

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CAPISTRANO UNIFIED SCHOOL
DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH Case No. 2015120782

EXPEDITED DECISION

On December 18, 2015, Capistrano Unified School District filed an expedited due process hearing request as part of its due process hearing request with the Office of Administrative Hearings, State of California, naming (Student).¹

Administrative Law Judge Sabrina Kong heard this matter in San Juan Capistrano, California on January 20 and 21, 2016.

Attorneys E.B. Bell and Brianna Hill represented District. District legal specialist Kim Gaither, and District's general counsel Lindsey Wrape, attended the first day of the hearing. District's Director Sara Young, attended the second day of the hearing.

Attorneys Eric Menyuk and Bryan Winn represented Student. Mother attended both days of the hearing.

On January 21, 2016, the matter was submitted for decision. The ALJ allowed the parties to submit written closing argument by January 25, 2016. The parties timely filed closing briefs and the record was closed.

¹The complaint contained expedited and non-expedited claims. OAH set the expedited and non-expedited claims for separate hearings. The expedited claims proceeded to hearing with no continuances. (34 C.F.R. § 300.532(c)(2).) This Expedited Decision resolves only the expedited claims.

ISSUES²

1. Is Student's attendance at Wagon Wheel Elementary School substantially likely to result in injury to Student or others; and
2. Does Rossier Park School constitute an appropriate interim alternative educational setting for Student?

SUMMARY OF DECISION

District contends that Student's continued placement at Wagon Wheel Elementary School is substantially likely to result in injury to himself and others. District also contends that Rossier Park School, a non-public school, would be an appropriate interim alternative educational setting for Student. Student contends that he would not likely injure anyone if District provided him with appropriate behavioral supports. Student also contends that Rossier Park School would be too restrictive, and a general education program, with proper behavior supports, would be the appropriate placement. Student further contends that District could not place Student in an interim alternative educational setting because Student did not inflict "serious bodily injury" on anyone. District met its burden of persuasion that Student's continued placement at Wagon Wheel Elementary School is substantially likely to result in injury to himself or others, and Rossier Park School was an appropriate interim alternative educational setting. District prevailed on all issues, and may place Student at Rossier Park School as an interim alternative educational setting for a period not exceeding 45 school days.

FACTUAL FINDINGS

1. Student was a five-year-old boy at the time of the hearing and resided within District's boundaries at all relevant times. He was eligible for special education under the classification of other health impairment.

Student Behaviors That Pose Risk

2. Student's first day at District at Wagon Wheel Elementary School was August 25, 2015. He was a general education kindergartener, and had not yet qualified for special education. The class had approximately 30 students. Mother shared a July 2015 private assessment by Dr. Erin McNerney with District. Dr. McNerney was a Board Certified Behavior Analyst and had a doctoral degree in counseling, clinical and school

²The issues have been rephrased and reorganized for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

psychology. She diagnosed Student with attention deficit/hyperactivity and autism spectrum disorders.

3. Student demonstrated maladaptive aggressive behaviors including biting, spitting and kicking staff; throwing objects; and being non-compliant during the first week of school. District responded to Student's behaviors by adding additional staff to the classroom to support Rita Beninga, Student's general education teacher, including a temporary intervention aide to implement positive behavior intervention strategies with Student. School counselor Therese Avila or program specialist Lisa Jarrard most often served in the role of the intervention aide. Ms. Avila held a bachelor's degree and a master's degree in counseling. She received approximately six to nine hours of positive behavioral training from District, including use of "proning,"³ and an autism training course from District. Ms. Jarrard held a bachelor's degree in child development, a master's degree in education, and a mild to moderate specialist credential with an emphasis in autism. She also received behavioral training from District, including use of proning, and a District autism training course.

4. On August 31, 2015, Mother requested in writing that District assess Student for special education. On September 3, 2015, Ms. Beninga reported Student's classroom behaviors were disruptive to her ability to teach the class. Ms. Beninga also reported that parents of other students were concerned for the safety of their children because of Student's maladaptive behaviors. For example, Student kicked a classmate in the head and knocked the boy backwards.

