

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

FORT BRAGG UNIFIED SCHOOL DISTRICT,

OAH CASE NO. 2008100507

v.

PARENT on behalf of STUDENT.

DECISION

Deidre L. Johnson, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on November 13 and 14, 2008, in Fort Bragg, California.

Carl D. Corbin, attorney at law, represented the Fort Bragg Unified School District (District). Lura Damiano, the District's Director of Special Programs, was present during the hearing.

Student was represented during the hearing by his mother (Parent). In addition, Suzan Valley and Dr. Kim Smalley from the Redwood Coast Regional Center (Regional Center) alternated with each other as Student's and Parent's advocate throughout the hearing. Student was not present during the hearing.

The District filed its request for an expedited due process hearing on October 15, 2008. Oral and documentary evidence were received during the hearing. The record was closed and the matter was submitted for decision. On November 20, 2008, the ALJ reopened the record to admit a copy of the District's 2008-2009 academic calendar with supporting declaration, which was marked as Exhibit 34. On November 21, the District filed letters regarding an alternative placement at Turning Point, which were marked as Exhibit 35. Also on November 21, 2008, Student filed a response. Exhibits 34 and 35 were admitted into evidence and the record was closed.

ISSUES

1. Is maintaining the current special educational placement of Student substantially likely to result in injury to Student or to others?
2. If so, is the District's proposed placement at the Edgewood Residential Facility and Edgewood Nonpublic School (Edgewood), or a facility and school comparable to Edgewood, for not more than 45 school days, an appropriate interim alternative educational setting (IAES)?

FACTUAL FINDINGS

Background

1. Student was born in 1998, is now nine years old, and is in the fifth grade for the 2008-2009 school year. He has received special education and related services since preschool from the District under the educational disability category of Mental Retardation. He also has long had medical diagnoses of Down Syndrome and Attention Deficit Hyperactivity Disorder (ADHD).
2. Student's educational placements have been in special day classes (SDCs) for severely handicapped pupils, with designated instruction and services in speech and language. In addition, he has also had behavior support plans (BSPs) since preschool due to noncompliant and aggressive behaviors. Student's maladaptive behaviors have included verbal aggression such as threats and the use of profanities, and physical aggression including pushing, hitting, biting, and kicking peers, staff, and his mother, running away, sexualized behaviors, and knocking over and throwing personal property, such as school furniture and supplies.
3. During the 2007-2008 school year, Student was placed in an SDC for the severely handicapped at Dana Gray Elementary School (Dana Gray), taught by Julie Cho-Polizzi, an experienced special education teacher who had also taught him in third grade. The teacher was assisted by four classroom paraprofessionals.

Fourth Grade Behavioral Episodes

4. From the end of third grade in the spring of 2006, through that summer and into fourth grade for the 2007-2008 school year, Student's noncompliant and aggressive behaviors had become problematic at school, at home, and in the community. In the fall of 2007, Student engaged in an unknown number of aggressive episodes in the community, and at least six episodes of assaultive, aggressive behaviors at school that required the District's emergency interventions, summarized as follows.

5. On September 18, 2007, Student responded to Ms. Cho-Polizzi's instruction to not wear a mask he had just made by throwing himself on the floor, rolling around and moving or tipping tables and chairs (including computer tables). He kicked the teacher in the legs several times, bit and kicked two classroom paraprofessionals, and bit another on her wrist, drawing blood, yelling obscenities throughout. The staff used behavioral strategies and techniques including staying calm and asking for his cooperation, to no avail. The police and Parent were called to the school. One desk was broken, and the other students in the class had to be evacuated for their safety. Student could have been injured by a falling computer or table, but was not. Since Student had a painful tooth problem, the individualized education program (IEP) team thought that this was an isolated event, and revised his BSP to address times when he was feeling "out of sorts."

