

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matter of:

PARENTS ON BEHALF OF STUDENT

v.

SACRAMENTO CITY UNIFIED SCHOOL
DISTRICT.

OAH Case No. 2015090559

SACRAMENTO CITY UNIFIED SCHOOL
DISTRICT

v.

PARENTS ON BEHALF OF STUDENT.

OAH Case No. 2015090053

DECISION ON EXPEDITED ISSUE

Sacramento City Unified School District filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on August 31, 2015, naming Student.¹ The case number for this matter is 2015090053. The complaint

¹ Student filed his own complaint on September 14, 2015, which contained both an expedited issue and unexpedited issues. The case number for this case is 2015090559. The matters were consolidated on September 21, 2015. At a prehearing

contained an expedited issue, which is the only issue adjudicated in this Decision.

Administrative Law Judge Rebecca Freie heard this expedited matter on September 22, 23, 24, and 25, 2015, and October 1 and 2, 2015, in Sacramento, California. The last day of hearing, October 2, 2015, was conducted telephonically.

Sarah Garcia, Attorney at Law, represented Sacramento. She was assisted by Jennifer Baldassari, Attorney at Law. Rebecca Bryant, Director of Special Education for Sacramento, and Director of the Special Education Local Plan Area for Sacramento, attended the hearing as its representative on all days except October 2, 2015.

F. Richard Ruderman, Attorney at Law, represented Student. Parents were present for the entire hearing except for brief absences. Student was present only when he testified.

The record was closed and the matter was submitted for decision following oral closing arguments heard on October 2, 2015.

ISSUE

Is Northern California Preparatory Academy an appropriate interim alternative educational setting for placement of Student, such that District can remove him from his current placement at John F. Kennedy High School for not more than 45 days, because maintaining Student's current placement is substantially likely to result in injury to Student or others?

SUMMARY OF DECISION

Sacramento seeks to remove Student from Kennedy because it discovered him

conference on October 2, 2015, Student dismissed his expedited issue without prejudice. The unexpedited issues in both Sacramento's and Student's complaints remain to be heard.

attempting to order a crossbow, a ninja star, and two knives from the internet, using his school computer account. Further investigation found that Student had inappropriate, possibly pornographic, images on the school account. However, Student's continuing presence as a pupil on the campus of Kennedy, in a special day class for emotionally disturbed students, and one or two general education classes, is not substantially likely to result in injury to Student or others, in relation to the attempt to order various items via computer. Further, although the images found on his computer account are disturbing, and raise possible issues of a sexual disorder, Sacramento has not met its burden of proof that the facts establish a substantial likelihood of injury to either Student himself, or others on the Kennedy campus, based on this activity. Because Sacramento has not met its burden of proof in regards to the issue of possible injury to Student or others, there is no need to determine whether Northern California Prep is an appropriate interim alternative educational setting for Student.

FACTUAL FINDINGS

JURISDICTION

1. Student resides with Parents within Sacramento's boundaries. He is 16 years of age, and attends John F. Kennedy High School in the District. Kennedy is a comprehensive high school with approximately 2,200 to 2,300 students. Student loves his school, and the opportunities afforded to him there, particularly participation in general education programs that are unique to Kennedy. He was enrolled in two general education classes at Kennedy for the 2014-2015 school year. One of those classes had a strict code of personal conduct that could result in Student being removed from the class for physical aggression toward others which had a positive effect on his behavior that school year.

2. Student has been qualified for special education since he was

approximately nine years of age under the primary eligibility category of emotional disturbance, with a secondary eligibility category of other health impairment due to a diagnosis of attention deficit hyperactivity disorder. He has attended self-contained classrooms that have aide support since that time, with some participation in general education classes.

3. Student is usually kind and polite, and has friends among both special day class students, and general education peers at Kennedy. However, he is also emotionally dysregulated and has emotional outbursts when angry or frustrated as a result. Student has average to above-average cognitive abilities, but has a history of refusing to work in class, and being disruptive to other students when they are trying to work. In elementary school Student's outbursts included physically aggressive behaviors, including kicking, hitting, and biting of other students and staff, as well as other types of aggression. Student is immature; he still enjoys making things from Legos, and was described by several witnesses as having behaviors and interests similar to those of preteen to early adolescent boys. He collects coins.

4. Student's family enjoys outdoor activities such as camping, and Student and his father enjoy watching survival reality shows. A year or two ago, Student expressed an interest to Mother about learning how to use a crossbow.

