongdoing.

clenched his hands and rocked back and forth. However, she redirected him and he was fine after a minute or so. She reported no other problem behaviors for Student.

42. Roberta Austin, his current general education English teacher, described Student as attentive, sharp and willing to participate in class. She explained that Student occasionally teases other children by conduct such as poking them with pencils, but has had no other behavior problems in her class. She described one day when Student became agitated about doing his make up work from the 45 days he was out of school. He seemed anxious and clenched his fists for about a minute, but the behavior did not escalate and after the minute he was fine.

43. Sarah Drass, the special education teacher who provides resource and study skills services to Student in his current general education placement, testified that she has seen Student grow tense and agitated a few times this school year, but on each occasion she has been able to redirect him and his agitation has abated. She explained that he became agitated during the incident with the poem in Pappas' class (as described in Factual Finding 31 above), and once when Drass raised the issue of make up work for the 45 days that he was out of school.

44. Drass has been a special education teacher for over 25 years. She has a bachelors and masters degree and has received training in behavior management. She testified that she has not seen any conduct by Student during this school year that she could not handle. She expressed her concern about the knife incident and also a concern that his behaviors may escalate as the year progresses. She has not seen escalation at this time, but based on his past conduct she is concerned that there may be escalation in the future.

45. Student's current therapist Linda Cleveland-O'Keefe testified that she has seen improvement in Student's behaviors over time. She sees Student about twice a month, and is still working with Student on issues involving anger management,

impulsivity and self-control. She had told the IEP team in June 2008 that sometimes children will behave better in a general education class than an SDC if they have the desire to be in a general education placement. Based on what Student told her, she believes that he desires to be in general education. However, she admitted that it is beyond the scope of her practice to know whether Student would be safe at school.

46. Christian Williams, a youth pastor from the church Student attends, testified that Student has participated in youth activities and a surfing camp with no problem. Williams explained that Student likes to engage in physical wrestling type of play, but nothing beyond what normal boys Student's age will do. Once Williams had to intervene when the play became a dispute, but when he did so, the boys both stopped and shook hands.⁶

47. Student's adult brother, who is a licensed vocational nurse, testified as to how much Student has improved in his behavior in the past year. During the hearing, neighbors and friends described his current good behavior.

48. Student's mother also testified that Student's behavior has improved over the past year. She believes it will be a major setback to Student if he is placed in an ED SDC, and he may start to exhibit his frustration and self-injurious behaviors again. She said that Deputy Mauga told her after the knife incident that Mauga believed Student was just showing off. She said that Student got one knife from Boy Scouts and may have been

⁶ Williams testified that he was aware of the knife incident and had asked Student about it. He thought Student might have said something about being bullied by another child. However, Williams was very uncertain of this when he testified and later thought that Student might have mentioned something about coyotes. His uncertain testimony is not sufficient to make a finding that Student's possession of the knives had anything to do with other children.

given at least one other from his father's friend in Arizona.

49. Student was calm and composed during his testimony. He explained that he enjoys school this year because he feels challenged. He did not feel challenged last year in the SDC. He felt the requirements of that class were demeaning to him. He said that he has been developing coping skills through practice and is getting along a lot better with his friends than in the past. He uses techniques such as deep breathing and squeezing his fists hard to release energy. Sometimes he also holds his breath until his face turns red to release energy.

50. Student believes that his current medication helps to keep him from getting angry. He blames many of his angry episodes of the past and present school year on days he was unable to take his medication because of insurance problems or days he forgot to take his medication. He is responsible for monitoring his own medication intake.

51. Student's mother explained that Student did not take his medication during the 45 days he was on the interim placement at home. When he started back to school after the 45 days, he started on a lower dosage of medicine than he generally takes. Because he only takes one pill in the morning, he created this lower dosage by opening the capsule and pouring out part of the medication before he took the capsule. Student has not seen his psychiatrist regarding medication management since the knife incident and it is unclear to what extent his decision to start on a lower dose of his medication after returning to school was based on prior physician instructions.

52. The evidence does not support a finding that Student's behavioral problems during the current school year were due solely to lack of medication. Although Student's mother and Student relied on that as an excuse during their testimony, Student admitted on cross-examination that he only forgot to take his medication twice this year. While the lower dosage of medication that Student took when he returned to school after the 45 days might explain his outburst to Frisk at seeing his schedule change, the stronger

evidence indicates his actions were due to his concern about losing the Italy trip, not solely due to his lower dose of medication.⁷

53. During the hearing, several District employees testified that Student needs the structure of an ED SDC class. Baer explained that, based on what she observed last year when she was his ED SDC teacher, it is likely that his behaviors will escalate in the current school year. If he throws a book during one of his angry episodes, he could injure someone. He needs SDC staff to help him decompress. District program specialist Deborah Miller believes that Student needs the structure and support of the ED SDC class.

