

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

In the Matter of:

LONG BEACH UNIFIED SCHOOL  
DISTRICT,

Petitioner,

v.

STUDENT,

Respondent.

OAH CASE NO. N2008030017

**EXPEDITED DECISION<sup>1</sup>**

Administrative Law Judge (ALJ) Suzanne B. Brown, Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this expedited matter on April 7-9, 2008, in Long Beach, California, and by telephone on April 10, 2008.

Attorney Debra K. Ferdman represented Long Beach Unified School District (District). Douglas Siembieda, Program Administrator, attended the hearing on the District's behalf.

Student's grandmother/guardian (Grandmother) represented Student.

On February 27, 2008, OAH received a request for expedited due process hearing (complaint) from the District in this matter, and scheduled the hearing to convene on April 1-4, 2008. However, due to a change of residence, Grandmother did not receive service of the complaint until March 5, 2008. Because of the delay in service, the complaint is deemed filed on March 5, 2008.<sup>2</sup>

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<sup>1</sup> During a Prehearing Conference on March 26, 2008, the ALJ determined that this case raised both expedited and non-expedited issues. As detailed in the March 27, 2008 Order Following Prehearing Conference, the non-expedited issue will be litigated in a separate hearing.

<sup>2</sup> Because the District was on spring break during the week of March 24-28, 2008, April 7 was 18 days after March 5, 2008. (See 20 U.S.C. § 1415(k)(4)(B).)

During a Prehearing Conference on March 24, 2008, OAH granted a brief continuance and rescheduled the hearing for April 7-10, 2008.<sup>3</sup> Following telephonic oral closing arguments on April 10, 2008, the record was closed and the matter was submitted.

## ISSUES

1. Is maintaining the current placement of Student substantially likely to result in injury to Student or to others?
2. If maintaining the current placement of Student is substantially likely to result in injury to Student or to others, then may the District change Student's placement to an appropriate interim alternative educational setting (IAES) at a non-public school for not more than 45 school days?

## FACTUAL FINDINGS

### *Jurisdiction*

1. Student is a 9-year-old boy who resides within the boundaries of the District with his grandmother and other family members, including a twin brother. He currently attends a special day class (SDC) at the District's Patrick Henry Elementary School, and is eligible for special education under the category of emotional disturbance (ED).

### *Background*

2. Student was initially determined eligible for special education in 2002. For the 2006-2007 school year, Student was in the third grade and attended an SDC for pupils with ED. Student exhibited some behavioral problems that year; the school principal, Claire Alvarez, reported that she intervened approximately five times in behavioral incidents involving Student during that school year.

3. For the 2007-2008 school year, Student is in the fourth grade and attends an SDC for pupils with ED. The SDC consists of seven fourth-grade pupils and three fifth-grade pupils. The class is taught by a credentialed special education teacher, Carla Beam. Three full-time instructional aides are also assigned to the class. In addition to attendance at

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<sup>3</sup> As detailed further in the March 27, 2008 Order Following Prehearing Conference, Grandmother requested a continuance in order to allow her time to obtain legal representation. While this request constituted good cause for a continuance, the timelines for conducting an expedited due process hearing allowed only for an extremely brief continuance. (20 U.S.C. § 1415(k)(4)(B).) In addition, the federal regulations promulgated under the Individuals with Disabilities in Education Improvement Act of 2004 required the parties to participate in a resolution meeting prior to proceeding to hearing; the District subsequently indicated that the parties had scheduled that meeting to take place on April 1, 2008. (See, 34 C.F.R. § 300.532(c)(3).)

the SDC, Student's educational program also includes a behavioral plan and participation in a weekly counseling group with the school psychologist.

4. During the 2007-2008 school year, Student has exhibited severe behavioral problems at school several times a week. These problems include hitting, kicking, shoving, biting, stomping on toes, ripping items off walls, climbing on classroom furniture and cabinets, shouting obscenities, throwing objects at people, throwing rocks at moving vehicles, running out of his classroom, banging on the doors of other classrooms, leaving campus, stomping on the roof of a maintenance truck, and climbing up the outside of the school building towards the roof. In one incident on October 1, 2007, Student was running through the school hallways and yelling, ignoring the directions of school staff to stop, and ran through the school office yelling that he would kill everyone there. Subsequently, when a school safety officer arrived, Student told the officer that he would take the officer's gun, shoot the officer, and then shoot himself. District staff called the Los Angeles County Department of Mental Health's mobile psychiatric team, who took Student for involuntary psychiatric hospitalization.