STUDENT'S MIDDLE SCHOOL YEARS

5. Student attended a Sacramento middle school for seventh and eighth grades (the 2012-2013, and 2013-2014 school years) in a special day class for emotionally disturbed students taught by Christine Vasquez. At some point during his eighth grade year, Mother found Student in possession of an iPod belonging to a classmate that had images of the classmate smoking what appeared to be marijuana, and pictures of an adolescent female in a pose Mother found provocative. Student explained to Mother that his classmate had lost his charger and asked him to take the

iPod home so he could charge it. There was no evidence that Student took part in placing on the iPod the material Mother found disturbing, or that he had accessed it. There was no evidence Student has ever engaged in drug use.

6. Parents have only one computer that is kept in a central living area, and Student is closely supervised when he uses it. During the 2013-2014 school year, Mother found pictures in Student's bedroom of naked adults and children that Student had torn out of old National Geographic magazines that Ms. Vasquez had in her classroom. In addition, Ms. Vasquez discovered that Student had downloaded a picture of a young boy on the beach in a swimsuit on his school computer account. Mother asked Ms. Vasquez to not allow him access to the internet at school, and this was written into his IEP in February 2014.

7. When Student began attending Kennedy in August 2014, his freshman year, he attended classes for emotionally disturbed students in two self-contained classrooms with aide support and special education teachers at Kennedy, with the exception of two general education classes. Except when they are attending general education classes, the special day class students travel between the two classrooms, with each teacher responsible for specific courses. Student is very close to one of the special day class teachers, Robin Gunning-Young (referred to as Ms. Gunning by witnesses), who is his case manager, and is exceptionally concerned for his well-being. Although Student's IEP had internet restrictions written into the document, once Student was enrolled at Kennedy there were no restrictions on his internet use at school, other than those the school imposed on all students.

EVENTS OF MAY 28, 2015

8. On May 28, 2015, at Kennedy, Student went on the internet at school and started browsing on the Amazon.com website. He was looking at camping equipment, fishing gear, a crossbow, and a couple of knives. When he looked at the crossbow, a

popup appeared for a "ninja star." Student and his father watch survival shows on television which sometimes feature crossbows. Sacramento did not establish that Student's interest in these items was unusual, or made it substantially likely that he would cause injury to himself or others.

9. Student had a debit card, referred to as the NetSpend card, which had been sent to him when he began a summer job in 2014. Had he chosen to do so, Student could have had his pay from the job deposited in a NetSpend account, where he could then have accessed the funds. However, Student never had any money deposited into the account.

10. Student attempted to place orders for many of the items he saw on the Amazon site, using the NetSpend card as if it were a credit card. Among the items he tried to order were camping and fishing equipment, the crossbow, two knives, a ninja star, and a package of one inch by one inch plastic baggies. Amazon rejected the orders since the debit card was not funded.

11. On May 28, 2015, Student's other special day class teacher, not Ms. Gunning, discovered the attempted purchases, and someone reported it to Kennedy's principal, Chad Sweitzer. Student was called to Mr. Sweitzer's office, and denied attempting to make the purchases, claiming he knew the NetSpend card was not funded. Mr. Sweitzer investigated Student's school computer account and discovered that Amazon had rejected each purchase. Student was then sent back to the classroom with no discipline imposed, after Mr. Sweitzer told him that it was inappropriate for him to be using his school computer account for this purpose.

12. Later that morning, Ms. Gunning had one of the classroom aides run a check on Student's school computer account. The aide came upon a file entitled "naked." She called Ms. Gunning over to the computer, and when Ms. Gunning clicked on one of the icons, the image of a nude boy in a sexualized position appeared.

Although there were students in the classroom at the time, none of them saw the image. Ms. Gunning quickly clicked off the image and sent the aide to report what they had seen to David Van Natten, an assistant principal in charge of discipline. He spoke to both the aide and Ms. Gunning regarding what they had seen.

13. Kennedy's School Resource Officer, Adam Feuerbach, a Sacramento City police officer, was not on campus at the time, so Mr. Van Natten contacted the Sacramento County Probation Officer assigned to Kennedy, and with the school's information technologist, they accessed Student's computer account, and found over 100 images in the "naked" file. The images were pictures of nude male children, ranging from toddler to teenage, with some of the pictures depicting close-ups of genitalia. Four to six images appeared to be sexual. Student was then called into the office, and questioned by Mr. Van Natten. Student said that he thought he had deleted the images, and shortly thereafter ran from the office to the front of the school and then walked home.