6. On October 5, 2007, during a play period, Student grabbed another pupil's sleeve and spun the pupil's body into a corner, where a paraprofessional physically intervened between them. When the pupil pulled his arm free, Student's hand was suddenly released and hit his own eye. Student threatened to kill the pupil for hurting him, and charged toward the pupil and the aide, holding a toy wooden crane. He physically assaulted the paraprofessional with the crane. The other students in the class were evacuated for their safety during this altercation. Student cooperated in his removal to a "Quiet Room"; however, once there, he threw books and balls at the paraprofessionals and tried to get out to continue to attack the other pupil. He repeatedly assaulted one paraprofessional by kicking her in the legs, hitting her in the face with a shoe, and bruising her arm by throwing an object. When the principal arrived, Student kicked her as well, and the adults placed him in a restraint hold. The police were called to the room. Student continued to be agitated and use obscenities for some time. Student was sent home from school on a "home hospital" program while his IEP was reviewed.

7. On October 22, 2007, just before the class was going to give him a birthday party, Student became angry when his preferred game was not on his computer. He curled up in a ball shape, and made growling and snarling noises like an animal. The teacher's verbal interventions did not work. Student pulled down baskets of toys and classroom supplies from shelves while threatening to kill someone. When school psychologist Cate Hawthorne entered, he began yelling obscenities at her. The adults administered a restraint hold, but it took the help of a third adult to actually hold him. After release, Student continued to throw things at the adults, and a second restraint was executed. Parent was called to the school.

8. On October 24, 2007, Student and the teacher went to the bathroom as part of Student's daily toileting schedule. Student began growling and tried to pull the sink off of the wall, including jumping with his weight on it. He ignored the teacher's verbal interventions, ran back to the classroom, and began pulling baskets of supplies. He kicked the teacher hard in the legs. Two adults restrained Student against a wall, and escorted him to the Quiet Room. Parent was called to the school.

9. On October 25, 2007, eight SDC pupils (including Student), the teacher, and four classroom paraprofessionals had a physical education class outdoors. During a running exercise, Student physically assaulted a pupil he had just passed, and shoved the pupil into a cyclone fence. The teacher and one paraprofessional intervened and made him sit quietly on the ground for a few minutes, then allowed him to get up. However, Student jumped at the teacher, kicked her legs and flailed at her face. Two adults administered a ground restraint and escorted him to the Quiet Room.

10. Prior to October 26, 2007, the IEP team implemented a new IEP for Student that provided for his placement in a temporary intensive program in a small separate room created for him at Dana Gray, called the Rainbow Room, taught by Ms. Cho-Polizzi with one paraprofessional. The new IEP began on October 26, 2007.

11. On October 30, 2007, Student did well in the Rainbow Room until lunchtime when a paraprofessional left the room; his mood changed, and he began yelling at the teacher using foul language. After the teacher used a cell phone to call for help, Student yelled for her to “put that fucking phone down” Student physically assaulted the teacher, throwing things off shelves and kicking her knees. Two paraprofessionals arrived. Student climbed up a wall of shelves, announced that he was Spider Man and jumped, uninjured, after which he was finally restrained. At some point he was apparently moved to another room. When released, he made cat hissing sounds, then lunged at the school psychologist, and hit and kicked the adults. The teacher’s knee was injured, and another restraint was executed. Parent was called to the school. Student was suspended from school until November 2, 2007.

12. During some or all of the above incidents, Student also engaged in biting, scratching, hitting, shoving, and spitting. Although school staff did not suffer severe injuries, many suffered repeated bruises, cuts and scratches, among other injuries. Two pupils in the SDC class were harmed, including the pupil thrown into the corner of the room, and the pupil thrown into the cyclone fence. Risks of harm to the adult staff and other pupils existed as well because Student threw objects at them, including chairs, toys and books. Finally, Student could have injured himself when he tried to run away numerous times, when he jumped down from high shelves, and when he rolled around under tables trying to knock them down, because the tables or the equipment on them could have crashed onto his body.

Emotional Disturbance Assessments and Alternative Fourth Grade Placement

13. During the episodes of Student’s maladaptive behaviors in October 2007, as found above, the IEP team determined that the instructional and behavioral approaches in his IEP were ineffective, and that his behavior problems significantly interfered with the achievement of his IEP goals. The team determined that Student’s behaviors were “serious” because they were assaultive, pervasive and maladaptive, requiring frequent behavioral interventions, and that the District should therefore conduct a functional analysis assessment

(FAA).¹ On October 22, 2007, Parent signed an FAA plan and Student's placement was changed to the Rainbow Room.

