DISCIPLINING REMOVALS FOR SPECIAL EDUCATION STUDENTS

Presentation by Darren J. Bogié
August 2, 2013

INTRODUCTION

These materials are intended to provide some basic information regarding the legal requirements imposed on the discipline of special education students.

A proper legal analysis of proposed discipline of a special education student is highly fact dependent. Because the information contained in these materials is necessarily general, its application to a particular set of facts and circumstances may vary. For that reason, these materials do not constitute legal advice. We recommend that you consult with your lawyer prior to acting on the information contained herein.

LIST OF ABBREVIATIONS

C.F.R.	Code of Federal Regulations
EDUC. CODE	California Education Code
IDEA	Individuals with Disabilities Education Act
IEP	Individualized Education Program
OAH	Office of Administrative Hearings
U.S.C.	United States Code

OVERVIEW OF DISCIPLINE FOR SPECIAL EDUCATION

A. First Key Points to Remember

1. When it comes to discipline, students with disabilities are entitled to receive special procedural protections not afforded to the general student population. These protections were first expressed by the Supreme Court in *Honing v. Doe*, 484 US 350 (1988) in which the court prohibited certain disciplinary actions that result in a change of placement for a student with a disability. Generally the present rule is a student cannot be suspended from school for more than 10 days if the misconduct was related to his or her disability. (34 C.F.R. 300.530.)

2. State and federal law require special PROCEDURAL PROTECTIONS for special education students facing suspension or expulsion. Each of these protections must be provided or a suspension or expulsion may be set aside as unlawful. (Educ. Code § 48915.5.)

3. The IDEA provides that a district can remove a student with a disability who violates a code of student conduct from his/her current placement to an appropriate interim alternative education setting, another setting, or suspension for not more than 10 consecutive school days, provided the same change of placement would be made in the case of a student without a disability.

B. Conduct Warranting Discipline

The conduct for which a special education student may be suspended or expelled is generally the same as the conduct warranting suspension or expulsion by a general education student.

C. Major Provisions

1. *The 10-day Rule.* The IDEA provides that a district can remove a student with a disability who violates a code of student conduct from his current placement to an appropriate interim alternative education setting, another setting, or suspension for not more than 10 consecutive school days, provided the same change of placement would be made in the case of a student without a disability. This is in essence the so-called "10-day rule." The same rule applies to additional removals of not more than 10 consecutive school days in the same year for separate incidents of misconduct. Therefore, suspensions or other disciplinary changes in placement are limited to 10 days in any school year. This rule is only for SPECIAL EDUCATION STUDENTS and it is found in the federal law, not the state law! This includes the period while expulsion proceedings are pending. (34 C.F.R. 300.520(b), 300.530 and 300.536.)

2. *Continuation of Services.* Districts must continue to provide education services for IDEA-eligible students with disabilities who have been suspended for more than 10 school days or expelled. (34 C.F.R. 300.530(b)(2).)

3. *45-Day Removals.* Federal law allows for disciplinary removal for 45 school days for some offenses. (20 U.S.C. § 1415(k).) These offenses are:

a. Carrying a weapon to school;
b. Possessing or using illegal drugs;
c. Inflicting "serious bodily injury."

Remember these offenses resulting in a 45-day removal are defined by federal, not state law.

4. *Behavior Plan.* A school district has a duty to provide a behavior plan to address the misconduct of a special education student.

5. *Manifestation Determination.* Within 10 SCHOOL days of any decision to change the placement of a child for a disciplinary reason (expulsion), a school district must convene an IEP team meeting to determine whether the misconduct is a manifestation of the child's disability. A child may not be disciplined for conduct that is a manifestation of his/her disability. (20 U.S.C. § 1415(k)(1)(E) and 34 C.F.R. 300.530(e).)

> *If the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability, school personnel may apply the relevant disciplinary procedures to children with disabilities in the same manner and for the same duration as the procedures would be applied to children without disabilities. However, once the child is removed from his/her current placement, he/she must continue to receive educational services, so as to enable the child to continue to participate in the general education curriculum although in another setting, and to progress toward meeting the goals set out in the child's IEP, and receive a functional behavior assessment and write a behavior support plan, or if the child has one, modify the behavior support plan. This new placement is called an interim alternative educational placement.*

6. *The School District Has a Duty to Provide Educational Services on the 11th Day of a Student's Disciplinary Absence from School.* No later than the 10th cumulative day of disciplinary absence (suspension), a school district must begin to provide continuing educational services to special education students on the 11th day in an interim alternative educational placement.

7. *School Districts Now Can Unilaterally Place a Child in an Interim Alternative Educational Setting*. If it is *NOT* a manifestation of the student's disabilities, then the school district may apply the same disciplinary procedures to disabled children as general education children. However, after the 10th day of suspension, the school district must provide

educational services to enable the child to continue to participate in the general education curriculum although in another setting, and to progress toward meeting the goals set out in the child's IEP, and receive a functional behavior assessment and write a behavior support plan, or if the child has one, modify the behavior support plan.

8. *Parents' Due Process Rights*. Parents have the right to file for a due process hearing to challenge an IEP team's manifestation determination or the information relied upon by the IEP team. If the parents file for a due process hearing prior to an expulsion decision being rendered, no expulsion hearing may be conducted until the due process hearing and appeal are completed. The child must remain in his/her current placement (the child's placement at the time of the filing of the due process hearing) until the due process hearing decision is rendered.

9. *School District Basis of Knowledge That Student May Have a Disability*. The school district will be deemed to have knowledge that a child is a child with a disability if:

a. The parent of the child has expressed concern in writing (or orally if the parent does not know how to write or has a disability that prevents a written statement) to personnel of the appropriate education agency that the child is in need of special education and related services;

b. The behavior or performance of the child demonstrates the need for these services;

c. The parent of the child has requested an evaluation of the child; or

d. The teacher of the child or other personnel of the school district has expressed concern about the behavior or performance of the child to the director of special education of the agency or to other personnel in accordance with the agency's established child find or special education referral system.

10. *Exception to School District Basis of Knowledge that Student May Have a Disability.* A school district is not deemed to have knowledge that the child may be a child with a disability if:

a. The school district conducted an evaluation and determined that the child was not a child with a disability and the school district provided written notice to the child's parents of its determination that the child did not have a disability.

b. The school district determined that an evaluation was not necessary and the school district provided written notice to the child's parents of its determination.

D. Manifestation Determinations

The purpose of a manifestation determination is to examine the relationship between a child's disability and his/her misconduct. Such an evaluation must be undertaken when a district proposed to take specified serious disciplinary actions.

1. *A manifestation determination must be performed* when a district proposes disciplinary measures that will result in the change of placement of a child with a disability (34 C.F.R. 300.530(e).) A change of placement occurs when:

a. The removal is for more than 10 consecutive school days; or

b. The child has been subject to a series of removals that constitute a pattern (a series of removals that total more than 10 school days in a school year constitutes a pattern). (34 C.F.R. 300.536.)

2. *IEP meeting must be held within 10 cumulative days of suspension:*

a. Decisions to be made at the IEP meeting:

(1) Was the student's conduct caused by, or did it have a direct and substantial relationship to, the child's disability? or

(2) Was the student's conduct the direct result of the school district's failure to implement the IEP?

b. If the answer to a(1) or a(2) is "yes," then the student's conduct shall be determined to be a manifestation of the student's disability.

c. Steps after manifestation finding: The IEP Team shall –

(1) Offer a functional behavioral assessment (FBA) to the student's parent. After such assessment is agreed to, an IEP meeting will be held and a behavioral support plan will be offered for the student, provided that the school district had not conducted such an assessment prior to the manifestation determination IEP meeting (for the same conduct);

(2) In the situation where a behavioral support plan had already been developed, the IEP team must review the behavioral support plan and modify it, as necessary, to address the behavior; and

(3) 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 in an IEP plan.

d. The completion of the functional behavioral assessment is not necessary prior to a manifestation determination IEP meeting. All that is required is that the school district offer an assessment plan for a functional behavior assessment to the student's parent after the IEP team makes a finding that the student's conduct is a manifestation of his/her disability.

3. *Date, time and place of the IEP meeting for manifestation determination:*

a. The parent has the right to participate in the IEP meeting through actual attendance, representation or by telephone. However, the parent cannot require the school district to hold the IEP meeting beyond the 10th day of suspension. The school district must set up the IEP meeting to be held prior to the student having 11 cumulative days of suspension.

b. If the student is a foster child, notice must be given to the child's attorney and a representative of the applicable child welfare agency (notice may be given by phone).

c. The meeting shall be held at a time and place *mutually agreeable* to the parent and the school district.

d. Each parent is entitled to notice of:

(1) His/her right to participate in the IEP meeting;

(2) The fact that his/her child is being recommended for expulsion; and

(3) A manifestation determination decision will occur at the IEP meeting.

e. The IEP meeting notice must be in writing and must indicate the purpose (manifestation determination), time, and location of the meeting and who will be in attendance. Parents or guardians must also be informed in the notice of their right to bring other people to the meeting who have knowledge or special expertise regarding the individual with exceptional needs. (The decision of who has knowledge or special expertise is based on the discretion of the person inviting that party to the IEP meeting.) A copy of the Procedural Rights and Responsibilities must be included with the notice sent to the parents.

f. The school district can hold the IEP meeting without the parent in attendance if the school district, SELPA or county office is unable to convince the parent or legal guardian that he or she should attend. In this event, the school district, SELPA or county office shall maintain a record of its attempts to arrange a mutually agreed upon time and place as follows:

(1) Detailed records of telephone calls made or attempted and the results of those calls;

(2) Copies of correspondence sent to the parent or legal guardian and any responses received;

(3) Detailed records of visits made to the home or place of employment of the parent or legal guardian and the results of those visits;

(4) Attempt to telephone the parent or legal guardian at the manifestation determination IEP meeting and conference them into the meeting by speaker phone. (Educ. Code § 56341.5(g) and (h).)

4. *Due Process and Stay Put*:

During expulsion proceedings, a parent has the right to file for a due process hearing to challenge the manifestation determination of the IEP team or the information relied upon by the IEP team. *Once the parent files for due process, no expulsion hearing shall be conducted until the due process hearing and appeals have been exhausted* (20 U.S.C. § 1415.) However, the child can remain in the interim alternative educational setting that the school district determined at the IEP meeting, as long as the school district provides educational services to enable the child to continue to participate in the general education curriculum although in another setting, and to progress toward meeting the goals set out in the child's IEP, and receive a functional behavior assessment and write a behavior support plan, or if the child has one, to modify the behavior support plan.

Because California has chosen to extend "all applicable procedural safeguards prescribed by federal and state law" to expulsion proceedings, the parent's rights include the right to seek a stay put order through the Office of Administrative Hearings.

5. *Superior Court Orders:*

School districts should consult with counsel about the availability of Superior Court Orders to keep a special education student away from his/her last agreed upon educational placement.

E. 45-Day Removals

In two different situations, federal law permits a special education student to be removed for disciplinary reasons to an appropriate interim alternative educational placement for the same amount of time that a child without a disability would be subject to discipline, but for not more than 45 SCHOOL days.

1. *Dangerous:* Under federal law, a due process hearing officer may order a child with disabilities to be placed in an appropriate interim alternative educational setting for up to 45 SCHOOL days upon a showing at an expedited hearing that the child's current placement is substantially likely to result in injury to the child or others.

2. *Specified Weapons and Drug Offenses:* Under federal law (20 U.S.C. § 1415(k)(1)(G), a school district may unilaterally place a student with a disability in an appropriate interim alternative educational setting for up to 45 SCHOOL days if the student has committed the following offenses:

a. The child carries or possesses a weapon to school or at school, on school premises, or to or at a school function under the jurisdiction of a state or local educational agency;

b. The child knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance while at school, on school premises or at a school function under the jurisdiction of a state or local educational agency; or

c. The child has inflicted serious bodily injury upon another person while at school, on school premises or at a school function under the jurisdiction of a state or local educational agency.

Neither parental consent nor absence of manifestation is required for a 45-day removal for weapons or drugs.

3. *Definitions:* The terms "weapon," "drugs," and "serious bodily injury" are defined under federal, not state, law and can be expected to be narrowly construed:

a. Weapon is defined as "a weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than 2 ½ inches in length." (18 U.S.C. § 930(g).)

b. Illegal drug is defined as "a controlled substance" but does not include a controlled substance that is legally possessed or used under the supervision of a licensed health care professional, or that is legally possessed or used under any other authority under that act or under any other provision of federal law.

c. Controlled substance is defined as a drug or other substance identified under schedules I, II, III, IV, or V in section 202(c) of the Controlled Substances Act, (21 U.S.C. § 812(c).)

d. Serious bodily injury is defined as bodily injury which involves:

(1) Substantial risk of death;

(2) Extreme physical pain;

(3) Protracted and obvious disfigurement; or

(4) Protracted loss or impairment of the function of a bodily member, organ or mental faculty.

4. *Additional Rules that Pertain to 45-Day Removals*:

a. California law allowing discipline for offenses committed going to or from school or school functions appears to be different from the federal requirements; the federal law changed, so it appears if they carry a weapon to school, this can be used. However, if they possess, use, sell or solicit the sale of a drug or are under the influence of a drug, or inflict serious bodily injury, it must be at school or a school function.

b. Forty-five days means 45 SCHOOL days, and does not count the time school is closed for weekends, holidays, or summer vacation. This is a change in the law.

c. The IEP team must hold an IEP meeting to make a 45-day interim alternative educational setting recommendation. However, the school district can require the student to stay in the interim alternative setting for up to 45 school days regardless of whether the parent consents to the 45-day interim alternative educational setting.

d. An IEP team must determine what constitutes an appropriate interim alternative educational setting. The interim alternative educational setting must be selected so as to enable the child to continue to progress in the general curriculum, although in another setting, and to continue to receive those services and modifications, including those described in the child's current IEP, that will enable the child to meet the goals set out in that IEP.

e. Stay put does not apply in drug/weapon 45-day removal cases. (20 U.S.C. § 1415(k).) Be aware, however, that in California, some parents are filing for a due process hearing and bringing a motion for stay put without informing the hearing office that the child is on a 45-day removal.

f. Multiple 45-day removals are possible within the same school year. "These regulations do not prohibit a child with a disability from being subjected to a disciplinary suspension, including more than one placement in a 45-day interim alternative educational setting in any given school year, if that is necessary in an individual case," (e.g., a child might be placed in an alternative setting for up to 45 days for bringing a weapon to school in the fall and for up to 45 days for using illegal drugs at school in the spring).

Attached for your review are the following original legal materials:

1. The Office of Special Education Programs ("OSEP") *Letter to Sarzynski* (6-21-12) 59 IDELR 141.

2. *Student v. California Montessori Project* (OAH, April, 29, 2011, No. 2011030849).

3. *Student v. Tehachapi Unified School District* (OAH, March 24, 2006, No. 2006010238).

4. *Student v. Westminster School District* (OAH, January 13, 2011, No. 2010110730).

59 IDELR 141

112 LRP 35343

Letter to Sarzynski
Office of Special Education Programs

N/A

June 21, 2012

Related Index Numbers

150.025 Relationship between Misconduct and Disability

515.005 Entitlement to Transportation

Judge / Administrative Officer

Melody Musgrove, Office of Special Education Programs

Case Summary

Districts can't bypass an MD review just because a parent decides to drive her child to school during a bus suspension, OSEP told a school attorney. OSEP observed that if a student receives transportation as a related service, and the district provides no alternative transportation, a bus suspension is a removal that triggers an MD review if it constitutes a change of placement. *Questions and Answers on Serving Children with Disabilities Eligible for Transportation*, 53 IDELR 268 (OSERS 2009). The removal is a change of placement for purposes of triggering an MD review if it continues for more than 10 school days or is part of a pattern of exclusions of more than 10 days. In that case, the MD team must convene within 10 days of the suspension decision to determine whether the conduct is a manifestation of the child's disability. "Generally, a school district is not relieved of its obligation to provide special education and related services at no cost to the parent and consistent with the discipline procedures just because the child's parent voluntarily chooses to provide transportation to his or her child during a period of suspension from that related service," OSEP Director Melody Musgrove wrote. OSEP also informed the attorney that when a district evaluates whether a bus suspension is part of a pattern of removals, it must consider prior instances in which the student was suspended from instruction. Similarly, in assessing whether an instructional suspension is part of a pattern, the district must factor in prior bus suspensions.

Full Text

Appearances:

Dear Mr. Sarzynski:

This is in response to your letters to Patricia Guard, former Deputy Director of the Office of Special Education Programs (OSEP). I apologize for the delay in our response. Your letter asks three questions related to OSEP's Questions and Answers on Serving Children with Disabilities Eligible for Transportation (Questions and Answers on Transportation), specifically related to our response to question H-1: If transportation is included in the individualized education program (IEP) for a child with a disability who has documented behavioral concerns on the bus, but not at school, when may a school district suspend the child from the bus for behavioral issues and not provide some other form of transportation to and from school?[1] Your questions and our responses are below.