14. On May 29, 2015, Officer Feuerbach was contacted by Mr. Van Natten concerning the events of the previous day. Officer Feuerbach contacted the Police Department's Sex Abuse and Child Abuse unit, and was informed that the detective who might be assigned to investigate the case was on vacation, and he should conduct the investigation himself. Officer Feuerbach interviewed Mr. Van Natten, and subsequently received a written report from Mr. Sweitzer. After reviewing the "naked" file (it was unclear whether he reviewed it directly from Student's school computer account, or from another source such as a thumb drive or DVD), Officer Feuerbach consulted with his sergeant. On June 8, 2015, Officer Feuerbach took Student into custody at school, and Student was charged with violations of Penal Code sections 311.1, subdivision (a) and 311.11, subdivision (a).² Student spent three nights at Juvenile Hall, and is still

² Penal Code section 311.1, subdivision (a), is possession of any media depicting a

pending adjudication of the charges.

15. There was no clear evidence about how the “naked” file came to be loaded onto Student’s school computer account. Some witnesses testified about statements Student and others made about how, when, where, and why the images were initially downloaded, and how they came to be found on his school computer account. Some witnesses provided hearsay evidence in this regard. The hearsay evidence was uncorroborated, and insufficient to make any findings in this this regard, and some of the testimony was inconsistent. Further, no determination is made as to whether any of the pictures constitute child pornography. What is clear, however, is that the pictures were inappropriate, should not have been on Student’s school computer account. Mr. Van Natten admitted that this was not the first time when he had found Kennedy students in possession of pornography, and his testimony was very credible in this regard. Action was taken, based on the circumstances, and then everyone “moved on.”

SUBSEQUENT EVENTS

16. On June 4, 2015, a manifestation determination IEP team meeting was held, and the team found that both of the incidents of May 28, 2015, were a manifestation of Student’s disabilities. A follow-up IEP team meeting was then held on June 16, 2015, at which time Sacramento personnel suggested that Student be placed at a non-public school, Northern California Prep. Mother attended this IEP team meeting, but after some discussion, declined further participation since Ms. Gunning was not

person under the age of 18 engaging in, or simulating sexual activity with the intent of selling or distributing it. Penal Code section 311.11, subdivision (a) is possession of any media depicting a person under the age of 18 engaging in, or simulating sexual activity. Both crimes are “wobblers,” which means they can be charged as either a misdemeanor or a felony.

present. The school year had just ended, and Ms. Gunning was not invited to the meeting. The meeting was rescheduled to August 10, 2015, so Ms. Gunning could attend.

17. The participants at the IEP team meeting on August 10, 2015, included Parents; Nathan Stuckey, Student's private therapist; Ms. Gunning; Mr. Van Natten; Jeri Chase-Ducray, Program Manager (Ms. Gunning's supervisor); and one or two administrators from Sacramento's administrative offices. Before Parents and Mr. Stuckey came into the meeting, the Sacramento members of the team discussed placement at Northern California Prep. Ms. Gunning was the only member of the team who questioned whether Student needed placement at Northern California Prep. However, she did not state her concerns when Parents were present.

18. The meeting ended at an impasse. Parents would not agree to placement at Northern California Prep. Three weeks later Sacramento filed its complaint asking that Student be removed from Kennedy, and be placed for 45 school days at Northern California Prep as an interim alternative educational setting.

STUDENT'S DISCIPLINARY HISTORY

19. The parties were very focused on Student's disciplinary history. Several witnesses testified that history is the best predictor of future behavior. Student introduced his disciplinary record from Sacramento. From October 2006, when Student was age seven, to May 28, 2015, when Student was 15, the record showed approximately 53 behavioral incidents involving Student.

20. In regards to behavioral incidents involving physical aggression, there were school outbursts where Student was physically aggressive with peers and staff; and incidents where Student was reported to have kicked, bitten, pulled hair, scratched, hit, and stomped on the feet of others, both peers and adults. The incidents began in 2006. The last such incident at school occurred in October 2012, when Student

“stabbed/poked” two other peers with a “sharp plastic object.” However, skin was not punctured, and Sacramento did not show whether Student was being intentionally aggressive with the intent to injure, or just being playful. Student was 13 years of age at the time, and in the seventh grade. There were no other referrals involving aggressive physical contact with other students, other than an incident in April 2013, when he was reported to have put another student in a headlock and would not release the student after being asked to do so. Again, Sacramento did not establish that this behavior was intentionally aggressive with intent to injure another. This was the last time Student was cited for any physical contact at school.

