

DELAWARE DEPARTMENT OF EDUCATION  
SPECIAL EDUCATION DUE PROCESS HEARING PANEL  
In the Matter of )  
COLONIAL SCHOOL ) DE DP: 05-07  
DISTRICT )

v. )  
XXXXXXXXXXXXXXXXXX)  
and. )

In the Matter of )  
XXXXXXXXXX) DE DP: 05-08  
v. ) HEARING DECISION AND ORDER  
COLONIAL SCHOOL DISTRICT )Hearing Dates: 11/16/2004 and 11/17/2004  
)

Parent: XXXXXXXXXXXXX, ("Mother"), 239 Riveredge Drive, New Castle, DE 19720  
Counsel for Parent: Pro Se  
Counsel for District: Jennifer Brierley, Esq., Morris James Hitchens & Williams,  
P.O. Box 2306, Wilmington, DE 19899  
The Decision and Order refers to the parties, witnesses and others generically,  
to protect  
personally identifiable information. An index of names is attached for the  
benefit of the  
parties. The index will permit the parties to identify specific witnesses and  
other persons  
and pertinent references. The index is designed to be detached before this  
Decision and  
Order is released as a public record. Any resemblance between the names set  
forth herein

and individuals is merely coincidental as the surnames were fictitiously created  
to protect  
the identities of the witnesses and parties  
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DELAWARE DEPARTMENT OF EDUCATION  
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\*\* Replacement names have been used. In the event that any such name refers to  
an  
actual person that reference is coincidental.

#### I. PROCEDURAL BACKGROUND

Child is a 9 year old, 4 th Grade Student in the XXXXX School District. Child is  
enrolled at the XXXXX Elementary School ("Present School") in the XXXXX School

District ("District"). Child is presently not actively attending school. Instead Child is receiving "Home Bound" education over the objection of Mother who has unsuccessfully attempted to obtain the District's adherence to the "Stay Put" provisions. Child has been identified as suffering from an emotional disturbance requiring special education and related services as those terms are defined in the Individuals with Disabilities Education Act ("IDEA") and corresponding regulations and Title 14 Chapter 31 of the Delaware Statute.

This case arises from the consolidation of the District's 10/18/04 request for an expedited hearing ("Expedited Request") and Mother's 10/18/04 Request for Relief for the District's violation of IDEA ("Non Expedited Request").

The Expedited Request and Non Expedited Request were consolidated after suggestion from the District and no objection from Mother and District. In the Prehearing Order, District and Mother were given an opportunity to state which issues were before the Sole Hearing Officer and which were before the Panel. Neither party made any demarcation of those issues before the Sole Hearing Officer in the expedited case and those before the Panel in the Non Expedited Case. Notwithstanding, this is irrelevant as this decision is unanimous. For

purposes of brevity, a joint decision is presented.

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## II. SUMMARY OF DECISION

Child should be placed in an interim alternate educational setting at XXXXX for up to

45 calendar days immediately and both parties are to cooperate by filling out applications

and providing documents necessary for this to occur. Child should have been allowed to

attend Present school from October 19, 2004 until the date of this decision.

Child is

entitled to Compensatory Education for the school days from October 19, 2004 until the

date of this evaluation. An Independent Educational Evaluation to be conducted by a

Board Certified Psychiatrist associated with a Professional who has a doctorate in

education and practical experience in the educational needs of children with behavioral

challenges is to be done at District's expense. All parties are to cooperate for this

evaluation.

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## III. FINDINGS OF FACT.

1. Child, prior to starting the 4th grade at the Present School, had been receiving

intensive services from the XXXXX from April 19, 2004 through the

majority of the summer of 2004.

2. Child had been diagnosed at the XXXXX as suffering from a Mood Disorder NOS, Oppositional Defiant Disorder Attention Deficit Hyperactivity Disorder, Parent Child and Sibling relational problems and there was a suggestion of them ruling out bipolar disorder and Attention Deficit Hyperactivity Disorder Combine Type. District Exhibit 33, SD 0105. Child had been diagnosed as suffering from Bipolar disorder by a prior treating psychiatrist. District Exhibit 89.

3. The Child's Services at the XXXXX were principally therapeutic and designed to treat the physically aggressive misbehaviors of Child. However, the Child also received educational services at the XXXXX. District Exhibits 33, 34 and 35).