Question 1: If transportation is in the student's IEP, and if a suspension from the mode of transportation of greater than 10 school days is imposed without a manifestation determination but the student's parent or other adult voluntarily has transported the student to the school or educational program during the suspension, has there been any substantive violation of IDEA [Part B of the Individuals with Disabilities Education Act]? Although a related service in the IEP (transportation) may have been temporarily affected by the suspension, there has been no change in the educational services to which the student was entitled under these circumstances.

OSEP's Response: Generally, a school district is not relieved of its obligation to provide special education and related services at no cost to the parent and consistent with the discipline procedures just

because the child's parent voluntarily chooses to provide transportation to his or her child during a period of suspension from that related service.

As explained in response to Question H-1 of the Department's Questions and Answers on Transportation, when transportation is included in the child's IEP, a bus suspension must be treated as a removal under 34 CFR § 300.530 and all of the IDEA's discipline procedures applicable to children with disabilities apply. If a student is suspended from transportation included in the IEP for more than 10 consecutive school days that suspension constitutes a change of placement. 34 CFR § 300.536(a)(1). In the scenario you describe, such a change of placement would trigger the requirement for a manifestation determination. 34 CFR § 300.530(e). That is, within 10 days of the decision to suspend the student from his IEP-prescribed transportation services for more than 10 consecutive school days, the local educational agency (LEA), parent, and relevant members of the IEP Team must convene to determine whether the conduct that resulted in the suspension was a manifestation of the child's disability, using the process described in 34 CFR § 300.530(e). Additionally, if the child's behavior resulting in the bus suspension is a manifestation of the child's disability, consistent with 34 CFR § 300.530(f)(1), the school district must conduct a functional behavioral assessment, unless it has already done so, and implement a behavioral intervention plan for the child. If the child already has such a plan, the school district must review and modify it, if necessary, to address the behavior.

Question 2: In determining whether the 10 school days threshold has been met necessitating a manifestation determination regarding a suspension from the bus, is a school district required to include any previous suspensions from instruction?

OSEP's Response: As stated above, within 10 school days of any decision to change the placement of a child with a disability due to disciplinary removals, the school district must convene the appropriate group to conduct a manifestation determination. 34 CFR § 300.530(e). A change of placement due to disciplinary removals is defined in 34 CFR § 300.536 and means a removal for more than 10 consecutive school days or, as determined on a case-by-case basis, a series of removals that constitute a pattern because: (1) the series total more than 10 school days in a school year; (2) the child's behavior is substantially similar to the behavior of previous incidents that resulted in the series of removals; or (3) of additional factors such as length of each removal, total amount of time the child has been removed and the proximity of the removals to one another. Therefore, all disciplinary removals, including disciplinary suspensions from instruction, must be considered in determining whether the child's current removal from IEP-prescribed transportation services constitutes a change in placement due to a pattern and whether a manifestation determination is required.

Question 3: Regarding a contemplated suspension from instruction, is a school district required to include any previous bus suspensions in determining whether the 10 school days threshold has been met?

OSEP's Response: As described above, in determining whether the current disciplinary removal from instruction constitutes a change of placement due to a pattern of disciplinary removals under 34 CFR § 300.536(a)(2), the school district would need to consider any previous suspensions from IEP-prescribed transportation services.

Based on section 607(e) of the IDEA, we are informing you that our response is provided as informal guidance and is not legally binding, but represents an interpretation by the U.S. Department of Education of the IDEA in the context of the specific facts presented.

I hope this information is helpful. If you have additional questions, please feel free to contact Ms. Angela Tanner-Dean at 202-245-6320, or by email at Angela.Tanner-Dean@ed.gov.

[1]The document Questions and Answers on

Serving Children with Disabilities Eligible for Transportation can be found at: http://idea.ed.gov/explore/view/p/%2Croot%2Cdynamic%2CQaCorner%2C12%2C.

Regulations Cited

34 CFR 300.536(a)(1)
34 CFR 300.530(e)
34 CFR 300.536

Cases Cited

53 IDELR 268

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENT ON BEHALF OF STUDENT,	OAH CASE NO. 2011030849
v.	
CALIFORNIA MONTESSORI PROJECT.	

DECISION

Administrative Law Judge Bob N. Varma, Office of Administrative Hearings (OAH), State of California, heard this expedited matter in Sacramento, California, on April 7 and 8, 2011.

Bill Schell, Attorney at Law, appeared on behalf of Student. On April 8, 2011, William Sheslow, law clerk, assisted Mr. Schell in representing Student. Parent was present at the hearing. Student was also present at the hearing for a portion of the day on April 7, 2011.

Julie Robbins, Attorney at Law, appeared on behalf of the California Montessori Project (Montessori).[1] Terri Burroughs, Program Specialist for Montessori, was also present at the hearing. On April 8, 2011, Shelley Carman, Director of Special Education for Montessori was present as the representative for Montessori.

On March 14, 2011, Student filed a request for due process (complaint) which included both expedited and non-expedited issues for hearing. The due process hearing on the expedited issue was held within the mandated 20 school days. Upon conclusion of the hearing on April 8, 2011, the record was left open for the parties to submit closing briefs by April 18, 2011. The matter was submitted for decision on April 18, 2011. Student's school is on spring intersession from April 18 through April 29, 2011. Accordingly, the decision on the expedited issue is due on May 6, 2011.

[1] A public education agency is defined as any public agency, including a charter school, responsible for providing special education or related services. (Ed. Code, §§ 56500, 56028.5.) Children with disabilities who attend public charter schools retain all rights under federal and state special education law. (34 C.F.R. § 300.209(a); Ed. Code, § 56145.)

ISSUE[2]

Did Student's possession, or use, of the Fiskars scissors during the February 11, 2011 behavior incident constitute carrying or possession of a weapon such that Montessori was allowed to remove Student to an interim alternate educational setting (IAES) for 45 school days?[3]

PROPOSED REMEDY

Student requests that he be returned to his last educational placement prior to the February 11, 2011 incident.

CONTENTIONS OF THE PARTIES

Student contends that neither the Fiskars scissors, nor the manner in which Student used them in an incident on February 11, 2011, constitutes a weapon under the applicable state and federal special education laws. Accordingly, Montessori's removal of Student to an IAES for 45 school days violated Student's rights under the Individuals with Disabilities Education Act of 2004 (IDEA). Student contends that he should be returned to his educational setting prior to the incident of February 11, 2011.

Montessori contends that on February 11, 2011, during a serious behavior emergency, Student used a pair of scissors as a weapon. Montessori asserts that the scissors and the manner in which Student used them, had he completed his threatened action, could have caused serious bodily injury or death. Accordingly, Montessori contends that it did not violate Student's educational rights under the IDEA when it removed him to an IAES for 45 school days.

FACTUAL FINDINGS

Stipulated Facts

1. On April 7, 2011, the parties submitted the following stipulated facts:

[2] The ALJ has modified the issue for the purpose of clarity.

[3] Section 300.530(g)(1) of title 34 of the Code of Federal Regulations allows for a pupil to be removed to an alternative education setting for not more than 45 school days, without regard to whether the behavior is a manifestation of the child's disability, if the pupil carries a weapon to or possesses at school, on school premises, or to or at a school function under the jurisdiction of the education agency.

a. The scissors measure a total of five and one-half inches from the tip of the scissors' blades when closed to the end of the handle;

b. The length of the inner portion of each blade of the scissors, the portion used for cutting, is one and seven-eighth inches;

c. The length of each blade, in its entirety, including the portion that is enclosed by the handle, is three inches for one blade and three and one-quarter inches for the other;

d. When the scissors are fully open, the width between the tip of the blades is two and three-quarter inches.

Jurisdiction and Background

2. Student is an eight-year-old pupil who resides with Parent and is eligible for special education under the category of emotionally disturbed. Montessori is a charter school that operates the school attended by Student prior to his suspension and removal on February 11, 2011.

3. For the 2010-2011 school year (SY), prior to his removal, Student attended the Orangevale, California, site of Montessori. He was placed in a combined second and third grade general education classroom, with one-to-one aide support.

4. It was unclear from the evidence if Student had a one-to-one aide throughout his placement at Montessori from his entry at the start of the 2010-2011 SY. Student's aide, Julie Humphrey-Knutson, started as Student's one-to-one aide on January 28, 2011.[4] During her time as Student's one-to-one aide, she provided support in behavior modification through consultation by a Behavior Intervention Case Manager (BICM) for Montessori. The specifics of the behavior support provided by the BICM to Student and its frequency and duration, were not established by the evidence.

5. Prior to his removal following the February 11, 2011 incident, Student's teacher at Montessori was Michelle Holden.[5] Based upon Ms. Holden's uncontested testimony, the evidence established that Student displayed inappropriate and disruptive behavior throughout the 2010-2011 SY. The frequency of these behaviors varied from week-to-week. However, on average, Student had at least one behavioral incident per week. These incidents included verbal outbursts and physically aggressive behavior towards adults.

[4] Ms. Humphrey-Knutson has a bachelor of arts in Liberal Studies. She is currently enrolled in a dual credentialing program for her mild-moderate special education and multiple subject teaching credentials. She is also in the process of obtaining a master of arts in Special Education from California State University, at Sacramento.

[5] Ms. Holden has a bachelor of arts in Speech Communication. She holds elementary education and Montessori teaching credentials. Ms. Holden has been a regular education teacher since 1995.

Because neither party offered into evidence, Student's individualized education programs (IEPs) prior to the February 11, 2011 incident, and testimony was primarily limited to the incident itself, the evidence did not establish what behavioral supports were provided to Student during the 2010-2011 SY. The incident of February 11, 2011, which resulted in Montessori's removal of Student, is the subject of this expedited hearing.

Incident of February 11, 2011

6. School personnel may remove a pupil with a disability who violates a code of student conduct from his or her current placement to an appropriate IAES, another setting, or suspension, for not more than 10 consecutive school days. However, school personnel may remove a pupil with a disability to an IAES for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, if the child carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function under the jurisdiction of the state or local education agency.

7. On February 11, 2011, Student's class was creating heart-shaped containers for Valentine's Day, in an arts and crafts project. Each pupil had available a pair of scissors to complete the project. Student was independently working in his preferred area within the class. Four other pupils were working on their projects at a round table, approximately four feet from Student.

8. Ms. Humphrey-Knutson was approximately eight to 10 feet away, assisting another pupil. Student got up from his desk and went to the table with the four other pupils. At first, Ms. Humphrey-Knutson observed what appeared to be appropriate interaction between the children. However, she noticed that Student's fists had clenched. Based upon her knowledge of Student, she foresaw the potential for a behavioral incident and began to approach.

9. The parties did not offer into evidence any written behavior plan for Student. However, the evidence established that when Student became frustrated, he could take a break from the classroom activity and go outside or to the Resource Specialist Program (RSP) room with his aide. This was a strategy designed to prevent Student's behaviors from escalating, or to de-escalate Student once he had a behavior outburst. On February 11, 2011, prior to the scissors incident, Student had taken such a break in the RSP room. However, at the conclusion of the break, Student had refused to return to work. Ms. Humphrey-Knutson testified that Student had engaged in destructive behaviors in the RSP room and had hidden from her sight for approximately five minutes. The RSP room has a back door, through which Student had escaped. Thus, by the time of the incident at issue in this case, Student had already had one behavioral outburst.

10. With respect to the incident which is the subject of this hearing, as Ms. Humphrey-Knutson approached Student, she noticed that his fists remained clenched and his breathing had intensified. Ms. Humphrey-Knutson kneeled on the floor in an effort to communicate with Student. She attempted to get Student to take a break and leave the

classroom, consistent with his behavior plan. However, Student did not respond and remained focused on the other pupil, Z. Z had his head down and did not engage Student.

11. Though Student did not respond to Ms. Humphrey-Knutson, she felt that he was de-escalating and she got up from the floor and began supervising the children at the table. As she walked away, Student picked up Z's art project and Fiskars scissors. He began pointing the scissors at Z with his right hand, while his left hand was on the back of Z's chair. Student was repeatedly saying that Z had "lied on" him.

12. The evidence established that Student did not have a prior history of using scissors in a threatening manner. Ms. Humphrey-Knutson approached Student from behind and asked him to put the scissors down, while requesting help from Ms. Holden. Ms. Humphrey-Knutson's view was clear and unobstructed. As Ms. Holden approached, Student began to back away. Ms. Humphrey-Knutson admitted that she could not accurately state the length of time the incident with the scissors took. However, she estimated that 30 seconds could have passed between the time that she saw Student's hand on the back of Z's chair and when Student backed away from Z.

13. Ms. Humphrey-Knutson demonstrated how Student held the scissors while they were pointed at Z. Student had the scissors completely open and grasped them from the middle, on top of the screw that holds the blades together. He held them so that the blades were horizontal. They were pinched between Student's thumb and the top of his index finger, with the remainder of his fingers curled up below his index finger. In such a grasp, the scissors cannot be closed.

14. Ms. Holden testified that Student grasped the scissors with his fingers in the loops of the handle. She also stated that the scissors were in a horizontal position, pointed towards the other pupil. However, Ms. Holden initially testified that the incident with the scissors had occurred prior to her approaching the table. Ms. Holden then testified that she first came to the table, left to get a piece of paper because Student had taken the other child's paper, and upon her return noticed that Student had scissors in his hand. This was inconsistent with Ms. Humphrey-Knutson's testimony that Student took the art project and the scissors simultaneously. Ms. Holden's testimony that she was initially drawn to the table due to a dispute between students over paper was inconsistent with Ms. Humphrey-Knutson's testimony that Ms. Holden came over because she requested her help to deal with Student's escalating behavior. Ms. Humphrey-Knutson was at the table when Student had the scissors, while Ms. Holden was approximately 12 feet away.

15. Ms. Holden admitted that she did not remember the chain of events clearly. Due to her lack of memory and inconsistencies in her recollection, Ms. Holden's description of the scissor incident was given less weight. Because Ms. Humphrey-Knutson had a clear and unobstructed view, was at the table, witnessed the entire incident with the scissors and was persuasive, her testimony describing the portion of the incident wherein Student used the scissors was given more weight.

16. After requesting help from Ms. Holden, Ms. Humphrey-Knutson radioed the school principal on the walkie-talkie for additional help. By this time, Student had put the scissors down and was chasing the other Students. Student did not pick up the scissors again. Ms. Humphrey-Knutson collected all of the scissors from the table.

17. Ms. Holden shielded Z and another pupil from Student, as those two pupils had become Student's focus. Student pushed Ms. Holden repeatedly, in an attempt to get to the other pupils. At some point, Ms. Humphrey-Knutson informed Student that she would be restraining him and then placed him in a basket hold from behind. She is not trained in the use of physical restraints on students.

18. The school principal, Dorothy Hilts, arrived with her administrative assistant, Ann Walsh. Following Ms. Hilts' directions, Mss. Walsh and Holden lined up the other students and took them out of the classroom. The other students had not seen a similar level of behavioral escalation in Student previously.

19. Mss. Hilts and Humphrey-Knutson remained in the classroom with Student. Ms. Hilts is trained in Crisis Prevention Intervention (CPI), which authorizes her to use physical restraints with students to contain a child in a crisis situation. She tried to restrain Student, holding him momentarily once, but failed on three other attempts. On one attempt, Ms. Hilts fell. Ms. Humphrey-Knutson contacted the police in the meantime. While Student was running around the classroom, avoiding Ms. Hilts, he was successful in wrestling the phone away from Ms. Humphrey-Knutson. Student informed the police that everything was okay and they did not need to come to the school. The police did not come; however, it was unclear if this was at the direction of Student or Montessori staff.

20. Student eventually escaped the classroom. He stopped outside the classroom at a planter for a few minutes. Then Student noticed Ms. Holden and his classmates on the playground. He targeted Z and the other pupil and moved in their direction. Ms. Holden again blocked Student's access to Z and the other pupil. Mss. Hilts and Humphrey-Knutson reached the playground. While Ms. Humphrey-Knutson attempted to contain and de-escalate Student, Ms. Holden took her students back into the classroom and went into lockdown mode. In this state, the doors were locked, the shades were shuttered and the students were placed in the middle of the classroom. At some point, Student could be heard outside the classroom trying to get inside and banging on the door and windows.

21. Eventually, the school staff was able to contain Student and he calmed down. The entire episode from the initial dispute at the table to the end took over one hour. Parent was contacted, the incident was discussed with Parent and Student was suspended.

22. On March 4, 2011, Montessori convened a manifestation determination IEP team meeting. The parties agreed that Student's behavior was a manifestation of his disability. However, they disagreed on whether the scissors or the manner in which Student

used them constituted as a weapon. Student was placed at the Williams Academy, a non-public school, as his agreed-upon IAES.[6]

The Scissors as a Weapon

23. A weapon for purposes of disciplinary measures resulting in a 45 day removal to an IAES is defined as a "dangerous weapon." A dangerous weapon is a weapon, device, instrument, material or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than two and one-half inches in length.