5. On September 3, 2015, Ms. Jarrard and principal Lisa Parker referred Student for special education assessments. Mother consented to District's assessment plan for special education eligibility.

6. School psychologist Dr. Roxanne Pruski began a functional behavior assessment in September 2015 and reported her findings in a report dated October 27, 2015. Dr. Pruski worked in special education since 1983 as an early childhood teacher, a school psychologist, and a speech pathologist. She had a doctoral degree in school psychology and family therapy and completed a behavior training course through a two year program from the Orange County Department of Education.

7. Dr. Pruski observed Student intermittently from September 21, 2015, to October 13, 2015, and saw Student hit or kick 24 times, throw objects 29 times, spit 33 times, elope 15 times and refuse to comply 69 times. She observed Student hitting peers, but did not see him hitting Ms. Beninga or other staff.

8. Dr. Pruski also prepared a behavior intervention plan to address physical aggression, such as hitting, kicking, scratching, pinching, spitting, throwing and destroying

³A technique of managing aggressive behavior by using hands and body for restraining a student's head, arms, and legs without touching the joints.

property, eloping, and refusing to following instructions. Ms. Jarrard, Ms. Beninga and Mother provided input in developing the behavior intervention plan.

9. On September 21, 2015, District suspended Student for the first time for one day for maladaptive behaviors including screaming tantrums, spitting, throwing furniture and other objects, eloping, resisting following directions, hitting and kicking staff and other children. District suspended Student on seven additional occasions for causing, or attempting to cause injury to another person by hitting, kicking, punching, pulling hair and glasses, biting, spitting, lunging at staff who were preventing him from eloping or hurting himself as he was climbing and jumping from high cabinets or windows. All suspensions were for one day, except for a two-day suspension on October 20 and 21, 2015.

10. On September 23, 2015, District provided Student with an interim general education behavior plan to handle his maladaptive behaviors until after assessments were completed to determine eligibility and if so, to develop an IEP. On September 23, 2015, Student eloped from class and refused to return despite the promise of a preferred activity. Ms. Jarrard escorted him to a sensory room, an empty classroom across the hall from Ms. Beninga's class. Student threw furniture, objects within reach; charged at Ms. Jarrard, grabbing her hands, twisting her fingers and ripping her blouse. This incident lasted over an hour and required the help of Ms. Parker and another staff member. Ms. Jarrard sought medical attention after the incident, and learned that her fingers were sprained.

11. On October 20, 2015, Student eloped from the classroom into the sensory room, and tried to elope from the sensory room. Student lunged at and bit Ms. Jarrard several times, piercing her skin, as Ms. Jarrard prevented Student from eloping. Ms. Jarrard sought medical attention after the incident. The incident lasted between 45 minutes to an hour.

12. District held an individualized education program meeting on October 27, 2015. District found Student eligible for special education under other health impairment because of his attention deficit hyperactivity and developmental disabilities affecting verbal/nonverbal communications and social interaction. The IEP team discussed the functional behavior assessment. District offered placement in general education 75 percent and 25 percent in special education. In the general education environment, District offered Student small group instruction five times a week for 36 minutes each time with core curriculum modifications to address his needs; speech and language services 30 minutes once a week with a licensed speech and language pathologist assistant; and an intensive behavior intervention aide for transition, social skills instruction, and data collection five times a week for 60 minutes each time. In the special education environment, District offered specialized academic instruction five times a week for 45 minutes each session from a special education teacher; speech and language services 30 minutes once a week with a licensed speech and language pathologist assistant; and intensive behavior intervention, addressing social skills and language pragmatics, twice a week for two hours each time in a small social group, Friendship Connections. The IEP team developed goals in communication for speech intelligibility; three social emotional goals including, asking for help, initiating peer

interactions, and working cooperatively; six behavior goals including, breaks/calming, eloping, following directions, group engagement, break request, and self-control; two reading goals including, blending phonemes, and letter sounds; and two math goals including, numbers and number sequencing. Mother consented to the IEP and District implemented the IEP and the behavioral intervention plan. Although Mother did not believe District provided an aide at all times in compliance with the IEP and did not properly implement the behavior intervention plan, no credible evidence supported her belief.