14. Due to the severe and rapid escalation of Student's assaultive behaviors on and after October 22, 2007, as found above, the IEP team agreed that an immediate alternative educational placement was necessary. An IEP meeting was held on November 5, 2007, and Student was placed in a "directed home study program" as an interim placement. The IEP team agreed to refer Student to both the school psychologist and the Mendocino County Health and Human Services, Mental Health division (Mental Health) for assessments to determine if he was eligible for special education under the category of Emotional Disturbance (ED), and therefore eligible for AB 3632/Ch. 26.5 mental health services from the county.² While those assessments went forward, and Student was in a directed home study program, the District's collection of behavioral data for the FAA was delayed.

15. The IEP team met on February 6, 2008, to conduct Student's annual IEP and review the results of the District's psychoeducational assessment, the Mental Health assessment, and the FAA. School psychologist Ms. Hawthorne, completed a psychoeducational assessment and issued a report dated December 2007. Ms. Hawthorne reported that Student met the criteria for ED and recommended ED as a secondary category of eligibility for special education. She also recommended that, due to the rapid deterioration of Student's coping skills and increase in his verbal and physical aggression, he needed more intensive behavioral support in both the home and school settings.

16. The assessment report of Mental Health's clinician, John Wiser, dated January 28, 2008, found that Student met the mental health criteria for ED and qualified for AB 3632 services.³ Student's mental health diagnoses included Oppositional Defiant Disorder, Post Traumatic Stress Disorder (PTSD), and Dysthymic Disorder. Mr. Wiser recommended an out-of-home placement with treatment for his severe ED symptoms and behaviors.

17. The District's FAA report by Ms. Hawthorne, dated February 6, 2008, was incomplete, and recommended that data collection should resume when Student returned to school. It also provided functional behavioral analysis and information from other sources, including interviews and records, and proposed a positive behavior intervention plan (BIP)

¹ A "serious behavior problem" is defined as behaviors "which are self-injurious, assaultive, or cause serious property damage and other severe behavior problems that are pervasive and maladaptive for which instructional/behavioral approaches specified in the student's IEP are found to be ineffective." (Cal. Code Regs., tit. 5, § 3001, subd. (aa).)

² California Assembly Bill 3632, otherwise known as the Hughes Bill, added Chapter 26.5 to the Government Code to create a partnership between public school districts and county mental health services for the education and treatment of children with ED and the regulation of behavioral interventions.

³ In September 2007, the Regional Center had referred Student to Mental Health, and Mr. Wiser had been providing mental health counseling services and parent consultation once a week since that time.

based on known information, including the development of functional equivalent replacement behaviors to be taught to Student to enable him to protest and communicate his needs without aggression or violence.

18. The District and Mental Health members of the February 2008 IEP team recommended that Student required a nonpublic school and residential placement in order to address his needs, which the public school could not meet. Parent and the Regional Center members of the IEP team disagreed and recommended that more intensive supports and services should be tried before resorting to a residential placement.⁴ No specific placement offer was made, and the conclusion of the IEP team meeting was postponed while the parties looked for possible placement locations. The District's subsequent offer of educational placement for a free appropriate public education (FAPE) is not at issue in this proceeding.

19. In March 2008, based on its determination that Student was eligible for mental health services, Mental Health referred him to Dr. Eric vanSchoor, a clinical psychologist. Dr. vanSchoor confirmed the diagnoses and recommended a referral to Dr. Julie vanSchoor, a psychiatrist, for psychopharmacological treatments and therapy. In addition, he recommended that the Regional Center develop supports for Student in the areas of adaptive functioning, communication, and social skills; and services for Parent to address the problems resulting from substantial differences between the structured approaches in the school and the unstructured approaches in the home environment. Dr. Julie vanSchoor prescribed medications to address Student's ADHD (which were different from what a pediatrician had previously prescribed) and for his aggression, and provided weekly psychiatric counseling to Parent and Student by telephone.