4. Child progressed at the XXXXX in that, despite a long history of explosive violent physical attacks of fellow students and teachers, representatives of the XXXXX at the IEP meeting indicated that Child was a Model Student with no recent aggressive behaviors. (District Exhibit 28).

5. On August 23, 2004 and August 26, 2004, the District, Mother, representatives of the XXXXX, Dr. XXXXX met and a decision was made to return Child to present school with the assistance of a personal aide. (District Exhibit 28). XXXXX confirmed the FACT project would provide assistance, including intensive case management services to Child, the

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continuation of a mental health aide to act as a "one on one" to prevent the child's previous aggressive behaviors, access to direct treatment services, and outpatient services through the XXXXX such as counseling and community intervention. (District Exhibit 28). The aide was only temporarily to be with David Sen, a soft spoken individual who though months of work

with Child had gained the Child's trust. Transcript 11/17/04 at 650. The plan was that David Sen would train initially attend the Present School with Child to prevent the aggressive behaviors. The District would retain a replacement. Daniel Sen, in turn, would provide some training to ease the transition between the individual hired as the One on One para-professional and Child.

6. Originally, Dr. Alice Fan, a clinical psychologist and Case manager of Child with the FACT program, prior to the August 23 and 26, 2004 IEP indicated that she believed XXXXX ILC was an appropriate placement of Child.

Mother disagreed as the child had a bad experience, fighting with other students at XXXXX ILC, and in light of this history, Dr. Fan believed that Present School to be a better placement for Child.

7. Mother requested that Child have a One on One Paraprofessional ("One on One"). District Exhibit 28.

8. The current placement is Present School.

9. Mother contends and Dr. Alice Fan's testimony supports that at the IEP meeting(s) of 8/23/04 or 8/26/04 Dr. Fan had suggested that Present School hire a One on One para- professional to prevent Child from physically attacking other students and teachers/school personnel. Dr. Fan further indicated to District at this time that the individual hired had to be someone with a Mental Health Background. Dr. Fan further indicated that the One on

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One had to be one that Child trusted or that child perceived as helping Child with problem resolution. Dr. Fan suggested individuals with Mental Health Backgrounds were available at an agency, XXXXX. The District had indicated that it had thought that the individual had to be an employee of the District. Implicitly, it was unreasonable to believe that the District had to convey to Dr. Fan an inability to get an exception to an enunciated school

policy.

10. Dr. Alice Fan indicated that her grant from FACT would pay for the one on one aide for a short term until District retained one.

11. The School District never agreed that the person hired as the "one on one" aide had to have mental health training and this was not set forth in the IEP. District Exhibit 8. The notes for this IEP, District Exhibit 28, SD088 states:

" A Revision to the IEP was completed to reflect a regular classroom setting for all subjects except Math in a Resource Room setting. This computes to 5 hours per week of direct service. However, if the 1:1 Paraprofessional is approved through ICT, hours will increase to 30 hours per week." (Emphasis added).

Moreover, District indicated that it would meet at the end of September, 2004 to develop a new IEP, but failed at that time to schedule a date certain for the meeting and give to Mother the required Notices of the same. This is critical as virtually every witness for the District testified that they had significant doubts as to the success of the transition of Child to Present School.

12. On 8/30/04, Child started Present School for ½ days for the first week and thereafter at a fulltime schedule.

13. Child's assigned regular teacher was Cathy Sun. She has a Bachelor's, academic work towards a Masters and is State certified K-4. The room Child

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was assigned to had 17 boys and 5 girls or which a total of 4 children had special needs (3 in language arts and 2 in math( including some in both)).

14. On 9/15/04, there was a substitute for one of Child's teachers. Child had a point sheet presumably used as a part of behavioral modification which he was supposed to bring to the substitute teacher. Child did not bring up the point sheet when required and was informed by the substitute that he would lose 5 minutes of recess. Child then kicked a table and then a chair which hit

the substitute teacher in the knees. The particular substitute 6 years prior had underwent a knee replacement. District Exhibit 25 SD0081.