24. The term "serious bodily injury" is defined as: bodily injury that involves a substantial risk of death; extreme physical pain; protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member, organ, or mental faculty. It is not simply a cut, abrasion, bruise, burn, or disfigurement; physical pain, illness, or impairment of the function of a bodily member, organ, or mental faculty. Whether something can be capable of causing a serious bodily injury is a question of fact that is determined based upon the totality of the circumstances.

25. The issue of whether Student's use of the scissors constituted a dangerous weapon is analyzed by looking at the portion of the entire incident during which Student used the scissors. Neither party contended that Student's conduct, after he put the scissors down, constituted as a use of a weapon. However, Montessori contends that the opinions of Mss. Humphrey-Knutson, Holden, and Hilts should be considered in determining whether the scissors were capable of causing serious bodily injury or death.[7] Here, the evidence established that the children were upset by the incident and may have been frightened. However, the evidence did not establish to what extent this was due to the scissors incident rather than the entirety of events of the afternoon of February 11, 2011.

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[6] The issues of whether District violated Student's procedural or substantive rights under the IDEA in the time between February 14 and March 4, 2011, with respect to holding a manifestation determination IEP or providing an IAES in a timely manner, are not part of this expedited hearing and are not addressed in this decision.

[7] In its closing brief, for the first time, Montessori asserts that Z having his head down is an indicator that he was frightened. Montessori further asserts that Z suffered emotional trauma due to the incident and following the incident has made reports of his fear of being killed by Student. At hearing, no evidence was presented regarding Z's state of mind during the scissors incident and to the extent that Z's behavior was described, his state of mind was not testified to by an expert or a counselor or therapist who provided any service to Z. No evidence was presented regarding Z suffering trauma or making statements following the incident. Ms. Holden testified that Montessori received eight written complaints and several verbal complaints, however, no details about the complaints were provided at hearing. Accordingly, Montessori's newly raised evidence in its closing brief was not considered.

26. With respect to the scissors themselves, Student contends that they are not a weapon. He asserts that the blades are dull and are specifically designed to prevent any cuts or damage to skin. The blades can only cut paper or cardboard through the shearing action created when they work against one another. Furthermore, Student asserts that the tips are rounded and incapable of being used to stab another individual.

27. Montessori contends that blades are sharp and either blade can cause serious bodily injury or death. It asserts that the tips of the blades end in a 90-degree angle, which is sharp. Finally, Montessori contends that the scissors can puncture skin if used with enough force.

28. The scissors are in evidence. Based upon the stipulations set out in Factual Finding 1 and the scissors themselves, it is clear that the Fiskars scissors are small children's scissors. The exposed blades of the scissors are shorter in length than two and one-half inches. The advertisement for Fiskars children's scissors, submitted by Student, is supportive of Student's position that the scissors were designed with child safety in mind. The blades are dull and are not capable of cutting unless used in a motion that would open and close the blade, thus using the shearing function of the blades. The tips are blunt and rounded, and because they are rounded, they do not form a 90-degree angle. The totality of the evidence established that the scissors do not constitute a weapon capable of causing death or serious bodily injury.

29. Finally, Montessori's contentions ignore the obvious fact that if the scissors, in and of themselves, constituted a weapon, then Montessori would be responsible for arming every child in Student's class with a weapon, making every child subject to suspension or expulsion. Therefore, whether these particular scissors constituted a weapon capable of causing serious bodily injury or death is determined upon how Student used the scissors.

30. Based upon Ms. Humphrey-Knutson's testimony, the evidence established that Student held the open scissors in the middle of the scissors, between his thumb and index finger, with the remaining fingers curled below the index finger. Student held the scissors horizontally, three-to-four inches from the neck and chest area of Z. There was no evidence that Student made any motions towards Z, although he may have moved them up and down. In such a position, Student could not close the scissors; therefore he could not have used their shearing function to cut Z, even if the scissors were actually sharp enough to cut skin. Because Student never motioned the scissors towards Z, he could not have stabbed Z. Even if Student could have stabbed Z, the dullness of the blades and the blunt tips could not have punctured Z's chest or neck sufficiently enough to cause death or inflict serious bodily injury. Therefore, the evidence did not establish that the manner in which Student used the children's Fiskars scissors, turned what were otherwise child-proof scissors into a weapon capable of causing death or serious bodily injury, as defined in Factual Finding 24.

LEGAL CONCLUSIONS

Burden of Proof

1. In an administrative proceeding, the burden of proof is ordinarily on the party requesting the hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) Student requested the hearing and, therefore, Student has the burden of proof.

Did the February 11, 2011, behavioral incident constituted a violation of 34 C.F.R. § 300.530(g)(1) (2006)?

2. Under the IDEA and California law, children with disabilities have the right to a free appropriate public education (FAPE). (20 U.S.C. § 1400(d); Ed. Code, § 56000.) A FAPE is defined as appropriate special education, and related services, that are available to the pupil at no cost to the parent or guardian, that meet the state educational standards, and that conform to the pupil's IEP. (20 U.S.C. § 1401(9); Ed. Code, §§ 56031 & 56040; Cal. Code Regs., tit. 5 § 3001, subd. (o).) A child's unique educational needs are to be broadly construed to include the child's academic, social, health, emotional, communicative, physical and vocational needs. (*Seattle Sch. Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500, citing H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106.)

3. Title 20 United States Code section 1415(k) and title 34 Code of Federal Regulations, part 300.530 (2006), et seq., govern the discipline of special education students.[8] (Ed. Code, § 48915.5.) In many instances, whether, and how, a special education student can be disciplined is dependent upon a determination at a manifestation determination IEP meeting as to whether the student's conduct was related to his disability. (20 U.S.C. § 1415(k)(1)(E),(F).)

4. The law also provides that school personnel may remove a student to an IAES for not more than 45 school days, regardless of whether the student's behavior is determined to be a manifestation of the student's disability, under any of three "special circumstances." (20 U.S.C. § 1415(k)(1)(G); 34 C.F.R.§ 300.530(g).) One of these circumstances is if the child carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function under the jurisdiction of the state or local education agency. (20 U.S.C. § 1415(k)(1)(G)(i); 34 C.F.R. § 300.530(g)(1).) The student's IEP team determines the IAES. (20 U.S.C. § 1415(k)(2); 34 C.F.R. § 300.531.)

5. A weapon for purposes of disciplinary measures resulting in a 45 day removal to an IAES is defined as a "dangerous weapon." (20 U.S.C. § 1415(k)(7)(C); 34 C.F.R. § 300.530(i)(4).) A "dangerous weapon" is a weapon, device, instrument, material or substance, animate or inanimate, that is used for, or is readily capable of, causing death or

[8] All subsequent references to the Code of Federal Regulations are to the 2006 revisions, unless otherwise stated.

serious bodily injury, except that such term does not include a pocket knife with a blade of less than two and one-half inches in length.[9] **(**18 U.S.C. § 930(g)(2).)

6. The term "serious bodily injury" for these purposes is the same as that found in title 18 United States Code section 1365(h)(3). (20 U.S.C. § 1415(k)(7)(D); 34 C.F.R. § 300.530(i)(3).) The term is defined as: bodily injury that involves a substantial risk of death; extreme physical pain; protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member, organ, or mental faculty. (18 U.S.C. § 1365(h)(3). "Serious bodily injury" is not simply a cut, abrasion, bruise, burn, or disfigurement; physical pain, illness, or impairment of the function of a bodily member, organ, or mental faculty. (18 U.S.C. § 1365 (h)(4).) Whether there has been a serious bodily injury is a question of fact that is determined based upon the totality of the circumstances of the injury. (*United States v. Johnson* (9th Cir. 1980) 637 F.2d 1224, 1246).

7. The parent of a child with a disability who disagrees with any decision regarding placement in the IAES, or the manifestation determination, may appeal the decision by requesting an expedited due process hearing. (20 U.S.C. § 1415(k)(3); 34 C.F.R. § 300.532 (a)-(c).) In this case, Student contends that Montessori improperly removed Student to an IAES because his use of the Fiskars scissors during the February 11, 2011 incident did not constitute the use of a weapon capable of causing death or serious bodily injury.

8. Based upon Factual Findings 11 through 14 and 30, the evidence established that Student did not strike, cut or stab Z or any other pupil. Student did not inflict any physical injury with the Fiskars scissors. Accordingly, based upon Legal Conclusions 5 and 6, Student did not use the scissors to cause death or serious bodily injury.

9. As discussed in Factual Findings 1, 28 and 29, the Fiskars children's scissors at issue were handed out to all of the children in Student's class for an art project by Montessori. Their purpose by design is to be a safe cutting instrument and not to be a weapon.

10. Montessori contends that the manner in which Student used the scissors made them a dangerous weapon capable of causing death or serious bodily injury. There is a dearth of legal authority determining whether a pair of scissors, used in a special education disciplinary action, constitutes a dangerous weapon. The parties provided one citation. Montessori relies upon *Anchorage School District*, (2005), 45 IDELR 23, (*Anchorage*) for its contention that scissors can be capable of causing death or serious bodily injury. However, *Anchorage* is distinguishable from the case at hand because the student therein used "sharp adult-sized scissors," while lunging at the teacher. (*Id*.) In *Washington Township Board of*

[9] California defines a knife, for purposes of student discipline, as a dirk, dagger or other weapon with a blade, fitted primarily for stabbing, longer than three and one-half inches. (Ed. Code, § 48915(g).)

Education, (2000), 106 LRP 2569, (*Washington*) a student was found to be in possession of a weapon because the scissors he used to cut his aide's hair were ones he had taken from the bag belonging to a school staff. While the *Washington* decision provides no further detail as to the dimensions of the scissors, it is clear that the scissors in question were not ones provided by the school itself. As discussed in Factual Findings 1and 28 and Legal Conclusions 5 and 9, the scissors in this case are inherently not designed to cause death or serious bodily injury. These cases show that in determining whether scissors could be a weapon capable of causing death or serious bodily injury, the factors to be considered are the type and size of the scissors, and the manner in which they were used. This is a case-by-case analysis.

11. Based upon Factual Findings 13, 14 and 30, due the manner in which Student held the scissors, he could not have closed them to cut Z's skin. Therefore, the scissors shearing function could not have been utilized to cause death or serious bodily injury. Based upon Factual Findings 1and 28, the evidence established that the blades of the Fiskars scissors used by Student were dull and not capable of causing death or serious bodily injury. Finally, based upon Factual Findings 1 and 28, the tip of the scissors were rounded and blunt, and were not capable of causing death or serious bodily injury. Even if Student had made contact with Z's body using the Fiskars scissors, the scissors were only capable of causing cuts or some physical pain. Based on the manner in which Student used the Fiskars scissors, they were not capable of causing death or serious bodily injury, as defined in Legal Conclusion 5. Accordingly, based upon Legal Conclusions 4 through 6, the manner in which Student used the Fiskars scissors in this case did not turn them into a weapon.

12. As discussed in Legal Conclusions 8 through 11, Student did not use a weapon capable of causing death or serious bodily injury, or attempt to cause death or serious bodily injury. Therefore, Montessori was not entitled to unilaterally discipline Student by removing him to an IAES for 45 school days.

Remedies

13. Student seeks to be returned to his placement prior to the February 11, 2011 incident. The parties did not offer into evidence an IEP that would describe in specific detail what Student's educational placement was prior to the incident of February 11, 2011. However, evidence did establish that Student's placement in Ms. Holden's class was pursuant to an IEP to which Parent had consented. As set forth in Legal Conclusion 12, Montessori was not entitled to remove Student to an IAES based upon the February 11, 2011 incident. Accordingly, Student is entitled to return to his last agreed upon and implemented educational placement prior to the February 11, 2011 incident.[10]

[10] The parties did not raise the issue of whether Student was provided a FAPE in his IAES placement as part of the expedited portion of this matter. Therefore, the issue has not been addressed in this decision.

ORDER

Montessori's Orangevale campus is set to recommence session on May 2, 2011, following Spring intersession. Montessori is ordered to return Student to his last agreed upon and implemented educational placement prior to February 11, 2011, at the Orangevale campus, effective May 2, 2011, and convene an IEP meeting within 10 school days to comply with the requirement of Section 300.530(f) of title 34 of the Code of Federal Regulations.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that the hearing decision indicate the extent to which each party has prevailed on each issue heard and decided. Student prevailed on the single issue heard and decided.

NOTICE OF APPEAL RIGHTS

This is a final administrative decision, and all parties are bound by this decision. The parties are advised that they have the right to appeal this decision to a court of competent jurisdiction. Appeals must be made within 90 days of receipt of this decision. (Ed. Code, § 56505 subd. (k).)

Dated: April 29, 2011

/s/
BOB N. VARMA
Administrative Law Judge
Office of Administrative Hearings

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

In the Matter of: STUDENT, Petitioner, v. TEHACHAPI UNIFIED SCHOOL DISTRICT, Respondent.	OAH No. N 2006010238

DECISION

Administrative Law Judge Deidre L. Johnson, State of California Office of Administrative Hearings, Special Education Division (OAHSED), heard this matter on February 7, 2006, in Tehachapi, California.

Petitioner Student (Student) and his mother (Parent) filed a request for a due process hearing on January 9, 2006, that listed three problems regarding Respondent. Two of the problems involved a claimed denial of a free, appropriate public education (FAPE), and were not heard on February 7, 2006. The third problem involves an appeal of a school disciplinary manifestation determination. On January 30, 2006, Judge Judith Kopec of OAHSED issued an order which, among other things, bifurcated the FAPE problems from the disciplinary problem, and ordered the disciplinary problem to proceed to an expedited hearing as scheduled on February 7, 2006. Judge Kopec found the other two problems to be insufficiently stated and granted Student the right to file an amended complaint regarding them within 14 days of the order, or no later than February 14, 2005. Student did not file an amended complaint as to those issues. This decision will therefore dispose of the case.

Student was represented by Larry Perkins, Family Advocate and Associate Director of Sequoia Area VIII Board for Developmental Disabilities, State of California. Neither Student nor his mother (Parent) were present at the hearing or testified.

Respondent Tehachapi Unified School District (District) was represented by attorney A. Christopher Duran, of De Goede, Dunne & Martin, P.C. Also present as the District's designated representative was Sharon Owen, licensed school educational psychologist.

Testimony concluded, oral closing arguments were made, the record was closed, and the matter pertaining to the disciplinary problem was submitted on February 7, 2006.

ISSUES

Was the District's determination that Student's violent conduct on school grounds in October 2005 was not a manifestation of his disability appropriate and in compliance with the law?

(a.) Did District comply with procedural requirements in making the manifestation determination?

(b.) Was the conduct in question the direct result of the local educational agency's failure to implement Student's individualized education program (IEP)?

(c.) Was the conduct in question caused by, or did it have a direct and substantial relationship to, Student's disability?

FACTUAL FINDINGS

Student's Stay Put Placement

1. Student is a 17 year old boy in the District, and is currently in the twelfth grade at Tehachapi High School (THS). It is undisputed that, per the high school's IEPs, Student is eligible for special education and related services with a disability of Other Health Impairments (OHI), primarily based on a diagnosis of attention deficit hyperactivity disorder (ADHD).

2. On Monday, October 17, 2005, Student engaged in two acts of violence during school hours at THS. On that date, Student was suspended from school for five school days. District provided written notice to Parent on October 22, 2005 of a pre-expulsion IEP team manifestation determination meeting scheduled for October 31, 2005.

3. On October 31, 2005, during the IEP team manifestation review meeting, District determined that the above behavioral incidents were not a manifestation of his disability. Student faces possible expulsion from THS as a result of District's determination. Following Student's five-day suspension, he was allowed to return to THS. An expulsion hearing was set for December 5, 2005, and postponed at Parent's request. On January 9, 2006, Student filed a motion for "stay put" with his complaint.[1] On January 11, 2006, Parent consented in writing to District's offer to delay further action regarding an expulsion hearing

[1] See Legal Conclusions, Applicable Law, paragraph 6, *infra.*

while District conducts a "functional analysis of behavior assessment" (FBA)[2] of Student. District and Parent agreed that Student shall continue to attend THS but shall attend two resource specialist program (RSP) periods per day in the interim, pending the outcome of the assessment.[3] While District indicated to Parent that it may not proceed with an expulsion hearing depending on the results of the FBA, it had not withdrawn the manifestation determination as of the hearing date.

4. At the beginning of the hearing on February 7, 2006, Student's placement at THS under the terms of the above-described interim agreement was ordered by the undersigned Administrative Law Judge to be District's stay-put placement for Student pending the outcome of this matter.

Student's Initial High School IEP

5. Student's prior IEPs at THS, from his entry into high school in 2001 through the behavioral incidents in the fall of 2005, show the disability which made him eligible for special education, how the disability manifested uniquely for Student, and what academic and behavioral areas of his life were adversely affected by the disability.