20. From November 5, 2007 through June 23, 2008, Student remained in a directed home study program, in which his teacher was to meet with Parent once a week, give her the weekly school work for Student, and instruct Parent about the assignment. In turn, Parent would take the school work home, instruct Student, and return completed assignments to the teacher. There was no evidence that the District provided behavioral support services or counseling during that period except Mental Health's counseling, which Parent and Student inconsistently attended. The District provided Student extended school year (ESY) services for the summer of 2008, consisting of one hour per day for specified days.

Present Placement in Fifth Grade

21. On August 6, 2008, an IEP meeting was held to discuss a proposed change of placement to reintroduce Student to Dana Gray in fifth grade for the 2008-2009 school year.

⁴ The evidence established that Parent had asked the District and the Regional Center for an out-of-home placement for Student in September or October of 2007. The evidence also established that Regional Center does not take an independent position in this case but supports the Parent and advocates on her behalf. Hence, when Parent changed her mind in February 2008, Regional Center supported her and no longer recommended an out-of-home placement.

The August 2008 IEP team learned that Student had made notable progress in reducing his negative behaviors, due in large part to the psychiatric counseling and medications prescribed by Dr. Julie vanSchoor. Mr. Wisner reported that Student was more compliant, his mood swings were less severe, and his violent outbursts had lessened in frequency and intensity. Student continued to use abusive language when angry. Ms. Cho-Polizzi supervised Student's ESY class and gave the results, including the ESY behavioral data which showed that Student did not become verbally or physically aggressive during the ESY sessions of one hour a day. It showed that he displayed dangerous behavior, such as running away from his mother and crossing a street alone, and going into a construction area in a period of noncompliance. Denise Keller, Mendocino County Office of Education/Special Education Local Plan Area (SELPA) behavior specialist, observed Student during many of the ESY sessions and consulted with the teacher and the District in the development of a new BIP.

22. Based on the above information, the IEP team, including Parent, agreed to transition Student back to school at Dana Gray with two hours of daily instruction during the first week beginning August 18, 2008. Based on successful performance, they would add an additional hour each week until Student was back in school for six hours a day. The team therefore postponed consideration of the plan to transition Student to a residential placement. Mental Health indicated that, if the IEP team were to determine that the school placement was not working, Mental Health would again actively seek an out-of-home placement.

23. Pursuant to the August 2008 IEP, Student's educational placement and services for the 2008-2009 school year included close daily adult supervision, a minimum of ten minutes a day in the Quiet Room, a BIP, two hours a day, initially, of individual and small group instruction from the teacher in the Rainbow Room; 90 minutes a week of mental health family training, counseling and home visits by Mental Health; 90 minutes weekly of individual counseling by Mental Health, and three 30-minute sessions a week of speech and language services in the Rainbow Room. The BIP included a behavior intensity scale from zero to six, with zero as compliant, and six as attempting serious property damage or physical injury. It also included a seven-step plan to deal with problem behaviors, which began with the staff using "crisis communication" techniques, and ending with calling the police within thirty minutes if Student continued to be a danger to himself or others, or could still not be safely contained.

24. Every week between August 18, 2008, and September 15, 2008, the IEP team agreed to increase Student's daily school hours until, effective September 15, 2008, his school day had been increased to six hours a day. However, the weeks were not without "uneven" behavioral performances. The weekly behavioral reports the teacher sent to the interagency team revealed that Student had numerous noncompliant episodes of varying degree, surly moodiness, and aggression, including hitting Mr. Wisner in the back, trying to hit the teacher's feet, yelling at Parent while refusing to be separated from her, and threatening people. Student was back in school with a full day's schedule for about three weeks before the behavioral incident that occurred on October 3, 2008. According to the teacher, only a few incidents reached a rating of four on the intensity scale. Three incidents

reached a rating of five, including when Student hit Mr. Wisner, but he stopped when corrected.