21. From the beginning of seventh grade at middle school, the 2012-2013 school year, to the incidents of May 28, 2015, there were approximately 25 reported disciplinary events that were related to Student refusing to do school work, or being non-compliant. In middle school Student would have meltdowns that included crying, shouting, and making verbal threats to others. There were reports of Student disrupting class by talking to others, not complying with the directions of school staff, and/or a handful of times when Student made verbal threats to harm another person, or called someone a name. Student likely exhibited similar behaviors on other occasions that were handled by staff, but not reported. However, it should be noted that Student is in special education because he is emotionally disturbed with a pattern of dysregulated behaviors.

22. In 2013, Student became involved in a conflict with Mother, who wanted him to do household chores, or homework. He refused to do either. The conflict escalated when Father came home from work, and Student grabbed a knife and held it to his own throat. Parents called law enforcement and Student was taken to the hospital, where the attending physician determined that he required a 72-hour psychiatric hold pursuant to Health and Safety Code section 5150. It should be noted that Father has

worked with troubled youth in group homes and other environments for many years, and he believed that this intervention might be effective in preventing Student from engaging in similar behavior in the future. Student was not compliant in taking his psychotropic medication at the time, which may have been a contributing factor in the incident. Student had not been hospitalized in a mental health facility in the past, nor has he been since. There is no disciplinary record of this incident, although there was testimony about it, and it was referenced in at least one assessment.

23. In early June 2014, Student was on a field trip to Six Flags. He was among a group of students found by school officials to be in possession of alcohol. Law enforcement was called and when they arrived, Student was bending over with a pencil either writing on the sidewalk, or by his own admission, sharpening the pencil. An officer approached him, and at some point a scuffle broke out and Student was handcuffed and placed in the rear of a police car until his father came to retrieve him. There was no evidence that Student was cited by law enforcement for this incident, or had any legal repercussions as a result of this confrontation at Six Flags.

24. During the 2014-2015 school year, Student was more likely to shut down and refuse to work, and there were only two or three incidents of verbal aggression reported. All of Student's disciplinary incident reports for the 2014-2015 school year that were part of his disciplinary record, came from the special day class teachers, with the exception of the May 28, 2015 events. None of the referrals were from Student's general education classes.

25. Both Ms. Vasquez and Ms. Gunning reported that Student was greatly affected by Mother being diagnosed with a very serious illness in 2013 that resulted in multiple hospitalizations for treatment, including hospitalization in a Bay Area hospital for over three months in the late winter and early spring of the 2014-2015 school year. It is found that Mother's health issues contributed to Student's dysregulated emotions

during this two-year period.

26. In regards to sexual incidents in the Sacramento disciplinary record, there were a handful of occasions when Student said "Fuck you" to someone, but Sacramento did not establish that this was sexual aggression. There was one occasion when Student made a comment and gesture to a girl in his class that a teacher inferred was of a sexual nature. This occurred in December 2012. There was no other evidence of any other incident that could be described as an act of sexual aggression. Sacramento's expert called the incident "stupid adolescent behavior," when questioned about it by Sacramento's attorney. Student has not been observed or reported as engaging in any other activity, since behavior records began in 2006, which could be described as sexual. There was no evidence at all that Student has ever acted inappropriately with younger children, or has the sophistication and manipulative ability to groom a younger child to engage in sexual behavior.

THREAT ASSESSMENTS

27. Paula Solomon, Ph.D., is a clinical psychologist who has worked extensively in both treating and assessing emotionally disturbed children and adolescents. She received her bachelor's degree in 1974, and master's degrees in 1978 and 1987, the latter degree in clinical psychology. She received her Ph.D. in 1991. Dr. Solomon developed a risk assessment tool as clinical director for a residential treatment center, and has conducted numerous risk assessments of children and adolescents to determine if they are a danger to themselves and/or others. Dr. Solomon reviewed the evidence in the parties' evidence binders in this matter, discussed the case with Student's attorney, and interviewed Student and Parents. She then completed two standardized forms designed to assess the risk of harm that might be presented by an elementary or secondary school student. Dr. Solomon's experience in treating adolescent sex offenders was more limited than Student's other expert and Sacramento's expert, so more weight

was given to her threat assessment of Student in relation to the Amazon order, and whether Student posed a threat of physical violence.