6. Student's special education prior to entering high school reveals a relevant prior history of altercations and assessment. Student first became eligible for special education and related services in 1996. Prior to 2001, District records indicate that Student had been diagnosed with a Specific Learning Disability (SLD). At some point, Student had a behavioral support plan (BSP) in his IEP. For at least 8th grade (2001-2002 school year), Student's educational placement was "Home/Hospital Instruction." There is no dispute that Student was placed on Home Instruction in junior high school due to the number of altercations that occurred when he attended the school campus. During the time in Home Instruction, Student received individual and group counseling through county mental health services.

7. Student's IEPs at THS, including the designation of Student's disability as OHI, relied at least in part upon a triennial assessment done in 2001. Student's triennial assessment became due in September of 2001 while Student was placed in Home Instruction. District had Student assessed by the California Department of Education, Diagnostic Center of Central California, located in Fresno and a diagnostic assessment report was issued on September 20, 2001 (Fresno report).[4] Student returned to campus in August of 2002 for summer school and to start his freshman year at THS that fall. The IEP team at THS

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[2] Federal law refers to this as a functional behavioral assessment (FBA). (20 U.S.C. section 1415(k)(1)(F).)

[3] On February 3, 2006, Student made a motion to add the FBA assessor, a program specialist with the Kern County Office of Education, to his witness list. District objected to lack of timely notice of witnesses and completed assessments with recommendations, under Education Code section 56505, subdivision (e)(7). In addition to the motion's prejudicial lack of timeliness, it was also noted that permitting the witness to testify could interfere with a pending assessment that had not been completed. Student withdrew his motion.

[4] The Fresno assessment report of September 2001 was admitted into evidence solely as hearsay to explain and supplement District's IEPs.

finalized the triennial IEP for Student on November 21, 2002, over a year after the Fresno assessment, and three months after he returned to campus. The IEP Team decided that Student was eligible for special education services in the fall of 2002 with a disability of OHI.[5]

8. The November 2002 IEP team found that Student still needed supports to access core curriculum. For ninth grade, District placed most of his academic proficiency goals at the 4th to 6th grade levels using the Fresno report as a guide. Parent refused academic testing. In the area of cognitive/general ability, "mild weaknesses" were noted in visual processing, attention and sensory-motor integration. In the motor/perceptual area, the IEP indicated that Student experienced delays related to his disability calling for more time for tests, assignments, homework, and copying from the board. In the social/emotional domain, it was noted: "There is a diagnosis of ADHD which is supported by Fresno. Anxiety level is also high per rating scales in physical and emotional anxiety. He worries about grades, peers and school staff." Under supplementary aids and services, the November 2002 IEP listed that THS should provide the following behavioral supports: "clearly defined limits; reminder of rules; sitting near the teacher as available, as needed; positive reinforcement as available; take tests in RSP room if requested by student, as needed; and if a wide-eyed look - ask [Student] [illegible] to clarify, to stay after class." Student's initial high school placement was 98 percent general education and 2 percent special education in the RSP program, including one ten-minute consultation with an RSP teacher two times per month.

9. There were no reports of unacceptable behavior during that three-month observation period prior to the IEP meeting, and Student settled into high school motivated to graduate. District determined that Student appeared "on track" and that no written behavioral goals for Student's OHI disability, anxiety, prior history of altercations, or ADHD were necessary.

Last Operative IEP Placement of September 2003 and Amendment of September 2005

10. Student's IEP in place prior to the disciplinary incidents of October 17, 2005, was an IEP dated September 22, 2003, when Student was in the tenth grade at the same school. It was the last IEP to which implementation was consented by his Parent, and was amended once with Parent's consent on September 2, 2005. The September 2003 IEP increased Student's time in general education to 99 percent. This was done despite the fact that Student had experienced 2 behavioral altercation incidents in 2003, discussed *infra*. District did increase Student's time to access the special education teacher to ten minutes per week with the resource specialist. The September 2003 IEP contained the same language as the November 2002 IEP regarding Student's high anxiety level in the social/emotional

[5] The Fresno report referred to in the IEP found that its 2001 evaluation was consistent with Student's previous diagnoses of ADHD, Impulse Control Disorder Not Otherwise Specified (NOS), Learning Disorder NOS, and Relational Problems.

domain. District noted Student was performing below 60 percent on most academic exams, and set an annual goal of at least 70 percent.

11. The September 2003 IEP noted that Student's areas of weakness included "conflict & testing" but did not reference any particular events or problems. In fact, Student had two disciplinary altercations in 2003:

(a) On March 20, 2003, while Student was still a freshman, THS records show a disciplinary problem in which Student was disciplined for one "fighting" incident.

(b) On August 28, 2003, as a sophomore, he had one other disciplinary incident for "fighting."

12. At hearing, District characterized both of the above incidents as minor, because (a) they did not involve injury or medical treatment, (b) they resulted in a 2-day suspension each time, (c) they were not part of a "pattern" of behavior in the same school year, and (d) the overall number or frequency of behavioral incidents was significantly reduced from Student's prior junior high school altercations. Despite these reasons, District developed an annual goal in the September 2003 IEP in the area of conflict management. Student's level of conflict management performance was evaluated as "able to handle most conflict in a positive way 80 percent of the time," with a goal to increase that accomplishment to 95 percent of the time. At the same time, behavioral supplementary aids and services were reduced. The behavioral supports that remained in Student's IEP were: "positive reinforcement; [illegible], and written progress reports." The District credibly asserted that it wanted Student to have at least one full period of RSP study per day, but that Student and Parent did not want any RSP. Student wanted a general education transcript to go to college. Despite District's attempt to increase RSP time, District relented when Parent objected. Parent consented to the September 2003 IEP that included the conflict goal.

13. The next IEP meeting was on September 20, 2004 for 11th grade, and Parent attended but did not sign consent to the proposed IEP. Student had the same high physical and emotional anxiety levels.[6] Student was still below grade level in academics, he was on track to graduate, needed to pass some exams, and had some tardiness problems. District had no reason to discuss improper or aggressive behavior and it was not a concern to the team. After a year of successful performance without altercations, it was proposed that the conflict goal be eliminated. District also proposed to reduce further the RSP services for Student. Parent signed for receipt of the IEP but, did not consent. There were no meeting notes and no stated reasons for Parent's concerns.

14. On December 9, 2004, three months after the September 2004 IEP meeting, and almost a year and four months since the last behavioral incident, Student physically

[6] District records noted that Student's physical manifestations of anxiety included physical bowel syndrome, which required special accommodation for restroom breaks.

struck another pupil following a vulgar remark, the specifics of which are unknown. It did not involve serious injury. Student was disciplined with a three-day suspension.

15. On April 25, 2005, the IEP Team held a meeting to resolve the offer outstanding from September, 2004, in light of the disciplinary occurrence of December 2004, and Student's declining academic performance. Student was no longer on track to graduate with his class as he was a semester behind schedule in credits. Under the levels of social/emotional performance, Student was described as very social, he got along with peers, but at times displayed "resistance to authority and poor social adaptation skills." District proposed that Student needed a more structured environment, offering to reduce the regular education component to 83 percent, and to increase special education RSP services to 17 percent with specified services. Parent was not present at the meeting. She signed for receipt of the IEP offer on May 6, 2005 as "unhappy," and did not consent to it.

16. District held an annual IEP meeting on September 2, 2005, after Student began 12th grade. During the summer of 2005, Student went to summer school to obtain extra credits in order to graduate. He understood he had fallen behind academically, made a plan of action, and was catching up. District again offered a specific RSP study skills class for Student daily, but Parent did not want this service. Resource specialist Lori Bender was present to begin working with Student after another resource specialist was removed as Student's case manager after Parent complained. Parent refused to agree to place Student in an RSP study class, and District therefore offered to have the RSP teacher briefly meet with Student at lunch to monitor his progress on either Monday, Wednesday, or Friday. Parent consented to the amendment for Student's continued "consult" time with a resource specialist teacher weekly. Although the amendment of September 2005 says it amended the IEP of April 25, 2005, actually it amended the IEP of September 2003, to which Parent last consented.

17. A month later, on October 7, 2005, Student failed to attend a mandatory assembly. When he was assigned to report to an "in school suspension," he swore briefly at school personnel within their hearing distance. This occurred ten days prior to the behavioral incidents at issue.

Student's Disability

18. As found above, District's IEP emphasized Student's ADHD to support the eligible category of OHI. The eligibility criteria for "Other Health Impairments" include whether a pupil has limited strength, vitality or alertness, due to a chronic or acute health problem. ADHD is not among the statutory examples. ADHD is not a statutory category of disability in either federal or state special education law. It is often included in the disability category of OHI under the rationale of "limited alertness," involving inattention or hyperactivity-impulsivity. The parties presented little evidence to show how a disability of OHI, based primarily on ADHD, may affect a child's school performance, aside from viewing Student's levels of academic and behavioral performance in his IEPs and how it has manifested in his experience. At the same time, District's IEPs noted Student's weaknesses in certain processing and learning disability areas as another aspect of his disability.

19. Official notice is taken of the federal publication, U.S. Department of Education, Office of Special Education and Rehabilitative Services, Office of Special Education Programs, *Identifying and Treating Attention Deficit Hyperactivity Disorder: A Resource for School and Home* (2003) Washington, D.C 20202. Page 1 of the report provides that ADHD "is a neurological condition that involves problems with inattention and hyperactivity-impulsivity that are developmentally inconsistent with the age of the child. We are now learning that ADHD is not a disorder of attention, as had long been assumed. Rather, it is a function of developmental failure in the brain circuitry that monitors inhibition and self-control. This loss of self-regulation impairs other important brain functions crucial for maintaining attention, including the ability to defer immediate rewards for later gain. (Barkley, 1998a). Behavior of children with ADHD can also include excessive motor activity. The high energy level and subsequent behavior are often misperceived as purposeful noncompliance when, in fact, they may be a manifestation of the disorder and require specific interventions. Children with ADHD exhibit a range of symptoms and levels of severity....[and] ...typically exhibit behavior that is classified into two main categories: poor sustained attention and hyperactivity-impulsiveness." *Ibid*, at pg. 1. Studies have shown that "effective education of children with ADHD requires modifications to academic instruction, behavior management, and the classroom environment." *Ibid*, pg. 10. "Children frequently demonstrate other types of psychosocial difficulties, such as aggression, oppositional defiant behavior, academic underachievement, and depression...." *Ibid*, pg. 10. The report cited studies finding that compared to students without ADHD, students with ADHD had persistent academic difficulties that resulted in "lower average marks, more failed grades, more expulsions, increased dropout rates, and a lower rate of college undergraduate completion [cites]." *Ibid*, pg. 13. "Numerous studies have found that positive results occur when the major stakeholders in a student's education collaborate to address a child's ADHD ...[cites]. Effective collaboration and communication between home and school provide structure across the two major settings in the child's life. Common rewards, reinforcement strategies, and language help to promote consistency across settings." *Ibid*, pg. 14. Medication is often also used to control behavior. In this case, THS school records show that Student was not on medication for the ADHD.

District's Manifestation Determination

20. The relevant members of the IEP team that reviewed what happened in October of 2005 included Sharon Owens, the THS licensed educational psychologist for the past six years (and past Interim Special Education Director for the District from 2002-2003). Among other things, she interviewed the pupils involved in the incidents, Parent, and school staff, reviewed the Fresno report, the high school IEPs, Student's cumulative high school file, and disciplinary records, and gave Student's core teachers behavior assessment ratings to fill out. Parent participated in the manifestation determination meeting on October 31, 2005, along with Gary Walker, Student's regular education teacher (physical education), Lori Bender, his special education teacher (resource specialist), Dr. Mike Banricklow, then the

District's Director of Special Education,[7] and Student and Parent's family advocate, Larry Perkins. Ms. Owen prepared a confidential "manifest determination" report [sic], and Ms. Bender prepared a confidential academic assessment report that were presented and discussed at the meeting on October 31, 2005.

21. As determined in the October 2005 manifestation determination review meeting, "[Student] hit another student [pupil no. 1] in the head over an alleged girlfriend issue. The other student did not hit back. A second student [pupil no. 2] was also hit in the face when he inquired about the situation with the first student."

22. The school psychologist's manifestation determination report concluded that Student's girlfriend attended a party in Bakersfield on Friday night, October 14, where alcohol was present. On Sunday, October 16, the girlfriend reported to Student that she believed pupil no. 1 had sexually assaulted her. Student was "shocked at first and couldn't think." When he went to school the next day, he confronted pupil no. 1, who denied it. Student admitted that he became angry, felt threatened, and was being made to feel like a liar. Shortly thereafter, pupil no. 2 confronted Student, and Student punched him in the nose. He told Ms. Owen that he did not go to school that day with the intention of hurting anyone, and that "I know it was wrong." Student exhibited a high degree of anxiety, and admitted to Ms. Owens that he had "screwed up." District determined that pupil no. 1 had a concussion.[8] The incidents happened in Mr. Walker's class in the PE locker room area.

23. The academic assessment report of October 2005 was based on observation of Student by Ms. Bender in his 6th period English classroom on October 27, teacher comments she had collected, and the Woodcock-Johnson III Tests of Achievement she administered. Student's academic scores on the Woodcock-Johnson III tests were in the "low average range."

24. Significantly, Student's core teachers reported to Ms. Bender that they knew of no other observed behavioral problems involving Student until the October 17 incidents. For example, Student's supervisor for the Workability Program, reported that he placed Student with a demanding employer in the summer of 2004, and Student performed without incidents. He was on time, followed directions, was reliable and responsible. Teachers were reportedly shocked, saddened and surprised at learning of the incidents. The school psychologist had known Student since he was in elementary school, and had seen him work through a difficult period about five years prior, when Student had altercations at school, his father left, his mother was diagnosed with cancer, Student was placed on Home Instruction and he received mental health counseling. Ms. Owens was very proud of Student's hard work and accomplishments during high school since then. Student was a varsity basketball player. His coach Gary Walker teaches his players conflict resolution and was satisfied with Student's progress. Walker recalled only two incidents where Student lost his temper, one in

[7] Effective November of 2005, Patricia Merritt returned to the District as Interim Special Education Director.

[8] District's findings regarding the incidents that led to disciplinary action are taken as true for purposes of this appeal, and were not litigated in this proceeding. Although school records do not indicate the nature of any injury to pupil no. 2, Ms. Owens testified that pupil no. 2 had a broken nose.

which Student became angry at himself, and the other a shoving match, both in which Student had bottled up his anger. He never saw Student acting out in a persistent pattern indicating an anger problem. Student's success as a basketball player supports that opinion. Mr. Walker was a member of the IEP Team conducting the manifestation determination review. The English teacher Julie Avila likewise has not had any behavioral problems with Student in her class this past year, although Student was not doing well academically. Both teachers reported that Student needed work on his study skills. The four prior behavioral incidents at THS from 2003 through the fall of 2005 were reported at the review meeting. The team members, aside from Parent, shared a uniform opinion that Student's misbehavior was based on a unique, sensitive situation, aggravated by perceived physical injury to his girlfriend, where he made a mistake. Aside from Parent, the other team members viewed the incidents of October 17, 2005 as Student's "first offense" for the 2005-2006 school year, and found that no behavioral support plan was provided with his IEPs or necessary.[9]

25. The IEP team's inquiry at the review meeting included answering printed questions in the review report. In addition, the review report form directed that, if the team found any deficiency in the IEP, placement or implementation of the IEP or services, the conduct must be considered a manifestation of disability and a person assigned to coordinate remedying the deficiency problem. The questions included whether Student understood school rules; whether he could distinguish between right and wrong; whether he possessed problem-solving strategies; whether he learned from his mistake; whether he acknowledged wrongdoing; and whether there was anything else going on his life. In three major areas, related to the requirements of prior federal law, District questioned whether Student's IEP and placement (including supplementary aids, services, and any BSP or BIP) was "appropriate" in relation to the behavior subject to disciplinary action [yes]; whether Student's disability impaired his ability to understand the impact and consequences of his behavior [no]; and whether Student's disability impaired his ability to control his behavior [no]. While some of the above information may be relevant, District applied the wrong manifestation determination standards and failed to ask the requisite questions under present law. The school psychologist's report concluded: "Although he has a diagnosis of ADHD, he does not exhibit any of the symptoms of the disorder at school. He is focused, attentive, and exhibits much control and planning ability. .... [Student] appears to be able to control his actions and makes conscience decisions." After review of all relevant information presented at the meeting, District concluded that Student's above described misconduct on October 17, 2005, was not a manifestation of his disability.

LEGAL CONCLUSIONS

[9] District failed to explain why the behavioral incident of October 7, 2005, just 10 days prior, was not considered a recent prior offense at the meeting, although it was listed in the manifestation determination report.