15. On 9/16/04, when by agreement, FACT through Dr. Alice Fan was supplying the One on One<sup>2</sup>, Child got into dispute with another male student over a library book. The dispute was which Child was the rightful possessor of the book. The home room teacher, Cathy Sun took the book away from both children.. When Child walked away he threatened to kill the other student as he walked in front of Cathy Sun toward the homework bin. The teacher informed child he could not make threats such as that and that she would have to report it. At that point, Child was at the homework bin. Child turned to face Cathy Sun and told her that he was going to bring a knife in tomorrow and kill the other student. Cathy Sun opened her desk to get a behavioral referral form and started to fill it out. Cathy Sun heard a yell and looked up to discover Child beating the other student who was seated with his fists in front of all the other students. Child repeatedly pounded the other student with his fists until the other student curled up in a ball apparently under his desk.

2 The one on one was not present at the time of the incident.

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Cathy Sun jumped towards Child to stop the damage and child sat down. The student who was beaten was so traumatized stayed for some time under the desk in the fetal position refusing to come out. This traumatized other students in the class. Apparently, Child approached the other student who was defenseless from behind . Child then walked back to his seat. Transcript 11/16 at 229-235. Child was taken to a Counselor where he then pulled from the wall a poster in a plastic frame that was presented at the hearing and weighed about seven pounds and was approximately three feet high and two feet in length and threw it at the Counselor. Transcript 11/16/04 324-326.

16. Child was suspended for two days for the incident referenced in paragraph 12

the remainder of 9/16/04 and 9/17/04 respectively. The next school day was 9/20/04.

17. District hired a one on one aide, Randy Jones on or about September 20, 2004. David Sen provided some training to Randy Jones in that he did speak to him about Child's specific needs.

18. Randy Jones did not have mental health experience as that rather vague term was used by Mother and Dr. Fan.

19. On September 21, 2004 while Child was playing Dodge Ball, within the rules of that game another student threw the ball and it hit Child. Child walked over to that student and slammed him down to the pavement. The student who Child attacked was bleeding from the leg, Child showed no emotion at that time. The suddenness of these physical attacks makes it difficult for any one on one to intervene. It should be noted that Randy Jones was present at this incident and was not able to intervene prior to Child attacking and injuring the other student.

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20. Moreover, the One on One did try to intervene to prevent incidents. He was not always able to prevent them. For example on September 22, 2004, Randy Jones apparently was trying to calm Child down who had come back agitated from Math. Child responded by throwing Mulch at Randy Jones and actually picking the wood from a wooden bench with his own fingernails and throwing the wood chips at Randy Jones.

21. The Present School's made some attempts at behavioral modification using positive reinforcement. For example, on September 25, 2004, there was a special reward assembly for children with good behavior "ABC" where children had earned the reward were entitled to attend and watch a show. That day, there was a show with someone from the Smithsonian Institute where a student was invited to try on a space suit. While Child had not earned the



reward, Cathy Sun in an attempt to show Child the benefits of appropriate behavior took the child to the show and sat adjacent to him. Randy Jones also sat adjacent to Child. Child became angry when he was not chosen to try on the Space Suit and jumped up. Cathy Sun whispered to him that he was not chosen, Child elbowed Cathy Sun. Additionally, when the class returned to the classroom, Child ran into the classroom and started swinging his chair above his head. The other students were within a foot or two and close enough to be hit by the chair. Luckily no child was injured by Child swinging the Chair. Transcript 11/16 at 242-246.

22. On 9/30/04, Child attacked Randy Jones kicking him. District Exhibit 21. Child was suspended for two days.

23. On October 4, 2004, the IEP team met to discuss Child's Aggressive behavior. Sally Kite discussed the possibility of Child's alternative

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placements and the team agreed to reconvene 10/11/04 and 10/12/04 to develop a SETT Plan to help the IEP team analyze Child's "school environment and accommodate his needs."

24. On October 5, 2004, Child engaged in three incidents requiring discipline. The first occurred in the morning and involved Child saying, "bitch you took my answer". District Transcript 11/16 at 247. Later that day at recess, Child became agitated and teacher Cathy Sun approached him and quietly attempted to calm him down orally reminding child about making good choices. Child responded by throwing and striking Cathy Sun with a jump rope. He then picked up another jump rope, one 5 foot long with plastic handles and began swinging it as a whip at people. District Transcript 11/16 at 247- 249. The third incident that day occurred after recess as Child was getting ready to go home. Child had gotten into an argument with another student. His One on One aide, Randy Jones had taken him aside when they

returned outside of the classroom to talk to Child to calm him down. Child while initially shouting profanities appeared to calm down and was able to do his silent reading one of the last things in the typical day for Child. Cathy Sun

thought Child was calmed down since he was able to complete his assigned task, silent reading. Without warning as the children were lining up to leave, Child with no apparent warning ran across the room and physically threw the child with whom he had argued so hard, the other students feet just flew out from under him and the other student fell to the hard tile floor on his back. Transcript 11/16 at 251-253 and District Exhibit 18.