13. Michelle Roso, the intensive behavior intervention tutor, provided behavior support to Student the first week after the IEP meeting. She was in charge of Friendship Connections. Ms. Roso had over 16 years of experience in special education, specifically in behavior therapy, including implementing discreet trial training and Applied Behavior Analysis techniques. During the first week of November 2015, she observed Student dangling upside down on the school play structure/jungle gym after eloping from class, and feared that he would fall and hit his head.

14. On November 10, 2015, Student hurt two staff members, Sharla Pitzen and Theresa Avila, when they tried to calm Student as he yelled, kicked, hit, bit, spat, and refused to descend from climbing a group of tables, the sink, and windows while in his socks. Student slipped and fell when he tried to balance on the back of a chair. When District removed him from the classroom to the sensory room, Student continued his tantrum and aggressive behaviors, attempted to jump off the sink, lunged at Ms. Pitzen and Ms. Avila, and was incapable of being redirected. He hit them both with closed fists. Ms. Avila, with Ms. Pitzen's help, subdued Student by proning him. The incident lasted an hour. Ms. Avila reported red marks on her arms. Ms. Pitzen reported bruises across her stomach and arms, and bite marks on her left wrist.

15. On November 18, 2015, District held an IEP team meeting to discuss Student's occupational therapy needs and proposed non-public school placements for Student, including Rossier Park School. District members explained that Student had difficulties with transitions in a large group, and required a highly structured, small group setting to address his behavioral needs. Mother believed Student did not require a more restrictive environment. Mother did not consent to the non-public school placement.

16. On November 30, 2015, Student had several, shorter incidences where he was physically aggressive with Ms. Jarrard. He hit and knocked her glasses from her face. Ms. Jarrard successfully redirected Student and he reintegrated into the class.

17. On December 2, 2015, Student had a tantrum when asked to return to a class activity after an earned break. He screamed; threw pencils, papers; and kicked the staff, cabinets, desk, chairs and doors. Staff escorted him to the sensory room. He climbed the windows, the sink, and stomped on the sink faucet while running around the room attempting to elope. Staff feared he would slip, fall, and hurt himself. Ms. Jarrard and four other staff members, including Ms. Parker, tried to soothe Student, tried using warnings, reminding him of incentives, and other calming strategies, but all were ineffective. When Ms. Jarrard placed

her hands up to prevent Student from hitting her, he pushed her fingers back, hit and lunged at her, and tried to open the door, requiring several staff members to keep the door closed to prevent elopement. Eventually, Ms. Jarrard succeeded in proning Student with the assistance of other staff members. The incident lasted approximately two and a half hours. Ms. Jarrard hurt her back, hip and shoulders as a result of this incident and her doctor placed her on leave authorizing her to return part time on January 20, 2016.

18. On December 11, 2015, District held another IEP team meeting, and again proposed a non-public school placement. Mother requested an independent functional behavior assessment, was concerned that Student had not received the aide pursuant to the IEP, shared that Student was afraid of Ms. Jarrard, and reported he did not exhibit the maladaptive behaviors at home as he did at school. Mother wanted Student to continue in the general education environment with all supports and inquired about other District placement options. The IEP team considered the continuum of placement options, including mild to moderate special day classes and autism classes, but concluded those classes were below Student's academic level and did not have the specialized structure for Student's behavioral needs.