Applicable Law

1. The reauthorized Individuals with Disabilities Education Improvement Act (IDEA 2004) became effective July 1, 2005. IDEA 2004, as its predecessors, prohibits the expulsion of a student with a disability for misbehavior that is a manifestation of the disability. (*Doe v. Maher* (9th Cir. 1986) 793 f.2d 1470.) Subsection (k) of 20 U.S.C. section 1415 governs when and how schools may change the educational placement of a child with a disability because of a violation of a code of student conduct. Children with disabilities are entitled to a FAPE, including those children who are subject to disciplinary measures such as suspension or expulsion by a school for violation of its rules of conduct. (20 U.S.C. section 1412(a)(1)(A).) School personnel may remove a child with a disability to an interim alternative educational setting, another setting, or to suspension for not more than 10 school days without triggering the "change of placement" protections of the law. 34 Code of Federal Regulations (CFR) section 300.519 defines a change of placement as (a) a removal for more than 10 consecutive school days, or (b) a series of removals that cumulate to more than 10 consecutive school days and constitute a pattern based on listed factors. Depending on its form and duration, a suspension of a child receiving special education and related services due to a disability may constitute a change in their educational placement. Expulsion from school clearly constitutes a change in educational placement. (*Kaelin v. Grubbs* (6th Cir. 1982) 682 F.2d 595.)

2. 20 U.S.C. section 1415(k)(1)(E), regulates the manifestation determination procedure. Within 10 school days of any decision to change the placement of a child with a disability because of a behavior violation, the local educational agency (LEA), the parent, and relevant members of the IEP team shall review "all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents." This review team must determine the following:

(a) If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or

(b) If the conduct in question was the direct result of the local educational agency's failure to implement the IEP.

The law provides that if the review team, consisting of the above members, determines that either of the above is applicable, the child's conduct "shall be determined to be a manifestation of the child's disability."

3. If school personnel seek to order a change in placement that would exceed 10 school days, and if it is determined that the behavior that gave rise to the conduct violation was *not* a manifestation of the child's disability, then:

(a) The school may apply the same disciplinary procedures that are applicable to children without disabilities "in the same manner and for

the same duration in which the procedures would be applied to children without disabilities (20 U.S.C. § 1415(k)(1)(C);"

(b) The child must still receive a FAPE, although it may be provided in an interim alternative educational setting (20 U.S.C. § 1415(k)(1)(D)(i); and

(c) In addition, the child shall receive, as appropriate, a functional behavioral assessment (FBA) and behavioral intervention services and modifications "that are designed to address the behavior violation so that it does not recur." (20 U.S.C. § 1415(k)(1)(D)(ii).)

4. If the IEP team makes a determination that the child's conduct *was* a manifestation of the child's disability, the child's IEP team is required by 20 U.S.C. section 1415(k)(1)(F) to take action, as follows:

(a) The IEP team must conduct a FBA and implement a behavioral intervention plan for the child, if the LEA had not already conducted one prior to the behavior at issue.

(b) Where a behavioral intervention plan was already developed, the IEP team must review it, and modify it, as necessary, to address the problematic behavior.

(c) The IEP team must return the child to the special educational placement from which the child had been removed, unless the parent and the LEA agree to a change of placement "as part of the modification of the behavioral intervention plan."

5. The parent of a child with a disability who disagrees with either a school's decision to change the child's educational placement as a disciplinary measure, or the manifestation determination may appeal by requesting a due process hearing. (20 U.S.C. § 1415(k)(3)(a).[10] An expedited hearing shall be held within 20 school days of the date the hearing is requested. A decision or "determination" shall be made by the hearing officer within 10 school days after the hearing. (20 U.S.C. § 1415(k)(4)(B).)

6. With some exceptions, when an appeal has been requested, the child shall remain in the then-current educational placement under 20 U.S.C. section 1415(j). This is commonly referred to as "stay put."

7. One exception to the general stay put rule is in a disciplinary matter involving a weapon, drugs, or "serious bodily injury," where an alternative educational placement is made, the child shall remain in the interim alternative educational setting pending the

[10] The LEA may also request a hearing in specified circumstances.

decision of the hearing officer. (20 U.S.C. § 1415(k)(4)(A). In those narrow circumstances, 20 U.S.C. section 1415(k)(1)(G) permits school personnel to remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability. "Serious bodily injury" is defined in subsection (k)(7)(D) of Section 1415, and has the same meaning as the term is used in 18 U.S.C. section 1365(h)(3): "the term 'serious bodily injury' means bodily injury which involves -(a) a substantial risk of death; (b) extreme physical pain; (c) protracted and obvious disfigurement; or (d) protracted loss or impairment of the function of a bodily member, organ, or mental faculty."

8. IDEA 2004 added language to the disciplinary subsection (k) which emphasizes that, when dealing with students with disabilities who have violated a code of conduct, school personnel are expressly permitted to consider "any unique circumstances on a case-by-case basis" in determining whether a change of placement order would be appropriate. (20 U.S.C. § 1415(k)(1)(A).)

9. California law is in accord with federal law. California law refers to a "child with a disability" as an "individual with exceptional needs" who is identified as disabled by an IEP team and requires special education and services. Under California Education Code section 48915.5, an individual with exceptional needs may be suspended or expelled from school "in accordance with subsection (k) of Section 1415 of Title 20 of the United States Code," including the discipline provisions in federal regulations and other provisions of California law that do not conflict with federal law and regulations.

10. Education Code section 48900 provides that a pupil may not be suspended from school or recommended for expulsion unless the superintendent or school principal determines that the pupil has committed an act "related to school activity or school attendance occurring within a school" as defined in subsections (a) through (q).[11] Subsection (a)(1) is: "Caused, attempted to cause, or threatened to cause physical injury to another person." Education Code section 48911 provides that a suspension for conduct proscribed by Section 48900 shall be for not more than five consecutive school days. Under Education Code section 48915, expulsion shall be recommended for specified acts "unless the principal or superintendent finds that expulsion is inappropriate, due to the particular circumstance." Among the acts listed is: "Causing serious physical injury to another person, except in self-defense."[12]

11. While the standards in Section 1415(k)(1)(E) for determining whether a child's behavior was a manifestation of the disability are new, the principle behind them is not. The court in *Doe v. Maher*, *supra*, (9th Cir. 1986) 793 F.2d 1470, 1480, discussed the meaning of various phrases describing "conduct that is a manifestation of the child's handicap." The court explained: "As we use them, these phrases are terms intended to mean

[11] Other Education Code sections define additional acts that may be grounds for discipline.

[12] California's provision for discretion based on the particular circumstances is consistent with the new federal provision emphasizing the district's option for discretion in 20 U.S.C. section 1415(k)(1)(A) described in paragraph 9 above.

the same thing. They refer to conduct that is caused by, or has a direct and substantial relationship to, the child's handicap. Put another way, a handicapped child's conduct is covered by this definition only if the handicap significantly impairs the child's behavioral controls. ... it does not embrace conduct that bears only an attenuated relationship to the child's handicap." The court went on to say: "If the child's misbehavior is properly determined *not* to be a manifestation of his handicap, the handicapped child can be expelled. [cites] ...When a child's misbehavior does not result from his handicapping condition, there is simply no justification for exempting him from the rules, including those regarding expulsion, applicable to other children. ...To do otherwise would amount to asserting that all acts of a handicapped child, both good and bad, are fairly attributable to his handicap. We know that that is not so." (Emphasis original.) (*Doe v. Maher, supra,* at 1482.)

12. Education Code section 56339 provides that a pupil whose educational performance is adversely affected by a diagnosis of ADHD and who "demonstrates a need for special education and related services by meeting eligibility criteria specified in subdivision (f) or (i) of Section 3030 of Title 5 of the California Code of Regulations (CCR) or Section 56377 and subdivision (j) of Section 3030 ...for the federal Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 and following) categories of 'other health impairments,' 'serious emotional disturbance,' or 'specific learning disabilities,' is entitled to special education and related services."

The eligibility criteria for "Other Health Impairments" under CCR section 3030 are: "A pupil has limited strength, vitality or alertness, due to chronic or acute health problems, including but not limited to a heart condition, cancer, leukemia, rheumatic fever, chronic kidney disease, cystic fibrosis, severe asthma, epilepsy, lead poisoning, diabetes, tuberculosis and other communicable infectious diseases, and hematological disorders such as sickle cell anemia and hemophilia which adversely affects a pupil's educational performance. In accordance with Section 56026(e)of the Education Code, such physical disabilities shall not be temporary in nature as defined by Section 3001(v)."

13. Pursuant to 34 Code of Federal Regulations (CFR) section 300.346(a)(2)(i), in the case of a child whose behavior impedes his or her learning or that of others, the IEP shall consider, if appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior.

14. Student, as the petitioner and appellant, has the burden of proof in this proceeding. (*Schaffer v. Weast* (Nov.14,2005, No. 04-698) __ U.S. ___ [2005 U.S. Lexis 8554].)

Determination of Issues

15. As found in Factual Finding 20, appropriate parties as required by law participated in the manifestation determination review team, in that the LEA was represented, the Parent provided input and was present at the review meeting of October 31,

2006, as were other relevant members of Student's IEP team. Parent did not contend that she was not given proper notice of the meeting or that any District personnel were missing or inappropriate.

16. As found in Factual Findings 20, 22, 23, 24 and 25, the IEP review team reviewed relevant information as required by law prior to making a determination whether Student's behavioral altercations of October 17, 2005, were or were not a manifestation of his disability. The meeting complied with federal and State procedural requirements for the conduct of a manifestation review

17. It is found that Factual Findings 21 and 22 set forth the District's conclusions as to what happened in the behavioral altercations between Student and two other pupils on October 17, 2005, and they are considered true for purposes of this proceeding.

18. Pursuant to Factual Findings 21 and 22, Student's conduct, that resulted in a mild concussion to one pupil and a broken nose to another pupil did not involve "serious bodily injury" within the meaning of 20 U.S.C. section 1415(k)(1)(G). There was no evidence of extreme physical pain, substantial risk of death, or protracted injuries of the kind described in the federal definition.

19. As found in Factual Finding 25, the IEP review team used the wrong legal standards and failed to expressly ask the requisite questions under present law. The new manifestation determination standards effective July 1, 2005 differ significantly from the prior law. Under former section 1415(k)(4)(c)(ii), the inquiry was focused on whether, in relationship to the behavior subject to disciplinary action, the child's IEP and placement were "appropriate," including whether services and strategies provided were consistent with the IEP and placement, whether the child's disability impaired the child's ability to understand the impact and consequences of the behavior at issue, and whether the child's disability impaired the child's ability to control the behavior. Under the new law, whether the IEP is "appropriate" is no longer a determining factor in the manifestation review process. Rather, the inquiry must now focus on (a) whether the child's conduct was the *direct result* of the LEA's failure to *implement* the IEP; or (b) whether the conduct *was caused by* or *had a direct and substantial relationship to* the child's disability.[13]

Student's conduct was not the direct result of the LEA's failure to implement the IEP

20. Although the manifestation team applied the incorrect legal standard as to the IEP during its review, its error was harmless. It did not directly answer the question whether Student's IEP "had been implemented." Pursuant to Factual Findings 20, 21, 22, 23, 24, and

[13] Although under 34 CFR section 300.523(c)(2), present federal regulations still contain requirements to address impairment of ability to understand the impact and consequences of behavior, and ability to control behavior, in the context of the prior "appropriate" IEP standard for a manifestation review, they conflict with IDEA 2004, are being revised, and so far have been eliminated in the proposed new regulations. (Federal Register, Vol. 70, No. 118.)

25, by finding that Student's IEP was "appropriate," and that no BSP was included in the IEP, District, in this case, found that Student's IEP had been implemented by implication. If, using the wrong standard, the team decided that Student's IEP had been found not to be "appropriate," either by a deficiency in the IEP *or in its implementation*, the team was expressly directed by the school review report form to find the behavior to be a manifestation of the disability, and to take immediate steps to remedy it. The team did not do so. Every reasonable inference leads to the conclusion that the review team knew and understood that Student's IEP had been operative.

21. Pursuant to Factual Findings 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, and 17, and if District implements a change in placement for Student in this matter, District should consider review of Student's IEP, as appropriate, even though the behavior in question was not a manifestation of his disability. The LEA's obligation to consider appropriate review and revision arises under the IDEA in general and 20 U.S.C. section 1415(k)(1)(D)(ii) in particular.[14] Where misbehavior is caused by, or has a direct and substantial relationship to a disability, the child cannot be disciplined, and must either be given an FBA and a behavioral intervention plan, or a BIP in place must be reviewed and modified as necessary to address the behavior. On the other hand, where misbehavior is not caused by the disability, the child may be disciplined, but if the child's placement is changed (e.g. expulsion), the LEA is still required to *consider* giving the child an FBA and behavioral intervention services and modifications of the IEP "as appropriate." Either way, the LEA has a responsibility to the child and to the rest of the students to implement services and modifications "designed to address the behavior violation so that it does not recur." (20 U.S.C. § 1415(k)(1)(D)(ii).) An FBA, behavioral intervention services and modifications of the IEP are statutorily at District's discretion if the determination against manifestation is upheld. District should, however, consider such modifications and implementations of services *as would be appropriate* to prevent the recurrence of similar altercations. (See also 34 CFR § 300.346.)

Student's conduct was not caused by, or did not have a direct and substantial relationship to his disability

22. Pursuant to Factual Finding 25, District did not expressly answer the question whether Student's conduct "was caused by" or "had a direct and substantial relationship to" his disability. They used the prior legal standard to find that Student's disability did not impair his ability to understand the impact and consequences of his behavior or his ability to control his actions. Student's disability of OHI has at its heart limited vitality, strength and alertness, in this case impacted primarily due to ADHD. In order for the disability to be found to have a direct and substantial relationship to a child's conduct, many factors are involved. Pursuant to Factual Findings 20, 21, 22, 23, 24, and 25, District properly considered factors including whether Student understood school rules, demonstrated over time that he could control his conduct, plan, cooperate, deal with challenge and stress, and whether he possessed problem-solving strategies. Factual Findings 15 and 24, in particular,

[14] As noted in Factual Finding 2, District has already agreed to and has already begun an FBA assessment of Student, without waiting for a formal expulsion.

support the conclusions of the District that Student behaved well in classrooms with no disciplinary incidents with teachers (aside from the incident of October 7), did not exhibit impulsivity problems, performed well in gainful employment, as well as on the basketball court in varsity competition, and was capable of formulating and implementing plans to catch up in school credits by succeeding in summer school.

23. Although the manifestation team applied the incorrect legal standard as to the causal connection between the conduct and the disability during its review, its error was harmless. By evaluating numerous relevant factors, District, by implication, answered in the negative the narrower, more specific question of whether Student's conduct was *caused by or had a direct and substantial relationship to his disability*. Pursuant to Factual Finding 25, the school psychologist and relevant teachers all found Student performing well in school, focused and able to plan and control his actions. Student's disability manifested itself in high school primarily as anxiety, lower academic performance, processing delays, study skill problems, and difficulty staying on track. In the social/emotional and behavioral realms at issue, while he suffered anxiety, Student was well-liked, and cooperative, with no classroom disciplinary problems on an on-going basis that would suggest an inability to control one's conduct. There is little competent evidence to support a finding that Student's OHI played any significant role in the incidents of October 17, 2005. Although Student had a prior history of aggression and altercations in his younger years, as found *supra*, District's records of his high school performance showed that he had made significant progress academically and behaviorally since attending high school, with the limited exceptions found.

24. Pursuant to Factual Findings 21 and 22, the behavioral incidents of October 17, 2005 were not precipitated by the sudden, unpremeditated impulsivity of a Student troubled with repetitively impulsive or uncontrollable behavior. Student did not suddenly lash out at someone for no apparent reason due to an impulse triggered by the OHI disability. Rather, Student learned about a very unsettling assault on his girlfriend one day before the incidents. He had a day before attending school on Monday, October 17, to think about the information, and take steps to release his anger and concerns in a positive way. Student admitted that, in the confrontation, he felt threatened and felt that the first pupil was making him a liar. He had choices he could have made, but failed to make them. He acknowledged wrongdoing to Ms. Owen, and knew he had made a mistake. The unique mitigating circumstances in this case may be considered by District.

25. It is conceivable that Student's disability had some distant role in influencing his choice to confront the pupils and physically interact with them. But no evidence was presented to support a finding that Student's OHI disability "caused" his conduct, as in being the core reason for that conduct under the new federal standard, or that the OHI disability had a direct and substantial relationship to the conduct. Student had reason to confront the pupil, and reason to lose his temper in anger, but he also had demonstrated the skills and abilities to overcome those choices for the most part through his high school years. No evidence supported the suggestion that Student's reported anxiety or other minor manifestations of his disability left him unable to control his impulses. Despite some evidence of aggression extrapolated from his history, any relationship between Student's

disability and what occurred on October 17, 2005, was at best the kind of attenuated relationship that does not exempt Student from appropriate disciplinary action. (*Doe v. Maher, supra,* at 1482.)

ORDER

1. Petitioner's request for relief from District's manifestation determination is denied.

2. District's expulsion proceedings may go forward.

3. Pursuant to 20 U.S.C. section 1415(k)(1)(A), District may consider any unique circumstances on a case-by-case basis in determining whether a change of placement order would be appropriate.