25. On October 6, 2004, Child was refusing to go to his Math Class. Several school personnel were trying to get him to go in including the principal .

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Child picked a sign off the wall with a degree of force that some plaster presumably from the wall remained attached to the adhesive on the back of the sign, Child threw the sign at the school personnel. Transcript 333-338.

26. There was no School on 10/7/04 and 10/8/04 and the next school day was 10/11/04.

27. Notwithstanding the lack of school, on 10/8/04 Principal Gerry suspended Child for a minimum of one(1) day pending outcome of the IEP meeting on 10/11/04. District Exhibit 17. It does not appear from District's Exhibit 16 that on 10/11/04 District adequately explained to Mother that the suspension would continue.

28. The IEP team met on 10/11/04. Apparently there was a miscommunication as to a new purpose of the meeting to discuss a change in placement for Child. Mother would not waive the required ten(10) day notice for the meeting and another meeting was scheduled for 10/12/04. District Exhibit 16.

29. The IEP team reconvened on 10/12/04, but Mother had wanted Dr. Fan to

attend who could not attend. Mother would not as she was entitled under 14 DE ADMIN CODE Sec. 5.3.2 waive the ten (10) business days notice and the District Cancelled the meeting and suspended Child for another six (6) days. Child was slated to return on 10/19/04 Transcript, 11/16/04 at 140.

30. On 10/19/04, the District wrote mother and informed her Child was not to return to school until further notice. Presuming the mail (unless express mailed) is received in three (3) days, Mother is found to have received District 12 on October 22, 2004.

31. The District concedes not allowing Child to return to school starting 10/19/04

violates the stay put rule that a child remain in a current educational 12

placement pending the administrative or judicial review. 34 C.F.R.

300.514(a) and 14 Del. C. Sec. 3143. See District Brief and Transcript 11/16/04 at p.27-28.

32. The District was not required to provide educational services for ten(10) days

of suspension pursuant to 34 C.F.R. 200.520(1)(ii).

33. Mother never wanted homebound instruction and never conceded that Homebound was the equivalent to a typical school day of instruction.

34. Child's DSTP state testing results indicate that while Child was meeting the State standards for Reading, he was well below those standards for writing and Math. District 7.

35. On November 4, 2004 District began providing homebound services for 2 hours a day ten hours a week.

36. While the One on One aide hired by District as of the date of hire, Randy Jones lacked Mental Health Training, the District made appropriate arrangements for to gain mental Health Training. for Randy Jones. Transcript

11/16/04 at 132.

37. Mr. Jones lack of Mental Health Training did not cause Child's above misbehavior.

38. Child has a long history starting in the First Grade and continuing to present

of aggressive behaviors. As Child gets older and physically stronger these behaviors gets progressively more dangerous. These include but for the sake of brevity are not limited to the following:

a. First Grade at Present School

(1)shoving teacher's hand. District109.

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(2)slapping his teacher. District 105.

(3)hitting and kicking the principal. District 103.

In First Grade, Child was referred to District's Student

Intervention Team. District 102 and 107 where a point card system was developed as a part of behavioral modification. .

District 107. Further Child was referred to for a speech and language evaluation, District 107 which revealed no disorder.

District 98.

b. Second Grade at Present School.

(1) Child threatened and hit other students. District 91, 92 and 93.

(2) Child threatened suicide when he indicated he wanted to die.

District 95.

c. Third Grade- Mother "choiced" Child enrolling him a different school in the District to give him a fresh start. A couple of weeks

into the school year child attacked school personnel and

threatened them when they intervened in preventing him from

fighting another student. District Exhibit 78.

The District's IEP Team was meeting to discuss possible placements of Child in either a Resource room at his then third grade school, the Compass Program and the Intensive Learning Center at McCullough Elementary School.

District Exhibit 76.

On 10/15/03 the District determined Child was eligible to receive special educational services as suffering an

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"emotional disturbance." Child's IEP( developed in his 3rd Grade Year focused on Child behavioral needs and devoted almost 1 ½ pages to different strategies to be employed to assist Child with anger management skills, coping skills and social skills. District Exhibit 8. The IEP team decided to place Child in XXXXX ILC, a specialized program designed to meet the needs of children with substantial difficulties in learning and behavior. On his first day at XXXXX, child got into a fist fight with another student.