19. On December 14, 2015, Student had another tantrum in the middle of an art activity. Student spat, kicked and was incapable of being redirected. Ms. Roso escorted Student from the classroom to the sensory room where Student kicked cabinets, threw everything within reach, and spat over 30 times. When Ms. Roso tried to prevent Student from eloping from the sensory room, he became angry and punched her right eye. He climbed up the window, attempted to remove and tear the cardboard covering placed there to prevent him from climbing out. Staff was concerned for Student's safety because the windows were high and staff was fearful that Student would fall. The incident lasted over three hours. Ms. Roso had a bruised eye and back pains from lifting Student from the window. She suffered three back injuries from working with Student for which she sought doctor's attention.

20. District suspended Student a total of eight times from September 21, through December 14, 2015, for maladaptive behaviors. Student also had maladaptive behavior episodes which did not result in suspension. Student's intensive maladaptive behavior episodes generally lasted between 30 minutes to three hours, and occurred approximately three to four times a week from the beginning of the school year.

21. Student hurt himself during the August 25, 2015 to December 17, 2015 period including: (i) while in the sensory room Student hurt his fingers after hitting an object and was sent to the school nurse; (ii) while climbing on a sink Student slipped and hit his head; (iii) while balancing on a chair Student fell and hit his head.

Appropriateness of Rossier Park School

22. On December 17, 2015, District held a manifestation determination review with the relevant IEP team members and administrative staff to discuss Student's

maladaptive behaviors and suspensions. District notified Mother about the time and place of the meeting; Mother declined to participate. The manifestation review team determined that Student's conduct was a manifestation of his disability, that Student's maladaptive behaviors resulted in serious injuries to staff, and Student's continued attendance at Wagon Wheel Elementary School would substantially likely injure himself and others. District concluded that Student would benefit from a highly structured program, in a secure educational facility that would provide smaller classes, therapy, social skills, and embedded positive behavior supports in the curriculum. The manifestation team also determined effective December 18, 2015, the Friday before the winter break, Student would no longer attend Wagon Wheel Elementary School. The review team determined that Rossier Park School was the appropriate interim alternative educational setting for Student upon his return from winter break. District notified Mother of the manifestation team's decision; Mother did not consent. Neither party provided information of whether Student was attending school after winter break.

23. District employed program specialist Danielle Davis for 10 years as an autism class teacher, autism specialist, intensive behavior intervention supervisor, and, at the time of hearing, as the program specialist. She held a bachelor's degree, a master's degree in special education, a Clear Administrative Services Credential, and a certificate of Eligibility for Preliminary Administrative Credential. She was trained in intensive behavior intervention strategies, the District's equivalent of Applied Behavior Analysis training. She was part of the IEP team, participated in IEP team meetings as a consultant, observed Student in the classroom, visited Rossier Park School and met with its program director, Cynthia King.

24. Ms. Davis credibly opined that neither Wagon Wheel Elementary School, nor any of District's programs was appropriate for Student. Student's classroom at Wagon Wheel Elementary School had two doors making it difficult to effectively prevent elopement when Student had tantrums and acted aggressively. Ms. Davis and all District staff including Ms. Parker, Ms. Beninga, Ms. Avila, Ms. Roso and Ms. Jarrard agreed that Student's maladaptive behaviors were unpredictable, could escalate at any time, had increased in intensity and duration since the beginning of the school year, and redirection did not work consistently for Student. Additionally, Ms. Davis opined that Rossier Park School's program provided an effective safe, structured, and small group environment to handle Student's aggressive behaviors and elopement. Both Ms. Davis and Ms. King confirmed that Student would continue learning the general education curriculum and could progress toward meeting all of Student's IEP communication, social/emotional, behavior, math and reading goals at Rossier Park School. Rossier Park School also had occupational, and speech and language, specialists to address Student's other IEP needs. Rossier Park School had: small classes with up to 12 students with a teacher, an aide, and assigned therapists; full time behavioral staff experienced and trained to implement behavior support plans, and address behavioral issues; an assigned licensed therapist to each student; a strong academic program taught by credentialed special education teachers with general education curriculum training; a small campus; and self-contained classrooms-reducing the need for transitions. Additionally, Student could develop skills for self-control and, when ready, could return to a District school. Rossier Park School would propose additional IEP goals and services as

appropriate to address Student's behavioral and other needs once Student was in that placement. All of the above factors credibly established that Rossier Park School could meet Student's unique needs.