54. Susan De Pass, a program specialist for the District, testified as the District's expert witness in the case. De Pass was a special education teacher for many years and was a school psychologist for six years before becoming a program specialist. She is a behavior intervention case manager (BICM) and has taken numerous classes related to ED children and behaviors. She is very concerned about Student's conduct in brandishing a knife on the school bus and making a threat to another child.

55. In De Pass's opinion, Student's behaviors are escalating. As evidence of this escalation, she pointed to Student's conduct in brandishing a knife this year, which he did not do last year. She believes that Student needs a structured and cohesive system throughout the day and that his general education placement is not sufficient to prevent injury to Student or others. She feels that a general education teacher is not in a position to deal with Student in those situations. De Pass admitted that his behavior has improved,

⁷ The inconsistency and apparent lack of physician oversight of Student's medication program are of concern. However, the District presented no expert testimony or other evidence that the inconsistent medication management made Student a danger to himself or others. In fact, the District's cross-examination of Student effectively showed that lack of medication was not the critical factor in Student's misbehavior.

but not consistently improved. She believes that Student still has an extreme amount of anger or rage that he has not learned to control.

56. During her testimony, De Pass described the efforts being made in Student's general education classes at the present time to keep Student and other children safe. Student's current teachers have copies of his IEP and behavior plan. The teachers are offering him extended time to complete his make-up work for the 45 days when he was out of school. The teachers are instructed to be observant of Student and watch when he becomes agitated. They discontinue a conversation when it appears that Student is becoming tense.

57. De Pass believes the ED SDC class at La Paz Intermediate School would be an appropriate IAES for Student. The staff there is trained in behavior management and dealing with ED children. The children in the class get a high level of support from the adults. The class has 12 children, a special education teacher, a full-time classroom aide and a part-time aide. The psychologist there is trained as a BICM and has known Student and his family in the past.

58. Student's mother believes that Student is safe in his current placement. She believes that the District staff brought this due process case in retaliation for past conflicts between Student's mother and the District, not because of a genuine concern for Student.

59. The evidence does not support a finding of any improper motive by the District in pursuing this case. Student's conduct in bringing knives to school was very serious and mandated immediate action by the District. At all times in this matter, the District acted properly with the best interests of Student and the other children at the school.

LEGAL CONCLUSIONS

1. The District has the burden of proof in this proceeding. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528].)

2. Federal laws and regulations establish a detailed system for addressing disciplinary action against a special education child. When a district seeks to change a special education child's educational placement for more than 10 days as a result of a violation of a student code of conduct, the district must convene an IEP meeting to determine if the child's violation was a manifestation of the child's disability. (20 U.S.C. § 1415(k); 34 C.F.R. § 300.530 (2006).)

3. If the IEP team determines that the conduct was a manifestation of the child's disability, the district must review the child's behavioral intervention plan and modify it, as necessary to address the behavior. (20 U.S.C. § 1415(k)(1)(F)(ii); 34 C.F.R. § 300.530(f)(1)(ii) (2006).) The district is also required to return the child to the placement from which the child was removed, unless the parent and the local educational agency agree to a change of placement as part of the modification of the behavioral intervention plan. (20 U.S.C. § 1415(k)(1)(F)(iii); 34 C.F.R. § 300.530(f)(2) (2006).)

4. If the parent and the district do not agree on a change of placement, the district is permitted to remove the child to an IAES for no more than 45 school days in three circumstances: 1) if the child possesses a weapon at school or at a school function; 2) if the child knowingly possesses or uses illegal drugs; or 3) if the child has inflicted serious bodily injury on another person. (20 U.S.C. § 1415(k)(1)(G); 34 C.F.R. § 300.530(g) (2006).)

5. A district may also bring a due process hearing to request a change of placement if the district "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) (2006).) The hearing officer deciding such a case may:

order a change in placement of a child with a disability to an appropriate interim alternative educational setting 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)(ii)(II); 34 C.F.R. § 300.532(b)(2)(ii) (2006).)

6. The interim placement must enable the child to continue to participate in the general education curriculum and to progress toward meeting the goals set out in the child's IEP. (20 U.S.C. § 1415(k)(1)(D)(i); 34 C.F.R. § 300.530(d) (2006).)

7. These due process procedures may be repeated after the initial 45 days if the district "believes that returning the child to the original placement is substantially likely to result in injury to the child or to others." (34 C.F.R. § 300.532(a)(3) (2006).)

8. In the instant case, there is no dispute that Student engaged in a violation of an educational code of conduct and that his conduct was a manifestation of his disability. The only issue is whether maintaining his current general education placement is substantially likely to result in injury to Student or others. The District believes that Student's past history coupled with the totality of his conduct during the current school year shows a substantial likelihood that injury will result if Student is not immediately moved out of his general education placement. Student's mother disagrees.