PREVAILING PARTY

District prevailed on all issues for hearing in this case. (Ed. Code § 56507, subd. (d).)

NOTICE OF APPEAL RIGHTS

The parties are advised that they have the right to appeal this decision to a state court of competent jurisdiction. Appeals must be made within 90 days of receipt of this decision. Or, a party may bring a civil action in United States District Court. (Ed. Code § 56505, subd. (k).)

DATED: March 24, 2006

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DEIDRE L. JOHNSON
Administrative Law Judge
Office of Administrative Hearings

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENTS ON BEHALF OF STUDENT, v. WESTMINSTER SCHOOL DISTRICT.	OAH CASE NO. 2010110730

DECISION

Elsa H. Jones, Administrative Law Judge, Office of Administrative Hearings (OAH), heard this expedited matter on December 14, 15, and 16, 2010, in Huntington Beach, California.

Student was represented by Brian R. Sciacca, Attorney at Law, of Champlin & Sciacca, LLP. Student's Mother (Mother) and Father (Father), (collectively, Parents), were present on all days of hearing.

District was represented by Caroline A. Zuk, Attorney at Law, of the Law Office of Caroline A. Zuk. Leisa Winston, Administrator, Student Services of the Westminster School District (District), and Robyn Moses, Program Director of the West Orange County Consortium for Special Education (WOCCSE), the special education local plan area (SELPA), were present on all days of hearing.

Student filed his expedited request for due process hearing (Complaint) on November 22, 2010. Sworn testimony and documentary evidence were received at the hearing, and the matter was submitted at the conclusion of the hearing on December 16, 2010. District's winter break commenced on December 20, 2010, and continued through December 31, 2010.

At the request of the parties, the parties were permitted to file written closing briefs by no later than 5:00 p.m. on December 20, 2010. The parties timely filed their written closing briefs.

ISSUES[1]

1. Whether the District's decision to move Student to an interim alternative educational setting (IAES) at Rossier Park Elementary School (Rossier) for no more than 45 school days was supported by the special circumstances of serious bodily injury;

2. Whether the District's decision to move Student to an IAES for no more than 45 school days was prohibited by the settlement agreement between the parties dated December 15, 2009; and

3. Whether the IAES at Rossier was an appropriate placement for Student so as to meet his unique needs.

Student requests an Order that the District may not place Student in an IAES and that Student return to his agreed-upon placement at Hayden Elementary School (Hayden).

FINDINGS OF FACT

General Background and Jurisdictional Matters

1. Student is a six-year-old boy who, at all relevant times, has resided in the District with Parents. He most recently attended Hayden, located in the District, where he was in the first grade in a special day class (SDC). He has not attended any school as of November 3, 2010. He has been eligible for special education as a student with autistic-like behaviors since preschool. He has had behavioral and emotional difficulties since preschool.

Settlement Agreement

2. On December 15, 2009, Parents, on the one hand, and the District and the District's special education local plan area (SELPA), on the other hand, entered into a settlement agreement (Settlement Agreement) to resolve a due process complaint that District had filed regarding Student's educational program. There was no evidence that the Settlement Agreement was entered into at a resolution session or mediation. Parents were not represented by counsel with respect to the negotiation of the Settlement Agreement, but the District was. The Settlement Agreement resolved all disputes between the parties at that time regarding Student's educational placement and services. In particular, the Settlement Agreement provided that Student's educational program for the period from January 4, 2010, through December 31, 2010, shall include placement in a mild to moderate kindergarten to second grade SDC at Hayden, five days per week, from 8:00 a.m. to 2:00 p.m., on Mondays, Tuesdays, Thursdays, and Fridays, and from 8:00 a.m. to 1:05 p.m. on Wednesdays. This schedule would apply except when Student would be removed from the SDC to participate in

[1]The issues have been refined from those set forth in the Prehearing Conference Order, to more accurately reflect the evidence produced at the hearing.

the related services specified in the Settlement Agreement. The Settlement Agreement also provided that any modifications to the agreement must be in writing and signed by each party to the Settlement Agreement. The Settlement Agreement was never modified using this procedure. Alternatively, the Settlement Agreement provided that any modifications to the Student's educational program and services as set forth in the Settlement Agreement must be agreed to unanimously by the individualized education program (IEP) team. The Settlement Agreement included a provision that an IEP meeting would occur on or before March 20, 2010, and the annual IEP meeting would occur on or before December 30, 2010.

3. The Settlement Agreement provided that the parties waived their rights to initiate a legal proceeding, including a special education due process hearing or a compliance complaint with the California Department of Education regarding Student's education from September 1, 2009, through December 31, 2010, except as may be necessary to enforce the Settlement Agreement. The Settlement Agreement did not mention discipline of the Student by the District, and contained no explicit waiver of the District's right to take disciplinary action against Student. In addition to Parents, the Settlement Agreement was executed by Ms. Winston on behalf of the District, and by Ms. Moses on behalf of the SELPA.

4. At hearing, Mother was aware only that the Settlement Agreement did not prohibit the District from removing Student from his placement for disciplinary proceedings for illegal conduct, such as for drugs and weapons-related offenses. She testified that, had she known that the District could remove Student from his placement for hitting, kicking, or biting, despite the Settlement Agreement, she would not have entered into the Settlement Agreement. Mother testified that District knew of Student's proclivity for serious assaultive behaviors when it entered into the Settlement Agreement, as the District had disciplined Student for assaultive behaviors when he was in preschool. Mother presented no details as to the circumstances surrounding such discipline, or when it was imposed. Ms. Winston, the District administrator, testified that District had no documentation that Student had been disciplined at school prior to the current 2010-2011 school year. Student produced no documentary evidence of any discipline imposed upon Student by the District prior to the 2010-2011 school year. Under these circumstances, Ms. Winston's testimony that Student had not been disciplined by the District prior to the 2010-2011 school year is more persuasive than Mother's.

Student's IEP of March 4, 2010

5. In January 2010, when Student was five years old, he entered the SDC at Hayden taught by Janika Faulkner. Ms. Faulkner's SDC was for students with mild to moderate disabilities. Ms. Faulkner has been a special education teacher for over 12 years as of the time of the hearing. She has taught a kindergarten to second grade SDC at Hayden for over six years as of the time of the hearing. She received her B.A. in education/special education, kindergarten through grade 12 in 1998 from Pfeiffer University in North Carolina. She received her M.A. in education, curriculum and instruction, in 2007 from Concordia University, Irvine, California. She has received additional training in a variety of subjects, including autism, Pro-ACT (Professional Assault Crisis Training), conflict management, and

classroom management. She was elected by her peers at Hayden as Teacher of the Year in 2010.

6. From the time Student entered the class in January 2010, through October 2010, Student engaged in throwing, hitting, kicking, and biting behaviors on a daily basis. He also had a tendency to run away from authority. He would elope from the classroom, but not from campus.

7. On March 4, 2010, when Student was five years old and in kindergarten, the District convened an IEP meeting pursuant to the Settlement Agreement. The team included Parents; Ms. Winston, the District's administrator; Carolyn Hunter, the school psychologist and behavioral intervention case manager (BICM); Ms. Faulkner, the special education teacher; Robyn Moses, the SELPA Program Director/BICM; as well as an autism specialist; a general education teacher; an occupational therapist; and a speech pathologist.

8. Ms. Hunter has been a school psychologist since 2007, and she has been employed as such by the District since then. She received her B.A. in psychology from California State University, Long Beach, in 2003, and her M.A. in school psychology in 2006 from Alliant International University in Irvine, California. She holds a California Professional Clear Pupil Personnel Services Credential in school psychology. She became a BICM in May 2010.

9. Ms. Moses, the SELPA Program Director/BICM, has been a California school psychologist since 1989, a Pro-ACT instructor, and a presenter on autism, manifestation determinations, and behavior and emotional disorders in the school environment. She received her B.S. in child development with a minor in psychology in 1987 from California State University, Northridge, and her M.S. in educational psychology and counseling in 1989 from the same institution. She holds a Clear Pupil Personnel Services Credential; an Administrative Services Credential, and a Professional Clear Administrative Services Credential.

10. The team noted Student's eligibility of autism and that Student had good academic skills. Parents were concerned that Student's academic and emotional needs were not being met at school. Mother disagreed with the eligibility of autism, and wanted Student to be eligible under speech or language impairment, and hard of hearing, with a secondary disability of attention deficit hyperactivity disorder (ADHD). The team determined that Student had unique needs in the areas of communication development, gross motor development (sensory processing), and social/emotional development. In the area of health, according to Parent report, Student had demonstrated seizure activity. Parent reported that Student's medications were being adjusted. The team noted that Student's behavior impeded his learning or that of others, and that he required a behavior support plan (BSP), a behavioral intervention plan (BIP), and behavior goals. He was expected to meet the same standards of curriculum content mastery as a typical student in the classroom, with accommodations. The team formulated a total of 13 goals, to address sensory processing, sound production-imitation, transitioning from one activity to another, turn taking, safety,

following teacher's lead, following directions, attention, functional communication, self-regulation, oral motor (demonstration of voluntary lingual movements to improve lingual strength and range of motion), expressive language, and self-calming. With respect to the description of the goals regarding transitioning, self-regulation and self-calming, the IEP team noted Student's aggressive behaviors, such as biting, hitting, kicking, and throwing objects, as well as eloping from the classroom.

11. Mother disagreed with various aspects of the team's conclusions regarding Student's needs, and did not consent to the implementation of all of the goals. Mother consented to implement the sensory processing goal for no more than 30 days, and disagreed with the turn-taking goal, the following directions goal, the functional communication goal (to the extent it included the use of functional signs), the self-regulation goal, and the oral-motor goal (as written). The Student's teachers and service providers only worked on the goals to which Mother agreed.

12. The IEP team also offered Student related services. Student was to receive speech and language (LAS) services twice per week for 30 minutes per session. One session was to be in small group, and one session was to be individual. Student was also to receive occupational therapy (OT), on a consulting basis, one time per week, for 15 minutes per session. The IEP also provided that Student receive intensive individual instruction in the form of applied behavior analysis/discrete trial training (ABA/DTT) four times per week, in a separate classroom, for 30 minutes each session. The team provided that supervision of the ABA/DTT individual instruction would occur one time per month, for 90 minutes.

13. The team reviewed a report of a functional behavior assessment of Student and a proposed BSP. Since Student had demonstrated behavior problems, the team developed an interim BIP and proposed to conduct a functional analysis assessment (FAA). Parent refused to consent to the FAA.

14. The BSP stated that when Student was given a specific demand/task request, when he transitioned, or when he was overstimulated, he displayed aggressive behaviors toward staff and peers, such as throwing objects, hitting, kicking, pushing, and biting. He also demonstrated eloping behaviors such as getting out of his seat, running around the classroom, and running out of the classroom. The BSP listed replacement behaviors including self-calming strategies such as counting down, using his break card to request a break, and using supports to communicate wants and needs. The staff would prompt Student with a "first-then" card. Student would earn tangible reinforcers through a token system. The BSP was to be implemented by the special education teacher, the school psychologist, instructional assistants, the speech pathologist, occupational therapist, and ABA/DTT provider. Parents would be informed of all behavioral incidents every three months. The team stated that further information on Student's behaviors, and the interventions for them, would be determined by the FAA.

15. The interim BIP drafted by the IEP team referred to Student's results on previous District assessments. The team noted that Student was taking Lamictal to prevent

seizures and Concerta for his medically-diagnosed ADHD. The team did not know the consistency of the administration of these medications. The team also noted that Student had been diagnosed with Eustachian tube dysfunction, and was prescribed an allergy decongestant. The team noted that this condition could be associated with intermittent hearing loss. The team noted that the District's speech and language assessment demonstrated that Student's overall language skills were significantly delayed when compared to his same age peers. Based on the Motivational Assessment Scale (MAS) Student was motivated by escape and tangible reinforcement. Parents requested a copy of the MAS protocols. The team listed a variety of reinforcers. The team also recommended a variety of special behavioral interventions regarding Student's hitting, kicking, and biting behaviors, ranging from evasion techniques, two-person escorts to guide Student away from the area, and two-person seated restraint of arms. Parents did not consent to the implementation of the interim BIP.

April 30, 2010, Amendment IEP Meeting

16. On April 30, 2010, the District convened an IEP meeting to discuss the results of Student's FAA and his proposed BIP. The IEP team included Parents, Ms. Moses, Ms. Faulkner, Ms. Hunter, a regular education teacher, and an autism specialist. The team offered psychological services on a consulting basis for one time per week, at 30 minutes per session, during which the school psychologist would consult on a weekly basis with Student's classroom teacher regarding Student's BIP. Parents did not agree to implement the BIP at that time, and did not stay for the entire meeting. In September, 2010, Parents agreed to implement portions of the BIP.

Events of November 2, 2010

17. Student's assaultive behaviors became more severe in June and July 2010, continuing into fall 2010. In fall 2010, when Student turned six years old, he was still attending Ms. Faulkner's SDC at Hayden, where he was in first grade and accessing first grade instructional materials. He was verbal. There were 16 children in the class, and four adults, including Ms. Faulkner. Student had a difficult time following school procedures.

18. During October 2010, Parents were in the process of adjusting Student's medication. Student's behaviors escalated throughout October. During this time, Parents and Ms. Moses were also discussing Student's placement, in anticipation of the termination of the Settlement Agreement, by its terms, on December 31, 2010. In this regard, District had attempted to schedule an IEP meeting to discuss Student's placement. Mother had indicated to the District that she was available for such a meeting on November 10, 2010.

19. On Tuesday, November 2, 2010, Parents ceased giving Student his Concerta. Student arrived at school that day at approximately 8:00 a.m. Later in the morning, Ms. Faulkner attempted to have Student clean up and go to lunch. Student jabbed his pencil on her arm several times. Then, when he was several feet away from her, she asked him to clean up and he said, "No," ran towards her, and head butted her in the left part of her chest

with all of his force. The blow knocked the wind out of her, and she felt she could not breathe. She did not feel pain then. She did not demonstrate her discomfort, since her training had taught her to focus on keeping the child safe and calm, and that if she showed her distress, the child's behaviors could escalate. Either she or her classroom aide then called Ms. Hunter, the school psychologist, to come to the room. Ms. Hunter had worked with Student directly, and also consulted with Ms. Faulkner once or twice a week regarding Student. When Ms. Hunter arrived, Ms. Faulkner sent the aide out to deal with the other children. Student began to throw things in the room. Ms. Faulkner and Ms. Hunter tried to calm him by various methods, including taking his shoes off, and having him squeeze Ms. Faulkner's hands. They tried to encourage him to put on his shoes and go to the room where he received his DTT therapy for a break. They thought they could calm Student in the DTT room, and it would be safer for the other children if Student was temporarily taken from the vicinity. They both escorted him to the DTT room. There was a discrepancy in Ms. Faulkner's and Ms. Hunter's testimony as to whether Student willingly went to the DTT room during the incident. In view of the rather intense event, their lack of consistent recall on this relatively minor point did not adversely reflect on the credibility of either witness.

20. When they arrived at the DTT room, Ms. Reed, Hayden's principal, and Mark Murphy, Hayden's assistant principal, were at the door, waiting for Mother to arrive. At the DTT room, Ms. Hunter and Ms. Faulkner were careful that only one person spoke at a time, which is another calming strategy. Ms. Hunter sang to him, and engaged him playing with a toy car. At some point while Ms. Hunter was playing with Student, Student began to hit Ms. Hunter with the cars, and when she attempted to protect herself, he bit her once in the arm. Later, when Student was on the floor and attempting to kick Ms. Faulkner, he bit Ms. Hunter in the other arm when she attempted to block the kick. Ms. Hunter sustained pain at the time of the bites, but did not scream aloud when she was bitten, as, like Ms. Faulkner, she had been trained not to display pain or stress to Student during a behavioral event. Ms. Faulkner and Ms. Hunter did not learn of each other's injuries until after the event.

21. Student threw items and ran in the room. Ms. Faulkner engaged him in coloring, but he soon began to throw toys again. Ms. Faulkner felt the situation was dangerous. She kneeled to bring herself closer to Student's height. While she was kneeling, Student kicked her in the center of her chest. She felt pain but she did not scream or show any discomfort, pursuant to her training. Then, while she was kneeling to get to his level, he again threw toys. Ms. Hunter was sitting in a chair at that time, and Student went over to hug her. His behavior was erratic during this event, as he was loud and overactive at times, and then crying at other times. Ms. Faulkner was able to engage Student in coloring again, and then Mother arrived.