25. Mother believed that Student should be in a District school, but he needed different staff-specifically aides trained in Applied Behavior Analysis, and supervised by a Board Certified Behavior Analyst. Mother visited and toured Rossier Park School. Mother did not meet with Ms. King. Mother observed one classroom at Rossier Park School with children who were in second, third and fourth grade and with varying disabilities. Mother did not see any kindergarteners in the class she observed, found the classroom claustrophobic, and did not want Student to attend the school. Mother was also concerned about the long commute. Ms. Davis researched the commute from Student's home to Rossier Park School during traffic hours, using Google, and recalled it was 35 minutes in the morning. Mother estimated the commute would be 30 miles, or 60 to 90 minutes during traffic hours, but did not provide any credible basis for her estimate. Mother's estimate and commute concerns were therefore not as persuasive. Mother was also concerned that Student might be placed in a harness for bus transport to Rossier Park School based upon information she learned during her tour. While the commute on a school bus might take slightly longer than the 35 minutes opined by Ms. Davis, and Student might be harnessed during the bus commute, these two potential factors when weighed against the other positive factors of that placement were not significant enough to render Rossier Park School an inappropriate interim setting for Student.

26. In her July 2015 report, Dr. McNerney concluded Student should be educated in a general education class with appropriate supports. However, at hearing she could not make specific placement recommendations because she did not observe Student in school, and only met with Student for 60 to 90 minutes in a closed, assessment environment. She deferred to the IEP team for placement recommendations, opining that placement should start with the least restrictive environment. Her opinion as to placement was not persuasive or informative as to the issue. In the assessment environment, Dr. McNerney observed Student having similar maladaptive behaviors seen by District's staff: difficulty sustaining attention, remaining seated, engaging in activities quietly, and waiting/taking turns; interrupted others; did not listen; struggled to follow through with instructions; avoided/disliked tasks requiring a lot of thinking; was easily distracted; fidgeted and squirmed; and ran excessively. However, unlike District's staff that worked with Student in the classroom on a daily basis and observed the lengthy maladaptive episodes, Dr. McNerney found Student easily redirected in the limited assessment environment. Her testimony was less persuasive than District staff because her exposure to Student was limited to a 60 to 90 minute off-campus observation.

LEGAL CITATIONS AND ANALYSIS

Introduction – Legal Framework for Student Discipline under the IDEA⁴

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300.1 (2006)⁵ et seq.; Ed. Code, § 56000, et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) Under the IDEA and California law, children with disabilities have the right to a free appropriate public education. (20 U.S.C. § 1400(d); Ed. Code, § 56000.) A free appropriate public education is defined as appropriate special education, and related services, that are available to the child at no cost to the parent or guardian, that meet the state educational standards, and that conform to the child’s individualized education program. (20 U.S.C. § 1401(9); Ed. Code, §§ 56031 & 56040; Cal. Code Regs., tit. 5 § 3001, subd. (o).) A child’s unique educational needs must 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.)

Legal Framework on Disciplinary Change of Placement

2. Title 20 United States Code section 1415(k) and title 34 Code of Federal Regulations, part 300.530, et seq., govern the discipline of special education students. (Ed. Code, § 48915.5.) A school district may request a due process hearing to authorize a change of placement if the district “believes that maintaining the current placement of the child is substantially likely to result in injury to the child or to others...” (20 U.S.C. § 1415(k)(3)(A); 34 C.F.R. § 300.532(a).) Conduct that has been found substantially likely to result in injury includes hitting, kicking, shoving, biting, climbing on classroom furniture and cabinets, shouting obscenities, throwing objects at people, running out of the classroom, and banging on the doors of other classrooms. (*Long Beach Unified Sch. Dist. v. Student* (2008) Cal.Offc.Admin.Hrngs. Case No. 2008030017.) Behaviors that have been found likely to result in injury also include: hitting an adult in the back, lunging at the teacher and trying to punch and hit her, yelling at and threatening people (*Fort Bragg Unified Sch. Dist. v. Parent on behalf of Student* (2008) Cal.Offc.Admin.Hrngs. Case No. 2008100507); throwing desks, knocking over a computer, yelling and screaming, hitting, kicking, punching, and biting adults (*Fullerton Joint Union High Sch. Dist. v. Student* (2007) Cal.Offc.Admin.Hrngs. Case No. 2007040584); and throwing objects, kicking other children, punching and kicking school staff, eloping from school and running into the street, knocking over another child, screaming, and destroying property (*Lancaster Elementary Sch. Dist. v. Student* (2006) Cal.Offc.Admin.Hrngs. Case No. 2006030771)