5. In response to the October 1, 2007 incident that resulted in Student's psychiatric hospitalization, District staff contacted Grandmother and scheduled an addendum individualized education program (IEP) meeting. On October 25, 2007, Grandmother and other IEP team members convened for a meeting. District members of the IEP team proposed referring Student to the Los Angeles County Department of Mental Health for an AB 3632 mental health assessment, but Grandmother expressed concerns and did not agree to that proposal.

6. Thereafter, District school psychologist Phuong Le conducted Student's triennial reassessment, and prepared a Summary of Triennial Review, dated December 5, 2007. On December 6, 2007, the IEP team convened without Grandmother in attendance. The IEP notes state in part that "the IEP team recommends a more restricted environment in a non public school setting" and that "the team again requests the guardian give permission for the school to refer [Student] for an AB 3632 assessment via written consent form." On January 24, 2008, the IEP team reconvened with Grandmother in attendance, but Grandmother did not consent to the IEP or the proposed placement in a non-public school.

7. Over the course of the school year, Student continued to exhibit severe behavioral problems, which resulted in discipline including school suspensions. One of those incidents occurred on February 13, 2008, when Student threw physical education equipment on the playground. First, he threw cones into a basketball net and kicked playground balls into a group of pupils assembled for a physical education class, while ignoring instructions from an aide and the physical education teacher to stop. Next, he threw two wooden paddle tennis racquets consecutively, approximately 40 to 50 feet into the air, towards school staff and the pupils attending the physical education class. The physical education teacher instructed everyone to run and duck for cover, to avoid being injured by the falling racquets. When the physical education teacher approached Student and asked him to calm down, Student hit the teacher on the arm. Thereafter, Student ran into the

counselor's office, hid under the table, attempted to run out of the office, hit and kicked the counselor as she tried to escort him back into her office, and threw papers and other items around the office.

8. When a special education student is suspended for disciplinary reasons for more than ten days, federal law requires that the IEP team determine whether his conduct was a manifestation of his disability. As a result of the incident on February 13, 2008, Student was suspended for two days. Because of that discipline, Student's suspensions totaled at least ten days over the course of the 2007-2008 school year. As a result, the District scheduled a manifestation determination IEP meeting. On February 25, 2008, District staff convened the IEP team meeting without Grandmother in attendance.<sup>4</sup> The IEP team determined that Student's behavior on February 13, 2008, was a manifestation of his disability, and was part of a pattern of behaviors over the school year. The IEP notes state that "his conduct was the direct result of failing to implement the IEP recommendations on 1/24/08. These services include a referral to AB3632 (mental health services) and placement in a non-public school...."

#### *Substantial Likelihood Of Injury To Student Or Others*

9. The District may move a student to an appropriate IAES for up to 45 school days if maintaining the student's current placement is substantially likely to result in injury to the student or another person. Persuasive testimony from SDC teacher Carla Beam, school principal Claire Alvarez, and school counselor Kashara Moore, along with supporting documents such as incident reports and discipline records, established that maintaining Student in his current placement is substantially likely to result in injury to himself. For example, Student has run out of the school and left the campus during the school day approximately five times this school year. On one of those occasions, on November 1, 2007, he climbed on top of a maintenance truck and stomped on the truck's roof. In another incident on December 20, 2007, he climbed on the classroom's counters and stood on a pencil sharpener mounted on the cabinet; the pencil sharpener broke under Student's weight, leaving him hanging off the cabinet and likely to fall several feet to the floor. More recently, in March 2008, he climbed on the latticework on the outside of the school building and crawled up towards the roof. Also in March 2008, he climbed very high into the upper branches of a tree. Each of these incidents was potentially dangerous and created a substantial risk of injury to Student.