District Exhibit 71. This occurred again on 10/27/03.

District Exhibit 65. He also multiple times attacked school personnel and made threats. So on 11/6/03, the IEP team met again. At that meeting residential placement of Child was discussed. District Exhibit 62. However, the teams met a road block in that for student in Child's age group there were no therapeutic treatment centers accessible to the District. District Exhibit 62.

At a later moment on 1/6 /04, the Child's treating psychiatrist indicated that Child suffers from an Anxiety Disorder, Pervasive Development Disorder, Depressive

Disorder, Attention Deficit Disorder, Oppositional Defiant Disorder Traits, Rule Out Bipolar Disorder, Rule Out Psychotic Disorder. More critically he indicated that

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Child's "Mental health issues prevent him from responding positively to a system of points and rewards." District Exhibit 52. Child's same mental health issues today are impairing him from receiving benefit from a system of points and rewards.

On 1/29/04, Child's placement was changed to the XXXXX School, a program for students with behavioral difficulties where surveillance is employed. On 2/10/04 Child got into a fight with another student where the teacher separated the boys sent the boys to different rooms, but unexpectedly Child left his assigned room and attacked the other student. District Exhibit 38. The very suddenness of Child's attacks on other students regretfully is a pattern of behavior that has continued into the present year.

39. On 10/26/04 the IEP team met again. District Exhibit 10. At that 10/26/04 meeting program and placement of Child was discussed as well as a functional assessment of Child's behavioral triggers to use as behavioral interventions for the child. A SETT process was done by the District. The SETT Framework was attached as Exhibit 11. Transcript. 11/16/04 at 145-148. Further District presented Mother with District Exhibit 2, a rather detailed chart, that supports that child's aggressive behaviors even over the limited period manifested disproportionately in the general classroom

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setting at Present School and less in the Special classroom setting where Child attended Math classes. One of the triggers for Child's aggressive behavior occurs when he is not called upon for participation. Transcript, 11/16/04, 146. Also, another trigger seems to be that Child does not want to appear different. Transcript, 11/16/04 146. These triggers will be present less frequently in a small classroom where all the students receive supports than in a larger classroom where very few receive them.

Transcript 11/16/04,146.

40. Present school has approximately 420 students. Transcript 11/16/04 at 151.

41. The District desires that Child be placed on an interim basis for 45 days at the XXXXX School which has approximately 37 students. Transcript 11/16/04 at 151. At the XXXXX School Child would be in a class with between 5 and 6 students. Child's education at XXXXX would be under the following format. Child would receive one on one educational services from a specialized certified education teacher for twenty minutes, followed by 20 minutes of computerized instruction followed by twenty minutes of independent work at a slightly lower level than Child could perform so as not to be at Child's frustration level. Transcript 150-152.

42. The District testified that Special education was not available at Present school on a full time basis but only on a part time basis. Transcript 11/6/04 at 160. The District further did not believe that Child would best be served at its full time special education center, XXXXX ILC in that

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Child had failed there previously. Transcript 11/16/04 at 160.

Additionally, it is found that the system employed at XXXXX is more likely to intellectually challenge child than at XXXXX ILC.

43. Child's own counselor did not see XXXXX different age groups than

Child as a problem for Child. Transcript. 11/17/04 at 589. Moreover, the therapist did not see XXXXX as an inappropriate interim temporary placement. Transcript. 11/17/04 at 680.

44. Dr. Fan testified that she believed that if Present School had provided a properly trained mental health aide she did not have any evidence that Child could not be successful at Present School. Transcript 11/17/04 at 500-501. However, her testimony did not carry great weight as she was not aware of much of Child's behavioral history prior to 4th grade and had virtually no knowledge of what Randy Jones had done while he was Child's One on One. Lastly, one of the most violent incidents occurred prior to Randy Jones start of employment.

45. The mental Health Aide that had gained Child's trust and who Mother claims was effective had worked with Child two or three months before gaining Child's trust , doing things with Child which could be conceived as fun activities, and certainly lower stress level situations. than occur in an academic setting. Transcript 11/17/04 at 650. However, it would seem that trust alone was not enough in that Child in third grade had a trusting relationship with a One on One at XXXXX, but had acted aggressively towards his fellow students despite this relationship.