⁴Unless otherwise indicated, the legal citations are incorporated by reference into the analysis of each issue decided below.

⁵All references to the Code of Federal Regulations are to the 2006 version.

3. If the ALJ deciding the case determines that maintaining the current placement of the student is substantially likely to result in injury to the student or to others, the ALJ may order a change in placement to an appropriate interim alternative educational setting for not more than 45 school days. (20 U.S.C. § 1415(k)(3)(B)(ii)(II); 34 C.F.R. § 300.532(b)(2)(ii).) The interim alternative educational setting must enable the student to continue to participate in the general education curriculum and to progress toward meeting the goals set out in the student’s IEP. (20 U.S.C. § 1415(k)(1)(D)(i); 34 C.F.R. § 300.530(d).) Additionally, the IDEA requires that a student with a disability who has been removed to an interim alternative educational setting receive behavioral intervention services and modifications so that the behavior for which the student has been placed in the interim alternative educational setting does not recur. (20 U.S.C. § 1415(k)(1)(D)(ii); 34 C.F.R. § 300.530(d)(1)(ii).)

4. A district may place a student in an interim alternative educational setting for not more than 45 school days, regardless of whether the student’s behavior is determined to be a manifestation of the child’s disability, under “special circumstances” defined as (a) carrying or possessing a weapon to or at school, on school premises, or at a school function; (b) knowingly possessing or using illegal drugs, or selling or soliciting the sale of a controlled substance, while at school, on school premises, or at a school function; or (c) inflicting serious bodily injury upon another person while at school, on school premises or at a school function. (20 U.S.C. § 1415(k)(1)(G); 34 C.F.R. §300.530(g).) The student’s IEP team determines the interim alternative educational setting. (20 U.S.C. § 1415(k)(2); 34 C.F.R. § 300.531.)

5. The term “serious bodily injury” for the purpose of these disciplinary measures 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 based upon the totality of the circumstances. (*United States v. Johnson* (9th Cir. 1980) 637 F.2d 1224, 1246.)

6. The IDEA does not require parental consent to placement in the interim alternative educational setting, or that a district must place a student in the interim alternative educational setting that parents prefer. (See *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)

7. At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) Here, District is the filing party and has the burden of persuasion on all issues.

Analysis of Issue 1: Conduct Substantially Likely to Result in Harm to Self or Others

8. District contends a substantial likelihood exists that Student's continued placement at Wagon Wheel Elementary School would result in injury to Student and others. Student contends his behaviors would not result in injury to himself or others if District provided Student with an aide trained in Applied Behavior Analysis and was supervised by a Board Certified Behavior Analyst. District prevailed on this issue.