10. Moreover, the evidence established that Student's behaviors create a substantial risk of injury to others. Ms. Beam, Ms. Alvarez, and Ms. Moore all established that Student has hit and kicked them on several occasions in recent months. For example, Ms. Beam credibly testified that Student has hit her a total of 20 to 30 times, mostly with a closed fist; Ms. Beam described how Student will impulsively strike out at her when she asks

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<sup>4</sup> The school principal telephoned Grandmother and sent a letter by certified mail to notify Grandmother about the meeting. Grandmother testified that she did not receive notice of this IEP meeting, although she acknowledged that her brother's signature was on the certified mail receipt.

him to do something he does not want to do. Testimony from Ms. Beam, Ms. Alvarez, and Ms. Moore, along with discipline records, incident reports, and weekly behavioral charts, also established that Student has hit and shoved other pupils on numerous occasions, and has hit, kicked and/or bitten instructional aides on numerous occasions. Student has also bitten Ms. Beam, and has stomped on the toes of Ms. Beam and Ms. Moore.

11. Similarly, consistent with incident reports and disciplinary records, testimony from Ms. Beam, Ms. Alvarez, Ms. Moore, and school psychologist Phuong Le established that on several recent occasions Student threw objects which were likely to cause injury to others. For example, on November 15, 2007, when Mr. Le, the school psychologist, was attempting to get Student to calm down, Student threw a pair of scissors at Mr. Le and kicked a soccer ball that hit him on the cheek. Later that same day, Student ran outside in front of the school, threw rocks aimed at passing cars, and succeeded in hitting three cars. In another incident, Student threw pencils at other people with the pencil point first, in the manner of throwing darts. As determined above in Factual Finding 7, Student also threw wooden paddle tennis racquets high into the air towards staff and pupils on the playground, requiring everyone to run and take cover to avoid injury from the falling racquets. In another example, on March 13, 2008, Student threw a basketball and hit another pupil in the back with sufficient force that it caused her to cry.

12. In addition, Student continues to engage in behaviors substantially likely to cause injury to both himself and others. As determined in Factual Finding 4, in one incident Student threatened to use a school safety officer's gun to shoot the officer and then shoot himself. More recently, on March 10, 2008, Student grabbed a scooter from the principal's office and rode it very fast through the office, down hallways, and around the playground into groups of other pupils, necessitating that the other pupils jump out of Student's way to avoid being hit.

13. Testimony from Ms. Beam, Ms. Alvarez, Ms. Moore, and Mr. Le describing Student's behavior was credible, unrefuted, and consistent with documentary exhibits created near the time of the incidents, such as disciplinary records, incident reports, and weekly behavioral charts. Witness testimony further established that Student acts impulsively and shows no regard for his own safety or the safety of others. Most significantly, the evidence established that Student's dangerous behaviors are ongoing and cannot be managed in his current placement. Ms. Beam, Ms. Alvarez, Ms. Moore, and Mr. Le all credibly described the extensive efforts that they and other school employees have made to try to prevent and reduce Student's dangerous behaviors. District staff have repeatedly utilized techniques for behavior modification, redirection and de-escalation, but those techniques have not succeeded in decreasing Student's dangerous behaviors. District staff have also proposed and/or implemented modifications to Student's educational program, such as a behavior plan, a modified school day, and counseling, but these have not been effective in reducing Student's dangerous behaviors. On the contrary, Student's dangerous behavior have been increasing as the school year has progressed. The District has also proposed referring Student to the county mental health department for an AB 3632 mental health assessment, but Grandmother has not consented to that referral. For all of the above reasons, Student

requires a higher level of behavioral support than can be provided at Patrick Henry Elementary School, and maintaining him in his current placement at that school is substantially likely to result in injury to him or others.