9. There is little or no case authority discussing what is meant by the phrase "substantially likely to result in injury to the child or to others" as it is used in the current federal statute and regulations. Both parties cite to *Light v. Parkway C-2 School District* (8th Cir. 1995) 41 F.3d 1223 (*Light*). *Light* is an older case, developed at a time prior to the current law, when districts sought injunctive relief in court to remove a child from his or her placement.

10. In the *Light* case, the child engaged in a "steady stream of aggressive and disruptive behaviors," including hitting other children, biting her teacher, throwing pencils and other objects at children, and attempting to overturn desks and tables. (*Light, supra,*

41 F.3d at pp. 1225, 1229.) The court rejected the parents' argument that a disabled child must be "truly dangerous" as well as substantially likely to cause injury, and commented that the "substantially likely" test "looks only to the objective likelihood of injury." (*Id.* at p. 1228.) The court also rejected the contention that injury:

is inflicted only when blood is drawn or the emergency room visited. Bruises, bite marks, and poked eyes all constitute "injuries" in the context of this analysis. More broadly, 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 p. 1230.)

11. Another early court examining "substantially likely" in the context of the same type of judicial relief, commented, "Danger must not only be likely (very possible), but must be 'substantially' likely." (*Clinton County R-III School District v. C.J.K.* (W.D. Mo. 1995) 896 F.Supp. 948, 949.)

12. Although more recent special education cases do not discuss the definition of "substantially likely," they do provide guidance as to the types of conduct that have been found substantially likely to result in injury. In *Long Beach Unified School District v. Student* (2008) OAH case number 2008030017, the child engaged in problem behaviors at school several times a week, including conduct such as hitting, kicking, shoving, biting, stomping on toes, ripping items off walls, climbing on classroom furniture and cabinets, shouting obscenities, throwing objects at people, throwing rocks at moving vehicles, running out of his classroom, banging on the doors of other classrooms, stomping on the roof of a maintenance truck, shouting that he would kill everyone in the school office, and threatening to take a school safety officer's gun to shoot the officer and then himself.

13. In *Fort Bragg Unified School District v. Parent on behalf of Student* (2008) OAH case number 2008100507, the cognitively-impaired child engaged in problem behaviors, including hitting an adult in the back, lunging at his teacher and trying to punch her, trying to hit a teacher's feet, yelling and threatening people. On one occasion the child's assaultive conduct was so bad that it took three adults to restrain him. The child was also physically aggressive to his parent, and had a long history of aggressive conduct.

14. In *Fullerton Joint Union High School District v. Student* (2007) OAH case number 2007040584, the child wrote a note which, when folded a certain way, stated "I could set the building on fire." The child yelled and chased a car in the school parking lot because he did not like the music from the car radio, and was almost hit by another car. The child engaged in behaviors such as throwing desks, knocking over a computer, yelling and screaming, hitting, kicking, punching, and biting adults, and spraying a cleaning product on an aide. He also engaged in self-injurious behavior such as hitting himself on the head and kicking a car windshield until it shattered.

15. In *Lancaster Elementary School District v. Student* (2006) OAH case number 2006030771, the child engaged in behaviors such as throwing objects, kicking other children, punching and kicking school staff, eloping from school and running into the street, knocking over another child because he lost a game of handball, throwing rocks into classrooms full of children, screaming, destroying property and ripping up other children's work.

16. Student's behavior in the instant case is far different from the behavior of the children in the cases cited above. Although Student did engage in similar behaviors to those children in the past school years, he has exhibited *none* of those behaviors in the current school year. He has not engaged in any of the head-banging or other self-injurious behaviors that he exhibited in the past. He has not thrown items, and even his verbal aggression has been limited to a few instances of unusual stress for him. The one physical

altercation he had during this school year was the result of teasing, not aggression or anger.

17. In short, Student seems to be a very different person than he was in the past. He has grown more mature and has far better control over himself than in the past. Whether this is due to the natural aging process, a more consistent application of Student's medication, the District's intensive intervention program in Student's sixth grade year, or a combination of all these factors is uncertain. However, the result is certain – Student's behavior is much better than it was in the past. Student is motivated to remain in his general education placement, and has modified his behavior accordingly.

18. Under these circumstances, Student's behavior in the current year is a far more effective predictor of his behavior in the near future than his conduct of the past two years. The evidence does not support a finding that Student's head-banging or other self-injurious behaviors are likely to start again if he remains in the general education placement. Even when he was at his most stressed, during the interview after the knife incident, there is no evidence that Student engaged in any of his past self-injurious behaviors.