28. Dr. Solomon relied extensively on her records review and interviews with Student and Parents. When she completed her two risk assessments, she was not aware of Student's 72-hour hold, or the Six Flags incident. However, even considering those two events revealed to her during Sacramento's cross-examination, she still considered Student was at most a moderate risk for violence in the school environment although she truly believed, even with those events, that he was a low risk. Important factors she considered were his discipline history, personal information she received from Parents and Student during interviews, the fact that Student had not had violent incidents at school for several years, and that Student was unable to verbalize any plan of committing a violent act at school. Further, there was no other independent information concerning such a plan. Her assessment was given much weight, and it is found that notwithstanding the Amazon order, Student poses, at most, a low risk of physical harm to himself and others on the Kennedy campus.

29. Sacramento's expert, Gerry Blasingame, Psy.D., reviewed the exhibits in this case and spoke to Sacramento's attorney. Dr. Blasingame received his bachelor's degree in 1984, his master's degree in marriage, family and child counseling in 1987, and he was licensed as a marriage and family therapist in California in 1989 and in Montana this year. In 2009 he received his doctorate in psychology. He is a member of the California Sex Offender Management Board, and has been an assessor and treatment provider for both adult and juvenile sex offenders and victims since the mid-1980's. Dr. Blasingame was reluctant to refer to the collection of images as a whole as child pornography, or to conclude that there was a strong likelihood that the collection of images could be predictive of Student becoming a pedophile. His opinion was tempered by the fact that he had not interviewed Student, Parents, and teachers, and that he had not had the

opportunity to observe Student in the school setting.

30. Dr. Blasingame testified that he saw an “escalating pattern of verbal and physical threats,” which he combined with the attempt to “purchase” weapons on the internet as factors he considered in forming his opinion of the risk Student posed if he remained at Kennedy. However, the discipline record and testimony of others established a decreased number of incidents of physical aggression, as well as verbal threats throughout the years. Dr. Blasingame acknowledged the fact that Student has never expressed any plan or intention to bring or use weapons on campus, let alone brought any weapons to school. Dr. Blasingame opined that if verbal threats and physical aggression were to “persist,” threat would be “a significant issue.” However, Student had been in school since September 3, 2015, at the time of the hearing, and there had not been a single instance where Student had failed or refused to do schoolwork, been disruptive in class, made any verbal threats, or shown any sign of emotional dysregulation. There was no evidence he ever possessed or brought any weapons to school. This confirmed Mother’s statement at the August 10, 2015 IEP team meeting, and her testimony at the hearing, that since spending three nights in Juvenile Hall, and facing the criminal charges against him, he “had changed immensely,” due to that experience. Dr. Blasingame also testified that he based his opinions on a belief that past sanctions had not modified Student’s behavior, but this is no longer true, in light of Student’s most recent behavior. In regards to the Six Flags incident, he gave it one point on a scale with 10 being the highest threat level.

31. Dr. Blasingame also rendered an opinion as to the risk Student might “reoffend” by accessing inappropriate images on the internet, and/or an escalation of this behavior. Again, tempering his opinion with the caveat that he had not done a complete assessment of Student, Dr. Blasingame found the risk of sexual offending by Student, if there was no appropriate treatment, to be “moderate.” His definition of this

level of risk was that there was a 20 to 40 percent chance of reoffending.

32. Student also had his own expert testify about his risk of harming others based on the collection of images. Deidre D’Orazio, Ph.D., is a clinical psychologist who has worked with sexual offenders since 1997. She received her bachelor’s degree in 1995, her master’s degree in clinical psychology in 1998, and her doctorate in clinical psychology in 2002. Much of her work has been assessing and treating violent sexual predators, including working as a consultant with the California Department of State Hospitals for several years, and working as a clinical psychologist at Atascadero State Hospital where California houses violent sexual predators who are deemed too dangerous to release. Dr. D’Orazio has served as an invited consultant to the Treatment Committee of the California Sex Offender Management Board, and will move onto the Board as a member in June 2016. She has conducted several hundred assessments of sexual offenders, treated over 100 juvenile sexual offenders, and conducted approximately 75 evaluations of juvenile sexual offenders.