*Change Of Placement To An IAES At A Non-Public School*

14. Because this Decision has determined that maintaining Student's current placement is substantially likely to result in injury to him or others, the next question is whether the District may change Student's placement to an appropriate IAES at a non-public school for not more than 45 school days. In his opening statement at hearing, Student argued that his behavior might potentially get worse if he is placed in a non-public school; however, Student did not present any evidence or further argument to support this contention. In contrast, special education coordinator Kathy Dadourian testified persuasively that a non-public school is an appropriate IAES for Student. Ms. Dadourian coordinates non-public school placement for District pupils, and is familiar with Student's behavioral needs. Ms. Dadourian established that three nearby non-public schools that specialize in students with behavioral problems are able to accept Student and would be able to meet his needs. Each of the three schools – Rossier, Barbara Dawson Education Center (Barbara Dawson), and Zinsmeyer – has fewer than 100 students, and no more than 12 pupils per class. Each non-public school class has a small teacher-to-student ratio, with at least one aide and one credentialed teacher per class. The non-public school staff are highly trained in dealing with behavioral problems. Each school implements behavior intervention services and a structured behavioral program that includes a behavioral contract and a reward system. The placement would include round-trip transportation by van. In light of all of the above, the evidence established that each of the three non-public schools offers a program that would appropriately address Student's needs, including his significant behavioral problems, as an appropriate IAES for up to 45 school days.

15. Student argued that placement in a non-public school was too drastic, and that instead his IAES could be an SDC at a different public elementary school. However, there was no evidence to support this contention. Pursuant to Factual Findings 4, 7, and 9-13, Student's behavioral problems are severe, his behaviors during outbursts are impulsive and sometimes violent, and he requires greater behavioral support than can be provided in his current SDC. Particularly considering that the staff who currently work with Student are experienced and well-qualified to deal with ED pupils, there is no indication that Student's needs could be met in a different SDC at a different mainstream elementary school. Hence, based on all of the above findings, the District may change Student's placement to an appropriate IAES at Rossier, Barbara Dawson, or Zinsmeyer for not more than 45 school days.

## LEGAL CONCLUSIONS

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

3. The IDEA and the Code of Federal Regulations do not define IAES for purposes of the District's request to change placement when the current placement is substantially likely to result in injury to the child or to others. However, under different circumstances not directly applicable here, the Code of Federal Regulations provides that a child with a disability who is removed from the child's current placement must 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 child must 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).) While these provisions do not govern in the present case, they nevertheless offer guidance regarding what constitutes an appropriate IAES.

*Is maintaining the current placement of Student substantially likely to result in injury to Student or to others?*

4. Based on Factual Findings 9-13 and Legal Conclusion 2, maintaining Student in his current placement at Patrick Henry Elementary School is substantially likely to result in injury to him or others. Student continues to engage in dangerous behaviors likely to result in injury to himself, such as running off the campus, climbing on classroom furniture and counters, climbing up the outside of the school building, and climbing on the roof of a maintenance truck. Student also continues to engage in violent behaviors likely to result in injury to others, including hitting, kicking, shoving, biting, stomping on toes, throwing rocks at moving cars, and throwing scissors, racquets, and other objects at people. Student has also engaged in behaviors substantially likely to result in injury to himself and others, such as riding fast on a scooter into groups of other pupils in the hallways and on the playground, and threatening to take an officer's gun and shoot the officer and himself. Despite extensive efforts, District staff have not been able to eliminate or significantly decrease Student's dangerous behaviors.

*If maintaining the current placement of Student is substantially likely to result in injury to Student or to others, then may the District change Student's placement to an appropriate IAES at a non-public school for not more than 45 school days?*

5. Based on Factual Findings 14-15 and Legal Conclusions 2-3, the District may change Student's placement to an appropriate IAES at Rossier, Barbara Dawson, or Zinsmeyer for not more than 45 school days. Those three schools are all nearby non-public schools that specialize in behavioral problems, are able to accept Student, and would be able to meet his needs as an appropriate IAES for up to 45 school days.

#### ORDER

The District may change Student's placement to an appropriate IAES at Rossier, Barbara Dawson, or Zinsmeyer non-public schools for not more than 45 school days.

#### PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing Decision must indicate the extent to which each party has prevailed on each issue heard and decided. The following findings are made in accordance with this statute: The District prevailed on both issues.

#### RIGHT TO APPEAL THIS DECISION

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

Dated: April 23, 2008



SUZANNE B. BROWN  
Administrative Law Judge  
Office of Administrative Hearings  
Special Education Division