22. At some point during the event, Mother called the school, to check on how Student was doing without the Concerta. She spoke to Ms. Reed, the principal, who advised her that Student was having a "hard day." Mother advised that she would come to school and pick up Student. When Mother arrived, Student was sitting in a chair in the DTT room, very limp and lethargic. Ms. Reed, Ms. Faulkner, and Ms. Hunter described to her what had happened, but Mother "zoned out" and was not able to recall what they told her, as she was

concerned about Student's condition. Ms. Hunter showed her the bite marks on her arms. Mother noticed they looked like red bruises, but did not notice any bleeding. Mother did not observe that Ms. Hunter or Ms. Faulkner was in pain. Rather, Ms. Faulkner and Ms. Hunter seemed more concerned about Student's well-being than their own. Mother and Student left school after the event.

23. As a result of the incident, District suspended Student for five school days, commencing on November 4, 2010. District timely sent Parents notice of the suspension, which specified that Student had violated Education Code section 48900, subdivision (a)(1) [causing or attempting to cause, or threatening to cause physical injury to another person]; section 48900, subdivision (k) [disrupting school activities or otherwise willfully defying the valid authority of teachers or other school personnel engaged in the performance of their duties]; and section 48915, subdivision (a)(1) [willfully using force or violence upon the person of another, except in self-defense].

Treatment of Injuries Sustained by Ms. Faulkner and Ms. Hunter

24. After Student had been subdued and Mother arrived at school, Ms. Reed advised Ms. Hunter and Ms. Faulkner to receive medical attention, and the two of them left together, at about noon, to go to Memorial Prompt Care (Prompt Care), the medical provider for the District. Ms. Faulkner would have sought medical care on her own even if Ms. Reed had not advised her to do so.

Ms. Faulkner's Injury and Treatment

25. While Ms. Faulkner was at Prompt Care, she began to feel pain in her chest. She had a bruise on her chest. She had an x-ray, which showed no broken bones. The doctor advised her that she had suffered an internal contusion. There was no medical evidence as to whether the contusion was caused by the head butt, the kick, or both. The doctor placed Ms. Faulkner on disability for the following workday, and prescribed both prescription-strength ibuprofen, to be taken two times per day and Vicodin, to be taken four times per day. She took them as prescribed.

26. Ms. Faulkner went home. During the evening, she felt heaviness and discomfort in her chest. She could not raise her left arm. She woke up at 3:00 a.m., and the pain was bad. She rated it as a 10 on a scale of 1 to 10. She took a Vicodin. Ms. Faulkner went back to Prompt Care at 8:00 a.m. on November 3, and was examined by a different doctor. The doctor wanted to prescribe stronger pain medications, but Ms. Faulkner refused to take them. She was told to consistently take her pain medications, and to return to Prompt Care the next day, November 4. The doctor told her that she had a chest contusion, and was unable to work. She returned to Prompt Care on November 4, where she was examined by another doctor. She was told to continue to take her pain medications, and to return to Prompt Care on Monday, November 8, and not to return to work in the meantime. Ms. Faulkner returned to Prompt Care on Monday, November 8, at which time she was cleared to return to work Tuesday, November 9. At that time, she felt well enough to return to work on

November 8. She was no longer in pain, and has not had pain from that time forward. She returned to work on Tuesday, November 9, 2010.

27. After the injury, Ms. Faulkner did not need anyone to care for her. She felt nausea and dizziness. She could feed herself, but she could not cook. The bruise resolved in about 48 hours. She took the Vicodin and prescription-strength ibuprofen for four days, but she did not think they were effective at first. She stayed at home, except for her medical visits, until Friday, November 5, when she went to San Diego with a friend. While there, she went to dinner, and walked around, but she felt "miserable" so she returned home the next day. She characterized her injury from the Student's kick as the worst injury she had ever had in terms of the pain it caused her.

Ms. Hunter's Injuries and Treatment

28. At the time of the incident, Ms. Hunter was wearing a Kevlar sleeve on each arm, and a long-sleeved sweatshirt. A Kevlar sleeve is a sleeve that extends to the upper arm, and was designed to protect the wearer from injuries such as those that may be caused by a bite. The bite on her left arm bled. Both bites left bruises on her arms. When she went to Prompt Care immediately after the incident, the doctor wrote a note saying she could go to work the next day. However, her arms hurt and swelled after the visit to Prompt Care. She suffered pain that night, and it interfered with her sleep, so she returned to Prompt Care on the morning of November 3rd. The doctor gave her prescription pain medication, which she believed was Tylenol and codeine, and told her she could go back to work on November 4th, but to restrict her work duties. After her visit to Prompt Care on November 3, she rested and iced her arm, and went out to have her hair cut. She returned to work on November 4, and did not miss any additional days of work due to the injuries. On November 9, she returned to Prompt Care for a check-up. The bruise on her right arm faded in approximately one-and-one-half weeks. There was no scarring. The bite on her left arm, which broke through the skin, caused bruising and swelling, which faded in approximately one week. The bite left a scar of approximately one-quarter of an inch in diameter. At the time of the hearing, Ms. Hunter was scheduled to have a blood test to determine whether she has contracted any diseases from Student's bites.

29. The District prepared reports pertaining to both Ms. Hunter's and Ms. Faulkner's injuries pursuant to California law for use by the District's insurance company, as a step in processing their potential worker's compensation claims.

Meetings of November 15 and 18, 2010

30. On November 5, 2010, District sent to Parents a notice that Student's manifestation determination IEP had been scheduled for November 10, 2010. This was the date to which Mother had previously agreed that an IEP meeting could be held to discuss Student's placement. However, upon receipt of the notice, Mother did not agree to the date, as she wanted the entire IEP team present. Therefore, on November 9, 2010, the District sent notice that the manifestation determination meeting would be held on November 15, 2010.

Prior to the meeting, Ms. Moses contacted Rossier, which is a certified California NPS, to investigate the possibility that Student could be placed there, and sent Student's IEP and BIP to Rossier, with identifying information redacted.

31. The District convened the manifestation determination meeting on November 15, 2010, as noticed. The attendees at the meeting included Mother, Ms. Faulkner, Ms. Hunter, Ms. Winston (the District's administrator), Linda Reed (Hayden's principal), Mark Murphy (Hayden's assistant principal), and Ms. Moses (the SELPA Program Director/BICM). The team, including Mother, permitted Ms. Hunter to leave the meeting before it ended. Mother stayed at the meeting for approximately 30 to 40 minutes, and was present for at least part of the placement discussion. Prior to the meeting, Ms. Winston, Ms. Moses, Ms. Hunter, and Ms. Faulkner met to discuss the November 2 incident, Ms. Faulkner's and Ms. Hunter's injuries and a possible placement for 45 school days to Rossier or at other District SDCs due to those injuries, and other strategies for handling Student's behavior at Hayden. There was no evidence that the District had predetermined the outcome of the meeting, or made any decisions to present the District's position on a"take it or leave it" basis.

32. At the manifestation determination meeting, the team noted that, during the November 2, incident, Student was removed from the classroom for assaultive behavior, and that when redirected he would comply for a short period of time before continuing to assault staff members. The team noted that Student's repeated head butting caused severe bruising to the chest area of one staff member, and two staff members were stabbed repeatedly in their arms with a pencil.[2] Further, Student bit one staff member through a Kevlar sleeve and sweatshirt, breaking the skin on the staff member's arm. The team reviewed the current IEP, assessment results, the behavior plan, Student's current school performance, parent input, teacher observations, and medical information. The team determined that Student's conduct was related to his disability and unique needs in communication and behavior. The meeting notes stated that Mother believed Student's conduct was not caused by or substantially related to Student's disability. The team determined that Student's IEP had been fully implemented.

33. The manifestation determination meeting notes reflected Parent's statement that Student's Concerta had been discontinued, and that his Lamictal dosage was changing weekly. The notes stated that District determined to place Student in an IAES at Rossier. Parent had arranged to visit the school the next day. The District would continue related

[2] This description of the events of November 2, 2010, is not entirely consistent with the witness testimony at the hearing. There was no evidence at hearing of "repeated head butting," and there was no evidence that Student repeatedly stabbed two staff members with a pencil. The description fails to include that Ms. Faulkner was kicked in the chest. However, the description accurately conveys the injuries to the chest and the bites that school staff sustained, which were the most significant factors to convey at the meeting. No party raised these discrepancies as an issue at hearing.

services pursuant to the IEP of March 4, 2010, and the District would also provide transportation.

34. The team was told that staff received medical treatment after the November 2 event and had to take disability leave. Ms. Moses explained the disciplinary process, and the change of placement to an IAES. Mother contended that the Settlement Agreement prevented the District from unilaterally changing Student's placement, but the District members of the team explained that the change in placement was necessary, despite the Settlement Agreement, in view of the special circumstances presented by Student's behavior, which jeopardized the safety of Student and staff. The team discussed whether the District was meeting Student's needs, and discussed a placement change on an interim basis to see how Student would manage in another environment. The team felt that Rossier was appropriate as it had a smaller class size, well-trained staff, could provide specialized instruction but kept Student with peers at his academic level, and Rossier could implement Student's behavior plan. Mother did not agree with the proposed placement, but wanted time to make a decision. District offered Rossier as Student's long-term placement, including his "stay put" placement, if events proved that it was an appropriate placement and if Parents so desired. At hearing, the evidence showed that District made this offer to address Mother's reluctance to place Student in a short-term, interim placement.

35. The team also considered several NPS's. Parents suggested placement in a Montessori school in Santa Ana. The team also invited Mother to visit other SDCs in the District.

36. Mother did not agree with the manifestation determination and the IAES placement, as she felt that Student's conduct was due to his medication changes and was not a manifestation of his disability. One of the Parents wrote a note on the manifestation determination meeting notes, stating, "The school has informed me/us today that they have no classes for [Student] within their school district." During the meeting, Mother became very frustrated, because she felt that the District was not including her comments in the meeting notes, and she ripped up several pages of the District's paperwork pertaining to the meeting.

37. At hearing, there was conflicting evidence as to the degree to which the team discussed the term "serious bodily injury" and its definition at the meeting. Ms. Hunter and Ms. Faulkner testified that the term and the circumstances which would constitute "serious bodily injury" were discussed; Mother testified that the term was not mentioned at the meetings. It is not necessary to resolve this conflict, as Mother was able to meaningfully participate in the meeting, and she understood its significance and the significance of the decisions made at the meeting.

38. The District convened a follow-up meeting on November 18, 2010, to include a general education teacher, and because Parents had asserted that they had not received proper notice of the November 15 meeting. The attendees at the meeting included Mother, a general education teacher, Ms. Faulkner, Ms. Hunter, Ms. Reed, and Ms. Moses. The notes

from the meeting contained an identical description of the Student's behavior, and reflected that the team had reviewed and considered the same information as was reported in the notes from the November 15, 2010, meeting. The team modified the language regarding the cause of Student's conduct as stated in the November 15, 2010 meeting notes to state that Student's aggressive behavior was related to his autism, diagnosis of ADHD, and possibly medications.

39. Mother reported that Student's behaviors were intense and aggressive at home during October 2010, but he had exhibited no such behaviors for approximately a week. Parents considered the November 2, 2010, event to be attributable to changes in Student's medications. The team considered an undated letter from John Sarrouf, D.O., of Pediatric Care Medical Group, Inc., regarding Student's medications, which was received on November 17 and November 18. The letter stated that Student was previously on Concerta, which caused a side effect of aggressive behavior. The letter stated that Student was switched to Intuniv, without side effect, and Mother had reported he was doing well on this new medication. The team requested more information from Parents regarding Student's medications, as well as an authorization to release information so that the District could follow up with the doctor. Parent informed the team that Student had been on Intuniv for almost three weeks, and Intuniv and Lamictal were his only medications.

40. Barbara Casey, the Executive Director/Principal at Rossier, participated in the meeting telephonically. The team answered Parent questions regarding pat-down, transportation, availability of computers, the classroom routine at Rossier, and the size of the classroom. It was anticipated that the bus ride would be approximately one hour to one hour and 15 minutes each way, using Rossier's bus. The evidence at hearing demonstrated that until Student was placed at an IAES, District could not ascertain the precise method of transportation it would provide, and the length of Student's trip to and from school. However, District had agreed to provide transportation as well as the other related services in Student's IEP at the manifestation determination meetings, and was capable of providing Student efficient transportation to and from Rossier.

41. The team considered Beacon Day School (Beacon) as a possible placement. Mother had observed Beacon since the November 15 meeting. Beacon was a California certified NPS, but at no relevant time has the District had a contract with Beacon. Parents requested that Beacon be Student's placement, with a one-to-one aide. Mother stated that the bus ride would only be 30 minutes each way. District and SELPA team members expressed concern regarding the academic levels and behavioral intervention used at Beacon based upon information provided by District and SELPA staff members, including Ms. Moses. District typically relied upon information from the SELPA in recommending placements, as the SELPA had more contact with NPS's. Specifically, the District members of the team believed that students were not working at grade level at Beacon, and that its behavioral intervention policies were overly physical. The team also discussed Student's needs and other SDC classes in the District for students with autism. Mother signed an authorization for release of information between the District and Beacon, so that the District could further explore Beacon as a placement. Parents refused to sign such an authorization pertaining to

Rossier. Instead, Mother wrote on the authorization form for Rossier that she did not want the school or the District to send any information to Rossier. At the end of the meeting, District agreed to place Student in an IAES for no more than 45 school days, and identified Rossier as that placement. Parents did not agree with the District's offer of placement at Rossier.

42. Student has not attended any school since he left Hayden on November 2, 2010. At hearing, Mother stated that Student was kept at home based on a doctor's recommendation. No document containing any doctor's recommendation or order was produced at hearing. After the IEP meetings, and while their Complaint was pending, Parents supplied District with a prescription slip dated November 18, 2010, of limited legibility, signed by Wissy Wallis, a nurse practitioner from CHOC Pediatric Subspecialty Faculty. The prescription requested that Student be allowed to stay home for 30 days while his medication was being adjusted. The District nurse followed-up with Ms. Wallis approximately one week prior to the hearing, after Parents authorized the District to contact her. Ms. Wallis reported to the school nurse that Student had not been examined since September 23, 2010, there was no current plan of care or plan to treat Student in the future, there was no evidence of seizures, and Ms. Wallis did not believe that Student was required to stay home. The school nurse also spoke to Dr. Sharouf, who reported that there were no restrictions on Student attending school. At hearing, Mother testified that if the District had offered Beacon as an IAES placement at the manifestation determination meetings, she would have sent Student there. This testimony is inconsistent with the contention that Student's medical condition required him to stay home from school for 30 days.

The IAES Placement at Rossier

43. Rossier only accepts students who are referred by school districts. It is certified by the state of California to serve students with several types of disabilities, including emotional disturbance, autism, and other health impaired, and it specializes in students with behavioral issues. Student's IAES was to be in a classroom that served children in first-grade, with a first-grade academic curriculum taught by a credentialed special education teacher and at least two instructional aides. Additionally, behavioral therapists would be in the classroom regularly. The school had a positive behavior system to reinforce appropriate behavior and to assist students in learning to behave in public school, so that the student's maladaptive behaviors will be reduced when the student returns to public school. Its teachers and staff have ongoing trainings in autism and behavior, including Pro-ACT training. Barbara Casey, Rossier's Executive Director and Principal, testified without contradiction that she had reviewed Student's IEP of March 4, 2010, and his BIP, and that Rossier could implement them. The evidence was also undisputed that Student would receive all related services provided in his IEP while at Rossier, and that District would provide any related services that Rossier could not provide, such as Student's ABA/DTT services. Rossier had a policy of "patting-down" all students' pockets upon their arrival at school, and did not allow backpacks. The evidence was uncontradicted that Rossier would be able to accommodate any discomfort Student may have regarding the "pat-downs," as well as Student's need for a transition object, including a backpack.

44. Mother objected to Rossier for several reasons. First, she had concerns for Student's safety. She believed that the classroom Student would be in at Rossier was not large enough to safely accommodate Student when he threw himself on the floor, as he had a tendency to do. There was no evidence that any child had been injured at Rossier in this manner due to the small size of the classroom. Mother was also concerned that Rossier kept the gate to its campus unlocked, and it sometimes swung open. The gate faced Tustin Street, a busy street, Student's classroom would be only 50 feet or so from the gate, and she feared he would elope and run out into the street. There was no evidence that Student had ever eloped onto a busy street, nor that any child from Rossier had ever eloped through its gate and into the street. In this regard, a sidewalk with a grass area and a parking lot were situated between the gate and Tustin Street. Second, Mother was concerned that Student would not be able to tolerate the length of the bus rides to and from Rossier. When Student attended Hayden, he rode the bus to school, which was a 45-minute ride, and Parents would pick him up after school.

45. Mother was also concerned that Student would not tolerate Rossier's policies of "patting down" students pockets when they came to campus, and of not permitting backpacks. Student's backpack was his "transition" object. Finally, she did not think Student wanted to attend Rossier, because of an incident that occurred when he visited the campus with Mother on November 16. Student had reached for some candy in a bowl located on a counter, and Ms. Casey had removed the bowl, stating that the candy was only for staff. This hurt Student's feelings, such that Student hid under chairs for 10-15 minutes until several staff members coaxed him out.