Behavioral Incident of October 3, 2008

25. On October 3, 2008, Student engaged in two episodes of maladaptive behaviors. In the morning, he refused to come in from recess when it started to rain, ran to the top of the monkey bars, and refused to come down until the teacher used verbal interventions. Later in the afternoon, the teacher directed Student to go to the bathroom to wash his hands. He briefly complied and then ran, pushing and shoving pupils in the way, into another room where he threw himself on the floor and tried to hit the teacher's feet with his fists. The teacher intervened verbally, but minutes later Student lunged at her, yelling "fucking bitch." Student attempted to punch the teacher's head with his fists, and hit her face, grazing her cheek. The teacher unsuccessfully attempted to apply restraints and called for adult help. Student continued to attack her. A paraprofessional and the teacher took Student to the Quiet Room, located across a blacktop area outside. The room was filled with many objects that Student could throw, risking injury to himself or the adults, so a third adult assisted to clear the room. Parent was asked to come to the school and Student was suspended from school.

26. Student's afternoon behaviors on October 3, 2008, were sudden, violent, and not predicted by the school staff. It took three adults to secure Student and move him. Ms. Cho-Polizzi, the teacher whom Student attacked, rated the intensity level as a six, at the top of the scale, for attempting serious physical injury by kicking, pushing, and punching. The teacher and paraprofessionals were concerned about their safety and the safety of the other pupils in the severely handicapped class, some of whom were medically fragile. The adults were also concerned that the force they had to use to subdue Student could have injured him. Ms. Cho-Polizzi was persuasive in her testimony that because Student has grown in size and strength in the past year, all three adults were fatigued within three minutes.

27. On October 6, 2008, an IEP meeting that had been scheduled before the events of October 3, was held and then continued to October 15, 2008. On October 6, the IEP team discussed trying to hire two strong male adults as paraprofessionals to work with Student at Dana Gray. On October 15, the District and Mental Health members of the team recommended immediate placement in a nonpublic residential school to meet Student's needs, including "a high level of structure and predictability, repetition, reduced requirements, numerous and frequent breaks and rest periods, and minimal distractions. In order to keep staff, students, and [Student] safe, he requires a behavior intervention plan and a very high level of constant, close adult support and separation from other students."

Present Substantial Likelihood of Injury

28. The District may move a student to an appropriate IAES for up to 45 school days when the student's current placement is substantially likely to result in injury to the student or another person.

29. The District contends that Student's current placement at Dana Gray is substantially likely to result in injury to another person or to Student, and that the District should be permitted to move Student to Edgewood, a residential facility and NPS school in San Francisco. Parent contends that Student has made significant progress despite the relapse on October 3, 2008, that he is now receiving intensive behavioral intervention in the home, and that he should be provided increased behavioral interventions in the school or home before being moved to a residential facility.

30. Persuasive testimony from SELPA behavior specialist Ms. Keller, private psychiatrist Dr. Julie vanSchoor, clinical psychologist Dr. Eric vanSchoor, Mental Health clinician Mr. Wisner, and District teacher Ms. Cho-Polizzi, and supporting documents, all established that maintaining Student in his current educational placement at Dana Gray is substantially likely to result in injury to others, if not to himself. For example, Ms. Keller testified persuasively that, due to Student's increased strength and the unpredictability of his behaviors, he is presently dangerous and poses a real risk of harm to others, and that he requires a level of intensive behavioral intervention that is consistent across the home and school settings which cannot be provided for at Dana Gray. The history of Student's behavior corroborates those conclusions.

31. Student is also physically aggressive with Parent. Dr. Julie vanSchoor established that Student has a long history of exposure to domestic violence, as a result of which he learned violent behaviors, particularly toward women, from his father, who committed suicide in 2006. Parent, who has had a difficult life, learned to protect herself by using violence, and still occasionally uses violence in the home to control Student's behavior. Dr. vanSchoor persuasively and credibly established that Parent is now learning in family mental health counseling how to address conflict without slapping, shoving, or hitting Student, but that use of these methods has not yet ceased. Due to Student's limited cognitive abilities, he does not currently understand why he should not use similar violence to have his needs met in the school environment. Thus, Dr. vanSchoor's persuasive opinion is that Student is at present likely to be violent, although the likelihood may diminish over time given proper interventions and treatment.