9. The evidence convincingly established Student's placement at Wagon Wheel Elementary School caused and would substantially likely continue to cause injury to Student or others. From August 25, 2015 until December 17, 2015, Student's maladaptive behaviors increased in duration and intensity. From August 25, 2015 to October 27, 2015, before Student was found eligible for special education, District provided additional staff in the classroom, an intervention aide, and a general education behavior plan; none of which reduced his maladaptive behaviors. After District found Student eligible for special education on October 27, 2015, District developed an IEP for Student including behavior goals based on the results of a functional behavior assessment; a behavior intervention plan designed to address his unique needs; additional staff support; and trained intensive behavior intervention aides. District implemented the IEP and provided the services and supports. During this period, District staff used the proning technique on Student twice for his safety and the safety of others. None of District's efforts helped reduce or eliminate Student's aggressive or eloping behaviors. Student's physical aggression resulted in injury to several District staff, and was substantially likely to continue. Student's physical aggression was also substantially likely to cause him injury as well as to other students based on the increased duration and intensity of his maladaptive behaviors by December 2015.

10. The ALJ has the power to order placement in an interim alternative educational setting upon making the finding that Student was substantially likely to injure himself or others at Wagon Wheel Elementary School. District has met its burden and therefore is entitled to an order placing Student in an interim alternative placement for not more than 45 days from the first day of attendance at the interim alternative placement.

Analysis of Issue 2: Interim Alternative Educational Setting

11. District contends that Rossier Park School is the appropriate interim alternative educational setting for Student. Student contends that Rossier Park School was inappropriate, and that a general education program with proper behavior supports is the appropriate placement in the least restrictive environment. Student also contends that District had no authority to place Student in an interim alternative educational setting under 20 U.S.C. § 1415(k)(1)(G); 34 C.F.R. §300.530(g) because District's staff did not suffer "serious bodily injury" as defined under 18 U.S.C. § 1365(h)(3).

12. District met its burden of establishing that Rossier Park School was an appropriate interim alternative educational setting for Student, for not more than 45 days. Student's elopement behavior required a safe environment. Rossier Park School had a small

campus with self-contained classrooms, and experienced and trained staff. The staff to student ratio was low. Student needed a highly structured environment capable of implementing his IEP goals while providing access to the general education curriculum, within the framework of a comprehensive behavioral program. A 45-day interim placement at Rossier Park School would enable Student to participate in the general education curriculum with appropriate modifications to his IEP and behavioral intervention services and supports to address his needs. Mother preferred Student be placed in a District school with an aide trained in Applied Behavior Analysis and supervised by a Board Certified Behavior Analyst, as the least restrictive environment for Student. However, Student offered no persuasive evidence supporting Mother's beliefs that this would improve Student's maladaptive behaviors. Student offered no evidence that Rossier Park School could not provide an age appropriate environment for Student beyond Mother stating that she did not see any kindergarteners when she visited Rossier Park School. Student's expert, Dr. McNerney, only opined generally that Student should start in the least restrictive environment and deferred placement recommendations to the IEP team. Dr. McNerney did not observe Student at school, and therefore did not offer a persuasive opinion regarding an appropriate placement for Student. Student's IEP team members were all well-qualified, had experience with Student, and Ms. Davis visited Rossier Park School in the context of Student's placement, which provided District with a credible basis for concluding Rossier Park School was appropriate for Student.

13. Student's second contention raises an issue that was not alleged in District's complaint. District does not contend that Student caused serious bodily injury to any other person justifying an interim alternative educational setting. The issue as framed in this case relates to title 20 U.S.C. § 1415(k)(3)(A) and title 34 C.F.R. § 300.532(a), as discussed above in Issue One. District correctly determined that Student should be placed at Rossier Park School as an appropriate interim alternative educational setting because his continued placement at Wagon Wheel Elementary School was substantially likely to result in injury to Student or others. Therefore, whether or not staff's injuries amounted to "serious bodily injury" as defined under 18 U.S.C. § 1365(h)(3) is irrelevant.

14. In conclusion, District met its burden of establishing it had the right to place Student at Rossier Park School as an appropriate interim alternative educational setting because Student was substantially likely to injure himself, or others. District requested an order extending the time period of the interim alternative educational setting through the pendency of the resolution of the non-expedited issues in the matter. However, District provided no authority that supports a finding that it is entitled to an order extending the time frame for an interim alternative educational setting under title 20 U.S.C. section 1415(k)(3)(B)(ii)(II) for more than 45 school days.