33. Dr. D’Orazio reviewed the material in the parties’ evidence binders in preparation for her testimony, and discussed the case with Student’s attorney. Like Dr. Blasingame, Dr. D’Orazio tempered her opinion of Student’s risk because she also had not interviewed Student or Parents. Based on the information she had, Dr. D’Orazio found the risk to staff or other students of Student remaining at Kennedy to be low. This was based on statistics that show possession of pornography alone is a very low risk factor for someone moving into the area of actually committing sexual offenses. This is true even when the pornography is found to be child pornography.

34. Dr. D’Orazio reviewed Student’s discipline record and based on the information contained in those reports, as well as the other information she reviewed, including the images Student had on his school computer account, credibly opined that Student’s posed a “very, very low risk” of harm to himself or others on a comprehensive

high school campus. This opinion was based on the fact that there was no evidence Student had shared the images with others, and research showing that fewer than four out of 100 people who had persistently accessed child pornography would do it again. Although there was evidence that the images in the "naked" file had been downloaded over a period of time, in several different sessions, there was no evidence as to when or if it was accessed otherwise. There was no evidence Student had sexually acted out at school, in the community, or at home.

35. Dr. Solomon, Dr. Blasingame, and Dr. D'Orazio provided important testimony in this hearing. Dr. Solomon has extensive experience assessing students who have posed a risk of physical injury to themselves and others. Her experience in assessing the risk of danger of sexual behavior is less than Dr. Blasingame and Dr. D'Orazio, but she has had some experience with juveniles who have committed sexual offenses, and her opinion is given some regard in that area because she was the only expert who actually met and interviewed Student and Parents.

36. Dr. Blasingame and Dr. D'Orazio both admitted that their opinions were based on the review of the documents in the evidence binders, the DVD of the images Student was alleged to have downloaded, and their conversations with the attorneys who represented the parties who retained them. Both were entirely forthright about the limitations of their opinions, because they had not had an opportunity to interview Student, or conduct any other assessments. Both acknowledged that the research concerning the risk posed by juveniles who have possessed alleged child pornography is extremely limited, and both referenced a single study conducted in Sweden. Both testified that they found the same four images to be sexual, although Dr. Blasingame had some concern about two others.

37. Only Dr. Blasingame's opinion concerning the risk Student posed based on the Amazon incident was discounted because he testified that the disciplinary record of

Student showed an increasing tendency of violent actions by Student when, in fact, the opposite was true. It should be noted that the disciplinary record that was entered into evidence began with most recent events, and proceeded page by page to earlier events, which may explain Dr. Blasingame's testimony in this regard. None of these expert witnesses, all of whom were qualified and essentially credible, supported Sacramento's contention that Student's continued presence on the Kennedy campus is substantially likely to result in injury to either Student or others in relation to the downloaded images. Nor did any of the other testimony and evidence support such a finding.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA³

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)⁴ et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to

³ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

⁴ All subsequent references to the Code of Federal Regulations are to the 2006 version.

an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's individualized education program. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are also called designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs; and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp.

200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit,” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 951, fn. 10.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D); Ed. Code, § 56505, subd. (l).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) Here, Sacramento bore the burden of persuasion.

INTERIM ALTERNATIVE EDUCATIONAL SETTING

5. Sacramento contends that it is substantially likely that maintaining Student’s placement at Kennedy will result in injury to Student or others. It points to

Student's purported attempt to order "weapons" from Amazon.com using the school's internet system, and his storage of "child pornography" on his school computer account as examples of why his continued presence at Kennedy is a threat to Student's own safety as well as the safety of others on campus. Sacramento argues that Northern California Prep is an appropriate interim alternative educational setting for Student.

6. Student argues that Sacramento has failed to meet its burden of proof that Student's continued placement in the special day class for emotionally disturbed students at Kennedy is substantially likely to result in injury either to himself or others. He contends that Sacramento's belief that Student is a safety threat is mere speculation. In regards to the Amazon.com incident, Student argues that interest in weapons is normal for many teenaged boys, and there is no evidence that Student has ever possessed any weapons at school, has acted violently causing injury to himself or others for many years, or made any real threats of violence. In regards to the allegation that Student possessed child pornography, Student argues that there is a serious question as to whether the collection of images was an attempt to possess child pornography, and further argues that there is no evidence that Student ever intended to show others the images, or to expose others to the images.