32. Beginning about three weeks before the hearing in this case, the Regional Center contracted with a nonpublic agency, Multiplicity Therapeutic Services (Multiplicity), to provide 140 hours a month of intensive behavioral support services to Student in the home, addressing his behaviors and communications skills, along with 10 hours a month of behavioral consultation. Multiplicity had been providing Student and Parent some behavioral consultation once a week since May 2008, funded by the Regional Center. Multiplicity's behavioral consultant for Student, Adam Bubulia, testified that while Student is still aggressive, his aggression has been "greatly reduced" since the intensive daily behavioral interventions have begun, and that most of his noncompliance is expressed as verbal defiance. Mr. Bubulia and his team of behavioral aides are helping Parent learn strategies and to develop communication skills as well. Mr. Bubulia believes that the District has not implemented appropriate positive behavior support strategies because the District is

using physical interventions too quickly; it is his opinion that Student does not react well to physical intervention and will continue fighting if there is resistance. Multiplicity's approach is to use withdrawal and time out, rather than confrontation. Mr. Bubulia therefore thinks the District could hire his company or another company to provide intensive behavioral supports in the school.

33. Giving due consideration to Mr. Bubulia's testimony, greater weight is given to the testimony of Dr. Julie vanSchoor and Debbie Keller on the issue of Student's present propensity for injuring someone in the school setting. Dr. vanSchoor received her doctorate degree in 1995, was a resident in adult or child psychiatry at the University of California at Davis Medical Center from 1995 to 2001, and was an assistant clinical professor of psychiatry there. She has contracted with Mental Health to provide psychiatric services since 2005. Dr. vanSchoor has conducted 2,500 assessments, including many hundreds of elementary school children with a combination of Down Syndrome and Mental Retardation. Ms. Keller is a board certified behavior analyst (BCBA), holds a master's degree in counseling, and is also certified in Professional Assault Crisis Training (ProACT). She has been a behavior specialist with the SELPA since 2000, and trains school district personnel on FAAs, behavior support intervention strategies, ProACT, and BIPs. In contrast, Mr. Bubulia has a master's in education, took an undergraduate course in child psychology, and was a teacher. He has been with Multiplicity for a year and a half and has received behavioral training with them. He is also currently receiving behavioral training from Dr. Smalley at the Regional Center. Thus, he is not as qualified or experienced as the District's witnesses, and, in addition, did not know what an FAA is. While Mr. Bubulia and Multiplicity state that Student's aggression has subsided, the evidence established that Student's aggression had also subsided during the period from at least August 6 to October 3, 2008, marred by episodes of mild or moderately noncompliant and defiant behaviors. Yet, it dramatically reappeared on October 3, 2008, and appears likely to do so again. Moreover, the recent reduction in aggression noted by Mr. Bubulia has occurred at home, where Parent and Student live in a trailer in a rural wooded area. The District's strategies included withdrawals and time outs in early stages of Student's behavioral escalations. However, the evidence did not establish that such techniques would be appropriate on a school campus when swift action may be necessary to avoid imminent injury to staff or pupils. Overall, a current period of relative compliance at home for about three weeks does not establish that Student is not at present substantially likely to injure someone if he goes back to his placement at Dana Gray.

34. Based on all of the foregoing, Student's attendance at Dana Gray has been characterized by unpredictable violent verbal and physical outbursts and assaultive behavior, aimed primarily toward the teacher and the paraprofessionals, but also at the principal and the school psychologist, as well as a few pupils. The weight of the evidence and testimony offered at the hearing demonstrated that if Student continues to attend Dana Gray in his current placement, there is a substantial likelihood that injury would result to another, either an adult or a pupil, and perhaps to Student himself. Accordingly, the District may move Student to an appropriate IAES.

Edgewood's Educational and Residential Placement

35. The IAES must enable the child to continue to receive educational services so as to enable the child to continue to participate in the general curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP. The IAES must enable the child to 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. The District contends that Edgewood's residential program will enable Student to make educational progress in his curriculum and IEP goals because, in order to do so, he needs consistency across all settings which Edgewood can provide.

36. Following the February 2008 IEP meeting, Mr. Wiser of Mental Health contacted about 30 possible residential facilities for children with disabilities, the vast majority of which were ruled out because Student did not meet their criteria. The Edgewood facility and nonpublic school in San Francisco was the only one that agreed to interview Student. Just before this hearing, Mr. Wiser confirmed that Edgewood still has an opening for Student. Mental Health would arrange Edgewood's interview of Student and Parent to complete the placement process.