19. Obviously, the knife incident is very serious conduct. The law recognizes the danger when any child brings a weapon to school. For this reason, the law permits a school district to remove a child from his school placement for 45 days even if the child's behavior was a manifestation of his disability. (20 U.S.C. § 1415(k)(1)(G); 34 C.F.R. §300.530(g) (2006).) However, the law limits that automatic removal to 45 school days. Possession of a weapon alone is not enough for a second 45-day removal, unless it is substantially likely that injury will result.

20. Therefore, it is necessary to look at the circumstances surrounding a child's possession of a weapon to see if those circumstances indicate that injury is substantially likely to result. In Student's case, the evidence does not support a finding that the knife

incident alone is sufficient to show a substantial likelihood. Freda, the assistant principal who investigated the incident, did not believe that the incident alone was enough to show Student was a danger. The hearsay statements by Deputy Mauga support Freda's opinion. Both Freda and Mauga believed it was thoughtless conduct by an intermediate school child, not an indication of danger. Mauga told Student's mother that Student was "showing off."

21. Student's actions during the incident also support their opinions. Although the District characterized Student's actions as "brandishing" a knife, there is no evidence that Student did so in anger or with intent to use it against the other child. Student's actions appeared to be annoying rather than threatening. At the time, Student thought the incident was "funny."

22. This does not mitigate the seriousness of Student's possession of a weapon at school or on a school bus, but it does show that Student's conduct in possessing the knives was not related to his episodes of anger or frustration. Certainly a child with a deadly weapon is far more of a danger should he grow angry or frustrated, but there is no evidence that Student has taken the knives to school since that time. There is also no evidence that he took a weapon to school before that time, and Student seemed genuinely remorseful about his wrongful conduct afterwards. It seems to be a one-time mistake by Student, not part of the behaviors that were addressed in Student's BIP.⁸

23. Student's recent threat to another child is also of grave concern. However, there is no indication that it was anything more than words. If there had been any physical contact or a series of threats, the situation might be different, but the threat standing alone is not enough to show a substantial likelihood of injury.

⁸ If Student were ever to bring a weapon to school again, that would be a very different situation.

24. Likewise, Student's comment to Freda about how Student might hit something if he was not in control of himself is also of concern. However, Student had the presence of mind to say that he wanted to hit "something," rather than saying he wanted to hit Freda. This is an indication that Student maintained some measure of self-control during the incident. While Freda acted properly in seeking to deescalate the situation when he had concerns, Freda was able to do so merely by walking away and asking another adult to watch Student, without any need for specific interventions.

25. The physical altercation between Student and the other child two weeks ago involved teasing. Student was annoying his companion, not threatening him, and was probably as surprised as anyone when his companion knocked him to the ground. It is doubtful that the phrase "substantially likely to result in injury" was intended to apply to occasional teasing and annoying of others which results in a physical scuffle. This is not to say that a pattern of teasing which results in multiple episodes of physical violence could never be a basis for removal of a child to an IAES, but one incident of the type in this case is not enough.

26. The remaining conduct by Student is far less serious. While Student still exhibits tension, clenched fists and occasional yelling when he is frustrated or angered, in each case discussed at the hearing Student was calmed and redirected easily by staff (or calmed down on his own). These incidents are not enough to warrant a change of placement.

27. So the final question remains. Are the incidents from this current school year, taken together, sufficient to show that keeping Student in his general education placement is substantially likely to result in injury to Student or others? Without the knife incident, it is doubtful that substantial likelihood would even be considered. One verbal threat to a pupil, one implied threat to an adult, one incident of teasing that escalated into a scuffle and several incidents where Student grew tense and was redirected would not require a

change of placement. As Drass, a highly experienced special educator testified, the school staff is capable of handling the behaviors Student has exhibited so far this year. The concern is whether those behaviors will escalate. However, there is insufficient evidence that the behaviors are escalating.

28. Even when the knife incident is added to the others, it is not sufficient to show a substantial likelihood of injury. The knife incident was not based on anger or frustration, and was not the type of behavior that placed Student in the ED SDC in past years.

29. The District has the burden to show a substantial likelihood of injury and has not met that burden. The evidence does not support a finding that keeping Student in his current placement at the present time is substantially likely to result in injury to Student or others.

30. Because there is no reason to remove Student from his current placement, there is no need to determine whether the ED SDC class proposed by the District would be a proper IAES.

ORDER

The District's request to have Student moved to an IAES for 45 school days is denied.

PREVAILING PARTY

Pursuant to Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. In accordance with that section the following finding is made: Student prevailed on the sole issue in this case.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this Decision in accordance with Education Code section 56505, subdivision (k).

Dated: January 7, 2009

/s/

SUSAN RUFF

Administrative Law Judge

Office of Administrative Hearings