7. A district may place a special education student in an interim alternative educational setting for not more than 45 school days, regardless of whether or not the student's behavior is determined to be a manifestation of the child's disability, under special circumstances involving specified drug and weapons offenses, or when the child has inflicted serious bodily injury upon another person on school premises or at a school function. (20 U.S.C. § 1415(k)(1)(G); 34 C.F.R. §300.530(g).) The student's IEP team determines the interim alternative educational setting. (20 U.S.C. § 1415(k)(2); 34 C.F.R. § 300.531.) If parents do not agree with the offered interim alternative educational setting or the manifestation determination, they or the district can file a request for an

expedited due process hearing. (34 C.F.R. § 300.532 (a).) The hearing officer deciding the case may order placement of the child in an appropriate interim alternative educational setting for no more than 45 school days if s/he determines that maintaining the child's current placement 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).)

8. Sacramento cited several cases in support of its contentions. However, these cases were not persuasive. One of three cases was *Elizabeth Board of Education*, March 27, 2015, 66 IDELR 88. However, the decision is devoid of any description of the "violent misbehaviors" of Student which led to the district filing the complaint. Accordingly, this case is not helpful in deciding the instant matter. Two other cases were cited by Sacramento in support of its argument that Student's continued presence at Kennedy is substantially likely to result in injury to himself or others, *Timberlane Regional School District*, March 24, 2006, 45 IDELR 139 (*Timberlane*); and *Light v. Parkway C-2 School District* (8th Cir. 1994) 41 F.3d 1223 (*Light*). In *Timberlane* the student had a history of psychiatric hospitalization, auditory and visual hallucinations, and physical assaults on family members and medical personnel. She also had a serious medical condition that her parents were not managing well, and on her last day at school before the hearing, had made a suicidal threat. In *Light*, the student had behaviors that included, but were not limited to kicking, hitting, biting, throwing objects, and turning over furniture, with an average of 15 aggressive acts each week. She injured her teacher and others, and required the fulltime support of two aides. Based on this information, it is clear that an interim alternative educational settings were appropriate for these students.

9. Student also cited several cases in support of his argument that an interim alternative educational placement was not appropriate in the instant matter. The most significant was *Saddleback Valley Unified School District v. Student*, January 7, 2009, 109

L.R.P. 5815 (*Saddleback*). In this case, the district placed the student in an interim alternative educational placement at home due to possession of a knife on school premises. In past school years the student had engaged in self-injurious behaviors, and thrown objects when angry or frustrated, but he was no longer engaging in this behavior. When the student returned to the general education campus following the 45 day interim placement at home, his behavior was greatly improved. The school district filed a complaint asking to remove him to an interim alternative educational setting in a special day class for emotionally disturbed students at a different school after he got into a physical altercation with another child (mutual combat), made a verbal threat to another child, and became upset in a few classroom settings, but regained self-control on his own. The ALJ denied the district's request for an interim alternative educational setting in the special day class, because she found that his behavior was improving, not escalating,

10. In *Saddleback*, the ALJ analyzed several previous OAH decisions in which the school districts' requests for interim alternative educational settings for students had been granted. The behaviors that had been found to make it substantially likely that a student would injure himself and/or others if the educational placement remained unchanged included, as in the cases cited by Sacramento, kicking, biting, shoving, and other such acts directed towards other students and/or staff, as well as elopement and serious verbal threats. Although in *Saddleback* the district argued that the ALJ should consider Student's behaviors in past years, as well as his conduct for the current school year, including the knife incident, the ALJ found that his vastly improved behavior for the current school year, once he returned to the general education setting, demonstrated that he was not substantially likely to injure himself or others. The school district's request for placement in the special day class was denied.

11. In analyzing the substantial likelihood of injury in the instant case, one

must first look at the nature of the offenses. The first offense was Student's attempt to order a crossbow, ninja star, and knives on the internet at school. There is no question that this was an inappropriate use of the school's internet access. Although Sacramento witnesses talked about the risk Student posed in regards to this incident, focusing on the fact that he was ordering "weapons," the evidence established that Student had an interest in learning how to use a crossbow that had begun a year or two before. His family frequently camps, and he and Father liked to watch reality survival shows. Student was completely credible when he testified about the popup for the ninja star when he was looking at the crossbow online. Many witnesses credibly testified that teenage males are often interested in weapons. In addition to the "weapons," student also ordered fishing and camping gear, as well as survival gear. The baggies, while often used in drug sales, are also used by coin and stamp collectors, and Student collects coins.