37. The District relied on Mental Health's extensive search for a suitable placement. Mental Health has placed approximately 50 to 75 students at Edgewood in the past, and Edgewood has established a good reputation for providing quality services. After reviewing Student's information, Edgewood gave Mental Health verbal assurances that it could meet his needs. Edgewood treats children with ED and behavioral problems, and has a highly structured environment. Edgewood will admit and work with pupils with dual or multiple disabilities such as Student's. Student would be provided with a functional academic program at the nonpublic school, behavioral interventions, and individualized counseling. Thus, he would have the opportunity at Edgewood to continue to participate in the general curriculum and to progress toward meeting the goals in his IEP. Edgewood's program in working with ED students includes behavioral intervention services calculated to address problematic behaviors in a highly coordinated manner across all settings in the residential facility and in the school.

38. Persuasive testimony from Ms. Keller, Dr. Julie vanSchoor, Dr. Eric vanSchoor, and Mr. Wiser, along with supporting documents, all established that Student requires a residential placement in order to make educational progress during the IAES. First, as set forth above, the IEP team determined in the fall of 2007 that the instructional and behavioral approaches in Student's IEP were no longer effective, and that his behavior problems significantly interfered with the achievement of his IEP goals. After the series of substantial assaultive behaviors in September and October 2007, Student was placed in a directed home study program. Overall, the evidence established that Student did not progress in that program. Ms. Cho-Polizzi reported to the February 2008 IEP team that Student did not do his weekly homework, and that Parent had therefore stopped meeting with her to receive instruction and pick up the homework. In April 2008, Ms. Cho-Polizzi

reported to an IEP team that Student had completed slightly more than fifty percent of assignments on a sporadic basis. Moreover, there was no evidence that Student's progress toward his IEP goals had been worked on or measured. As of an IEP meeting on June 13, 2008, an update to the annual goals stated: "Due to the behaviors impeding learning, including task refusals, we were unable to get enough work sampling to determine present levels." Thus, there is evidence of little or no educational progress between November 2007 and July 2008 in the home study program. During the summer ESY, Student only had one hour a day of school over a specified time period. For the current school year, Student had only been in a full day class for three weeks before the October 2008 incident occurred. Thus, for over a year, Student has had little functional academic education between the home placement and the current educational placement.

39. The current educational placement at Dana Gray is also inappropriate because Student was in a restrictive, isolated setting monitored by adults with few opportunities for interaction with his peers, due to concerns for their safety. Ms. Keller persuasively testified that the District is not equipped to engage in the type of intensive behavioral interventions that Student needs at this time. In addition, the evidence established that, while Parent has made significant progress in trying to learn to be a better parent, and to meet Student's needs, she is not now able to provide the kind of consistent behavioral approaches Student needs across all settings. For example, while Parent is motivated to improve Student's circumstances, she is often still inconsistent, does not follow through on behavioral strategies, and becomes overwhelmed. Mr. Wiser credibly stated that when Student gets agitated, Parent also becomes agitated, and the situation can escalate into physical pushing or slapping. Dr. Julie vanSchoor provided compelling testimony that, absent immediate effective interventions, Student's prognosis is very poor and he is at significant risk for ending up incarcerated in juvenile hall or jail unless he learns how to interact in society without violence.

40. Parent contends that there are other alternatives to a temporary residential placement at Edgewood that should be tried first. However, the law requires an appropriate IAES placement, but does not require exhaustion of all possible alternatives. The District has made many reasonable efforts to accommodate Student's behaviors over the past year, moving him from an SDC class to a home program, then to a special room in the school, bringing in additional aides and teachers, and modifying his BIP. Therefore, since the District's proposed IAES at Edgewood will allow Student to continue his education, progress on his goals, and immediately address his problematic maladaptive behaviors so they may be reduced or eliminated, the Parent's preference for another placement is not persuasive. Parent's preference is to continue with Mutiplicity's intensive home intervention services provided through the Regional Center, but that does not address an appropriate interim alternative educational setting other than the home program or Dana Gray. Parent's request that a residential facility in Mendocino County, Turning Point, in conjunction with Orr Creek School in Ukiah, be considered instead of Edgewood is unpersuasive because Mental Health and the District have proposed Edgewood, and there is no evidence that Edgewood would be an inappropriate placement. In addition, there was no evidence that Turning Point and Orr