46. Mother had visited Beacon with Student and favored Beacon. She felt that the concerns of the District and SELPA regarding Beacon were based upon misinformation. When she and Student visited, other students were friendly to Student, and he had spent several hours playing there with them. Furthermore, Beacon was closer to Student's home than Rossier, and Beacon was more accessible via surface streets than was Rossier. This was important to Mother, as Mother did not drive on the freeway. Mapquest directions reflected that both Beacon and Rossier were each approximately the same distance from Student's house, in terms of mileage.

LEGAL CONCLUSIONS

Burden of Proof

1. The petitioner in a special education due process hearing has the burden of proving his or her contentions at the hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-57 [126 S. Ct. 528].) As the petitioning party, Student has the burden of proof.

Issue 1: Whether There Was "Serious Bodily Injury" so as to Justify an IAES Placement

2. The Individuals with Disabilities in Education Act (IDEA), provides that the parent of a child with a disability who disagrees with any decision regarding placement in the IAES, or the manifestation determination, may appeal the decision by requesting an expedited due process hearing. (20 U.S.C. § 1415(k)(3); 34 C.F.R. § 300.532 (a)-(c).) In this case, Student contends that the District improperly disciplined Student by removing him from Hayden. Student contends that neither Ms. Faulkner nor Ms. Hunter sustained serious bodily injury so as to justify any disciplinary action. District contends that both Ms. Faulkner and Ms. Hunter sustained serious bodily injury, such that it could properly remove Student to an IAES for up to 45 school days.

3. Title 20 United States Code section 1415(k) and Title 34 Code of Federal Regulations, part 300.530 (2006), et seq., govern the discipline of special education students.[3] (See Ed. Code, § 48915.5.) In many instances, whether, and how, a special education student can be disciplined is dependent upon a determination at a manifestation determination IEP meeting as to whether the student's conduct was related to his disability. (20 U.S.C. § 1415(k)(1)(E),(F).)

4. The law also provides that an IEP team may place a student in an IAES for not more than 45 school days, regardless of whether the student's behavior is determined to be a manifestation of the student's disability, under any of three "special circumstances." These "special circumstances" include conduct involving drugs and weapons. Another of these "special circumstances" occurs when the student has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the supervision of the district. (20 U.S.C. § 1415(k)(1)(G); 20 U.S.C. § 1415(k)(2); 34 C.F.R. § 300.530 (g); 34 C.F.R.§ 300.531.) The term "serious bodily injury" for these purposes is the same as that found in title 18 United States Code section 1365(h)(3). (34 C.F.R. § 300.530(g)(3)(i)(3).) The term is defined as: bodily injury that involves a substantial risk of death; extreme physical pain; protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member, organ, or mental faculty. (18 U.S.C. § 1365(h)(3). "Serious bodily injury" is not simply a cut, abrasion, bruise, burn, or disfigurement; physical pain, illness, or impairment of the function of a bodily member, organ, or mental faculty. (18 U.S.C. § 1365 (h)(4).) Whether there has been a serious bodily injury is a question of fact that is determined based upon the totality of the circumstances of the injury. (See *United States v. Johnson* (9th Cir. 1980) 637 F.2d 1224, 1246).

5. The statute does not contain any objective indicia of "extreme physical pain," such as a particular time during which the pain must last, or that the injury that caused the pain must also cause scarring or disfigurement, or that the pain must be so severe as to require prescription medication or a doctor's visit. The failure of the statute to include

[3]All subsequent references to the Code of Federal Regulations are to the 2006 revisions, unless otherwise stated.

objective indicia with respect to "extreme physical pain" highlights the relatively subjective nature of pain.

6. Neither party cited any authority which further defines the term "extreme physical pain." Student cited several administrative law cases, which illustrated that the determination of the existence of "extreme physical pain" is dependent upon the facts of each case. For example, Student relied upon a California OAH case in which the ALJ found that when a student's conduct resulted in a mild concussion to one pupil, and a broken nose to yet another pupil, there was "no evidence" of extreme physical pain, substantial risk of death, or protracted injuries so as to meet the statutory definition of serious bodily injury. (*Student v. Tehachapi Unified School District*, (2006), OAH Case No. N2006010238.) As a special education administrative law decision, it is not binding authority. (Cal.Code Regs., tit. 5, § 3085.) Moreover, the case is not instructive on this issue. First, unlike in this case, neither of the injured victims testified, thereby supporting the ALJ's finding that there was "no evidence" of "extreme physical pain." Second, the ALJ's determination of this issue was dicta, as it was not necessary to a determination of the issues in the case. Rather, the issues of the case concerned the District's compliance with the procedural requirements of the IDEA in disciplining a Student, and whether the Student's conduct was a manifestation of his disability.

7. In this case, the evidence demonstrated that Student caused injury to Ms. Hunter, but the evidence did not demonstrate that Student's bites caused Ms. Hunter serious bodily injury. Ms. Hunter's injury did not cause her extreme physical pain. She was not prescribed any pain medication at first, and she returned to work on the second day after the incident. She managed to perform many of her daily routines after her initial visit to Prompt Care, and the single prescription medication she took resolved her pain. Her forearms were bruised, but the bruising resolved rather quickly and she was left with only a minor scar. Under these circumstances, Ms. Hunter did not suffer "serious bodily injury," whether defined as "extreme physical pain" or "protracted and obvious disfigurement" so as to constitute the special circumstances that are legally required to support the District's decision to place Student to an IAES for up to 45 school days.

8. However, the evidence demonstrated that Student's conduct caused Ms. Faulkner extreme physical pain. Ms. Faulkner's testimony was undisputed that she saw a physician three times in one week after the initial visit, due to the pain of her chest injury. Two prescription painkillers taken together did not alleviate her pain, and one of the doctors who examined her recommended she take additional doses of painkillers. Her activities were curtailed due to the pain from her chest injury. On doctor's orders, she was out of work for a week following the chest injury. Additionally, Ms. Faulkner's testimony that the pain she suffered was a 10 on a scale of 1-10, and that the pain she suffered made the kick to her chest the worst injury she had suffered in her life, was undisputed. Such testimony reflects that Ms. Faulkner suffered "extreme physical pain." Student contends that Ms. Faulkner did not define the "scale" she was using to describe her pain. In view of the subjective nature of pain, it is impossible to define it as one might a scale of objective conditions, such as temperature, pressure, length, weight, and the like. Ms. Faulkner's credibility with respect to

her pain is buttressed by the fact that she did not appear to exaggerate her condition. She admitted that she felt well enough to go to work on the Monday following the incident, but, on doctor's orders, did not return to work until Tuesday following the incident. Under these circumstances, Ms. Faulkner suffered "serious bodily injury," defined as "extreme physical pain," so as to constitute the special circumstances that are legally required to support the District's decision to place Student in an IAES for up to 45 school days. Acccordingly, the District was justified in removing Student to an IAES. (Findings of Fact 1-3, 17-41; Legal Conclusions 1-8.)

Issue 2: Impact of the Settlement Agreement on School Discipline

9. Student contends that the Settlement Agreement the parties entered into in December 2009, in which they agreed that Student "shall" be placed at Hayden, prohibited the District from changing Student's placement to an IAES without Parents' consent, as that would constitute a unilateral change in the terms of the Settlement Agreement. Student also contends that to allow the District to do so would violate the policy of the IDEA, which favors settlement agreements. District contends that the Settlement Agreement did not prohibit the District from temporarily changing Student's placement, as the IDEA grants District the authority to temporarily place students in an IAES for disciplinary purposes under specified circumstances. District contends that Student is not exempt from disciplinary procedures merely because his placement was agreed to in a Settlement Agreement rather than in an IEP meeting, and that District did not waive its authority to impose discipline pursuant to the IDEA and its regulations by entering into the Settlement Agreement.

10. OAH has limited jurisdiction to hear due process complaints to enforce the IDEA and the state Education Code, which does not extend to the enforcement of settlement agreements. Pursuant to Education Code section 56501, subdivision (a), a parent or school district may request a due process hearing with respect to the following issues: (1) there is a proposal to initiate or change the identification, assessment, or educational placement of the child or the provision of a free appropriate public education (FAPE) to the child; (2) there is a refusal to initiate or change the identification, assessment or educational placement of the child or the provision of a FAPE to the child; (3) the parent or guardian refuses to consent to an assessment of the child; (4) there is a disagreement between a parent or guardian and a district regarding the availability of a program appropriate for the child.

11. Education Code section 56501, subdivision (a) does not include the issue of a school district's alleged failure to comply with a settlement agreement. Rather, a compliance complaint pursuant to California Code of Regulations, title 5, sections 4600 et seq. is the appropriate means by which a student may address a school district's alleged failure to comply with a settlement agreement. (See *Wyner v. Manhattan Beach Unified School District* (9th Cir. 2000) 223 F.3d 1026.) Specifically, California Code of Regulations, title 5, section 4650, subdivision (a)(4), provides for the filing of such a complaint. However, there is authority that if the school district's violation of the settlement agreement may constitute a denial of a FAPE, OAH has jurisdiction. (*Pedraza v. Alameda Unified Sch. Dist.*, 2007 WL

949603 (N.D. Cal. 2007).) In this case, OAH has jurisdiction to consider the Settlement Agreement because Student contends the District's decision to change Student's placement to an IAES violated the Settlement Agreement and deprived Student of a FAPE.

12. As was stated in Legal Conclusion 4, a school district may place a student in an IAES for no more than 45 school days, regardless of whether the student's behavior is determined to be a manifestation of the student's disability, under "special circumstances," including when a student has inflicted serious bodily injury upon another person while at school. (20 U.S.C. § 1415(k)(1)(G); 34 C.F.R. § 300.530 (g); 34 C.F.R.§ 300.531.)

13. Well-established principles of contract law govern the interpretation and enforceability of settlement agreements. (*Miller v. Fairchild Indus*. (9th Cir. 1986) 797 F.2d 727, 733.) If a written agreement is not equivocal or ambiguous, "the writing or writings will constitute the contract of the parties, and one party is not permitted to escape from its obligations by showing that he did not intend to do what his words bound him to do." (*Brant v. California Dairies, Inc.* (1935) 4 Cal.2d 128, 134; see also 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 118 ["Ordinarily, one who accepts or signs an instrument, which on its face is a contract, is deemed to assent to all its terms. . . ."].)

14. The express terms of the Settlement Agreement do not address discipline of the Student by the District. However, among the well-established principles of contract law that apply to the Settlement Agreement is the principle that the object of a contract must be lawful, and may not conflict with either express statutes or public policy. (Civ. Code, § 1550; 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 420, p. 461.) Another principle is that a law established for a public reason cannot be waived by a private agreement. (Civ. Code, § 3513; 1 Witkin, Summary of Cal. Law, *supra*, § 679, p. 164.) Another principle is that performance of a contract is excused when performance is impracticable because of excessive and unreasonable difficulty or expense. (*Id.* § 842, p. 928.)

15. The IDEA is, in general, solicitous of the needs and rights of special education students, even in disciplinary matters. It provides that a student with a disability who violates a code of student conduct may be removed from school for a length of time in excess of 10 school days only if the student's conduct is not found to be a manifestation of his disability, and so long as the student is still provided a FAPE. If the student's conduct is found to be a manifestation of his disability, the District's options are more limited, and other procedures must be followed. (20 U.S.C. § 1415(k)(1)(C),(F).) However, the IDEA recognizes that a school district may remove a student with a disability from school for no more than 45 school days for certain illegal and dangerous conduct, even if the conduct was a manifestation of the student's disability. Thus, as was referenced in Legal Conclusion 4, if a student with a disability engages in specified conduct involving drugs or weapons, or inflicts serious bodily injury on a school employee in the school setting, that student's placement may be changed, regardless of whether that conduct was a manifestation of the student's disability. The exceptions to those portions of the IDEA that limit discipline of special education students reflects an acknowledgement of the public policy that society

cannot tolerate certain types of illegal and unsafe conduct in the school environment, even if such conduct is a manifestation of a special education student's disability. This public policy is supported not only by the ideals that schoolchildren should obey the law and not injure others. It is also supported by the practical reality, that, when students use drugs, brandish weapons, and cause serious bodily injury to others, there is a negative impact on a school district's abilities to provide a safe environment, to educate students, to attract and retain employees, and to be free of costly litigation. Therefore, to interpret the Settlement Agreement so as to constitute a promise by the school district not to change Student's placement even when he has caused serious bodily injury to a teacher would violate the public policy that underlies the statutory scheme of the IDEA statutes pertaining to discipline. Such an interpretation would also violate the contractual principle that the school district cannot waive a law established for a public reason.

16. Further, the defense of impracticability of performance of the Settlement Agreement could also apply to justify the District in changing Student's placement to an IAES. At the IEP meetings of November 15 and 18, 2010, the District determined that Hayden was not an appropriate placement for Student at that time, and that it would not be practicable for Student to continue to attend Ms. Faulkner's SDC, at least for a time.

17. Under these circumstances, the Settlement Agreement did not bar the District from changing Student's placement to an IAES. (Findings of Fact 1-46; Legal Conclusions 1-17.)

Issue 3: The Appropriateness of the IAES

18. Student contends that Rossier was an inappropriate IAES, as Rossier would not meet Student's unique needs in the areas of academics, safety, transportation, and transitions. District contends that Rossier was an appropriate placement, with trained personnel who could implement Student's IEP and BIP, and who could help Student decrease his maladaptive behaviors so that he could return to public school.

19. As was mentioned in Legal Conclusion 4 above, the IEP team determines placement when a student is removed to a 45-day IAES. (20 U.S.C. § 1415(k)(2).) A student who is removed from his current placement to an IAES must continue to receive a free appropriate public education (FAPE), so as to enable the student to continue to participate in the general education curriculum, although in another setting, and to make progress toward meeting the goals set forth in the student's IEP. (20 U.S.C. § 1415(k)(1)(D)(i); 34 C.F.R. § 300.530(d)(1).) Additionally, the IDEA requires that a child with a disability who has been removed to an IAES receive, as appropriate, behavioral intervention services and modifications so that the behavior for which the student has been placed in the IAES does not reoccur. (20 U.S.C. § 1415(k)(1)(D)(ii); 34 C.F.R. § 300.530(d)(1)(ii).) The IDEA does not require that parents consent to placement in the IAES, or that the District must place a student in the IAES that parents prefer. (See *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)

20. Pursuant to California special education law and the IDEA, children with disabilities have the right to a FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living. (20 U.S.C. §1400(d); Ed. Code, § 56000.) FAPE consists of special education and related services that are available to the student at no charge to the parent or guardian, meet the state educational standards, include an appropriate school education in the state involved, and conform to the child's IEP. (20 U.S.C. § 1401(9).) "Special education" is defined as specially designed instruction, at no cost to parents, to meet the unique needs of the student. (20 U.S.C. § 1401(29).) Similarly, California law defines special education as instruction designed to meet the unique needs of individuals with exceptional needs coupled with related services as needed to enable the student to benefit fully from instruction. (Ed. Code, § 56031.) The term "related services" includes transportation and such developmental, corrective, and other supportive services as may be required to assist a child to benefit from special education. (20 U.S.C. § 1401(26).)

21. In *Board of Education of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982), 458 U.S. 106 [102 S.Ct. 3034] (*Rowley*), the United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the substantive requirements of the IDEA. The Court determined that a student's IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. (*Id.* at pp.198-200.) The Court stated that school districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instructional and related services which are individually designed to provide educational benefit to the student. (*Id.* at 201.)

22. The evidence was undisputed that Rossier could implement Student's IEP, including his BSP and BIP, and that Rossier or District would provide Student's OT, LAS, and ABA/DTT services, thereby providing Student a FAPE. The evidence was also undisputed that Rossier's staff was well-trained in behavioral techniques, that staff had experience with children with numerous behavioral difficulties, and that staff would attempt to ameliorate Student's behaviors so that he could return to Hayden. With respect to safety, there was no evidence that any child had injured himself in Student's proposed classroom at Rossier because the classroom was too small, or that any child had eloped from Student's proposed classroom at Rossier, and ran into the street. Further, there was no evidence that Student had ever eloped onto a busy street. The evidence also demonstrated that Rossier would be sensitive to Student's possible unwillingness to be "patted down," and to his need for a backpack as a transition object. With respect to a transition plan, there is no legal authority to support the contention that such a plan is required for a disciplinary change in placement. Furthermore, the evidence at hearing demonstrated Student's transitioning difficulties occurred during transitions between activities, not between school sites. Finally, the evidence at hearing demonstrated that Rossier was reasonably close to Student's home, and that the District would be able to arrange for efficient transportation to and from Rossier.

Under these circumstances, Rossier was an appropriate IAES for Student. (Findings of Fact 1-46; Legal Conclusions 1-8; 18-22.)

ORDER

All relief sought by Student in his Complaint is denied.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. District prevailed on all of the issues heard and decided in this matter.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56506, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within ninety (90) days of receipt.

Dated: January 13**,** 2011

/s/
ELSA H. JONES
Administrative Law Judge
Office of Administrative Hearings