12. Although Sacramento seems to think that Student's interest in weapons translates to a substantial likelihood that he will injure himself or others, this was not proven. Although Student has a history of physical violence, the last incident on school property was October 2012, or April of 2013, both of which were incidents that were likely "horsing around," as middle school boys are apt to do. The incident at Six Flags is an anomaly. It occurred during a field trip, Student had probably consumed alcohol, and part of his emotional disturbance is manifested by disrespect for authority. The incident at home when Student was placed on a 72 hour hold was due to him not taking his medication.

13. There was no evidence that Student physically resisted being taken into custody by Officer Feuerbach on June 8, 2015. Further, although Student has a history of making verbal threats towards individuals when upset, there was no evidence that he has ever physically threatened the safety of Kennedy students or staff. He loves his

school, and the opportunities afforded to him there, particularly participation in general education programs that are unique to Kennedy. The evidence established that from the beginning of the 2015-2016 school year on September 3, 2015, Student has not had a single incident of maladaptive behavior on the Kennedy campus. Dr. Solomon's credible testimony established that Student does not pose a risk on Kennedy's campus in this regard. Finally, the fact that Mr. Sweitzer took no disciplinary action against Student when it was discovered that he had tried to order several things from Amazon.com at school is significant. Accordingly, the attempted Amazon order, in light of the other facts, does not indicate that it is substantially likely that Student will injure himself or others at Kennedy.

14. The alleged child pornography possession is somewhat more troubling. However, the evidence did not establish that Student is a pedophile, or even a budding pedophile, or that his possession of the material at issue poses a substantial likelihood of future injury to himself or others. Although Sacramento personnel testified about a fear that Student might show the images to others, and seeing them could be traumatizing to others, particularly persons who had been victimized by sexual abuse, there was no evidence at all that Student ever showed the images to others, or ever discussed them with others. Sacramento personnel testified that due to the size of the campus and availability of technology on campus with internet access, especially with so many students having their own personal devices, Student could not be adequately policed so that he would not use the internet. Again, there was no evidence that Student has accessed the internet since he was taken into custody. The only evidence that Student ever possessed the personal device of another pupil was when he was in eighth grade, which was a one-time occurrence, and there was no evidence that Student used the device himself. He merely brought it home to be charged since the owner had lost his own charger.

15. It should be noted that Student is not the only pupil at Kennedy who has possessed pornography. Dr. Blasingame testified that the likelihood of Student downloading more child pornography was 20 to 40 percent, placing the risk level for that happening in the future at the moderate level. Dr. D'Orazio's risk assessment found the likelihood to be at a very low level. Both established their expertise and credibility, but both also testified that their assessments were compromised because they had not had an opportunity to interview Student and obtain other information. However, Dr. Blasingame's more conservative likelihood of 20 to 40 percent, and finding of "moderate" risk of injury, does not translate into a substantial likelihood of Student posing a risk of injury to himself or others by downloading or showing child pornography to others. Student's totally uneventful first three weeks of school for the 2015-2016 school year supports this and belies Dr. Blasingame's assumption that Student has not shown he can respond to sanctions. Sacramento's stance that Student having inappropriate images on his student account in May 2015 means it is significantly likely that his presence on campus will result in harm to Student or others, is not supported by the evidence. Various scenarios posed by Sacramento personnel of Student gaining access to a Kennedy computer on campus, or utilizing the personal devices of other student to access the internet, are based on mere speculation. Accordingly, Sacramento did not meet its burden of proof in this regard.

16. Student seems to have benefited from being at a comprehensive public high school. He enjoys his general education classes, and there was no evidence that he is not doing well in them. The strict code of conduct in one of those classes has had some beneficial effect on modifying his sometimes impulsive, dysregulated behavior. He has friends at school, both inside and outside of his special day class. Finally, Student's case manager, Ms. Gunning, is very concerned about his well-being, and it is believed she can, with the assistance of the classroom aides and the other special day class

teacher, provide sufficient classroom supervision since both are aware of Student's situation. If Kennedy personnel are concerned about Student's behaviors in the general education environment, and during unstructured time, they can arrange for a higher level of supervision of him at those times.

ORDER

Sacramento's request for an order that Student be placed at Northern California Preparatory Academy as an interim alternative educational setting is denied.

PREVAILING PARTY

Pursuant to California 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. Here, Student prevailed on the issue heard and decided.

RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

DATED: October 16, 2015

/s/

REBECCA FREIE

Administrative Law Judge

Office of Administrative Hearings