Creek could provide educational and behavioral treatment services comparable to those that Edgewood can provide to meet Student needs in his interim placement.⁵

41. Based on all of the foregoing, Student now needs a significantly higher level of behavioral support than can be offered at Dana Gray, in view of the finding that his behavior poses a significant likelihood of injuring himself or others in the present placement. The weight of the testimony and evidence established that the Edgewood facility is an appropriate IAES for Student, and that a home study program would not be appropriate because Student was inconsistent in completing assignments, Parent was inconsistent in supervising the homework, and progress on Student's IEP goals was impeded. Further modification of Student's educational program at Dana Gray is not a viable alternative in the absence of effective school-based interventions for Student's aggressive behaviors. Therefore, Edgewood is an appropriate IAES that would meet Student's educational needs for not more than 45 school days.

LEGAL CONCLUSIONS

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

2. A local educational agency (LEA) may request an expedited due process hearing when it believes that maintaining the current placement of the child is substantially likely to result in injury to the child or to others. (20 U.S.C. § 1415(k)(3)(A); 34 C.F.R. § 300.532(a).)⁶ The hearing officer may return the child to the placement from which he was removed, or may order a change in placement to an appropriate IAES for not more than 45 school days if the hearing officer determines that maintaining the current placement of such child is substantially likely to result in injury to the child or to others. (20 U.S.C. § 1415(k)(3)(B)(i); 34 C.F.R. § 300.532(b)(2).) The expedited due process hearing must occur within 20 school days of the date the complaint requesting the hearing is filed and the hearing officer must make a determination within 10 school days after the hearing. (34 C.F.R. § 300.532(c)(2).)

3. The Individuals with Disabilities in Education Improvement Act (IDEA 2004) and the Code of Federal Regulations do not address the appropriateness of an IAES for purposes of a district's request to change placement when the current placement is

⁵ Ms. Valley of the Regional Center testified that Turning Point was a residential facility that admitted ED pupils placed by a school district or Mental Health, provided the Regional Center was involved. Since the District had been under the impression that it could not place Student at Turning Point, the ALJ directed the District to make inquiries and report whether it would offer Turning Point as an alternative to Edgewood. On November 21, 2008, the District filed letters from Mr. Corbin and Mr. Wisner, in which the District declined to offer Turning Point.

⁶ References to the Code of Federal Regulations (C.F.R.) are to the 2006 regulations.

substantially likely to result in injury to the child or to others. However, other disciplinary provisions provide guidance in making that determination. (20 U.S.C. § 1415(k)(2); 34 C.F.R. § 300.530.) The IAES must enable the child to continue to receive educational services so as to enable the child to continue to participate in the general curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP. (34 C.F.R. § 300.530(d)(1)(i).) Further, the IAES must enable the child to receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications that are designed to address the behavior violation so that it does not recur. (34 C.F.R. § 300.530(d)(1)(ii).) The IEP team determines the IAES under the disciplinary provisions referred to above. (34 C.F.R. § 300.531.)

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

5. As set forth in Factual Findings 1 through 34, and Legal Conclusions 2 and 4, maintaining Student's current placement at Dana Gray is substantially likely to result in injury to him or to others. Therefore, the District may remove Student from his current placement and place him in an IAES.

6. As stated in Factual Findings 27 through 41, and Legal Conclusions 2, 3, and 4, Edgewood offers the necessary programs and interventions to implement Student's IEP while providing significantly more control, intensive behavioral interventions, and structure to address Student's behavioral needs across all settings in a comprehensive and consistent manner. Edgewood is therefore an appropriate IAES for Student for not more than 45 school days.

ORDER

The District may change Student's placement to Edgewood for a period not to exceed 45 school days without parental consent.