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### III. CONCLUSIONS OF LAW

1. The District has met its burden of proof under 20 U.S.C. Section 1415(k)(2) that Child

should be placed immediately for forty- five (45) calendar days at XXXXX as his interim alternative educational setting.

2. The District violated Child's right to readmission to Present School starting October



19, 2004 and continuing until issuance of this Decision as well as any additional delay of School District, if any, in sending Mother any necessary documents for Child to gain admission into XXXXX.

3. Child is entitled to compensatory education for the number of school days he would have attended at Present School from October 19, 2004 until the date of this Decision.

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#### IV. BASIS FOR DECISION

##### I. Governing Statute For Interim Placement.

20 U.S.C. Section 1415(k)(2) states:

A hearing officer under this section may order a change in placement of a child with a disability to an appropriate interim educational setting for not more than 45

days if the hearing officer-

(A) determines that the public agency has demonstrated by substantial evidence that maintaining the current placement is substantially likely to result in injury to the child or to others;

(B) considers the appropriateness of the child's current placement;

(C) considers whether the public agency has made reasonable efforts to minimize the risk of harm in the child's current placement, including the use of supplementary aids and services; and

(D) determines that the interim alternative educational setting meets the requirements of paragraph 3(B).

20 U.S.C. 1415(k)(2) clearly provides a 4 part test. The School District bears the

burden of proof to show it has met each of these 4 parts which are separately addressed.

The School District has met this burden for the reasons set forth below.

A. The District Has Demonstrated by Substantial Evidence that Maintaining the Current Placement is Substantially Likely to Result in Injury to the Child or to Others.

The term "substantial evidence" is statutorily defined as beyond a preponderance of evidence. 20 U.S.C. Sec. 1415(k)(10(C)). Substantial evidence has further been defined as reasonable evidence that a reasonable mind would accept as adequate to support a conclusion. *Scranton School District*, 28 IDELR 96 (SEA, PA June 22, 1998). In the present case, the evidence as set forth from the findings of facts, clearly shows an escalating pattern of violence substantially likely to result injury to Child or Others. This is well beyond the traditional greater than 50% standard set by "preponderance of evidence" especially concerning the likelihood that other students will

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be hurt by Child's actions.

It should be noted that the injury from the above standard need not be defined as life threatening nature or requiring emergency medical treatment. Congress could have

made this part of a definition and did not. The undersigned believes Congress' in its

failure to do so purported to grant the fact finder leeway to determine the type on injury

based upon the circumstances presented. This interpretation is supported by Light v.

Parkway C-2 School Dist., 41 F. 3d 1223(8th Cir, 1994) where Senior Judge Heaney of

the 8th Circuit rejected the contention that "an 'injury' is inflicted only when blood is

drawn or the emergency room visited..... More broadly we reject the proposition that a

child must inflict serious harm before that child can be deemed substantially likely to

cause injury" Light v. Parkway C-2 School Dist., 41 F. 3d 1223,1230 (8th Cir, 1994).

In the present case, Child's aggressive actions occur without warning. This compromises a victim's ability to prevent injury or the District's ability to intervene. For

example, the other student injured on September 16, 2004 was seated, essentially defenseless and attacked from behind by Child. On October 5, 2004 the clear testimony

was that Child had seemed to calm down when suddenly he threw another student to a

hard tile floor. It is not controlling that this other child landed on his back and not his

head and suffered a permanent brain injury. In the tight confines of a room, an unanticipated impact such as that presented could have lead victim's head to strike a floor

or a variety of objects on his way down causing serious injury. Child's swinging of chairs in the classroom increases this risk. The serious nature, the number of incidents over a short period and the suddenness of the attacks, all lead to one conclusion, leaving Child in Present School clearly presents a serious risk of injury to other individuals.

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#### B. Consideration of the Appropriateness Child's Current Placement.

The undersigned do not consider the Present School as appropriate for Child. Almost from the beginning of his placement, Child has attacked both other students and

personnel, physically and verbally. These attacks occur often without warning.

Placing

Child in a regular class where there are 21 other students and in a school where there are

over 400 students increases the possibility of Child's attacks and detracts from Child's

receipt of educational benefit. In support of this, the undersigned notes that in the Terry

Center with its smaller staff to Student ratio, Child did not evidence the violent

tendencies. In his present group therapy, the aggressive incidents do not occur even

when Child experiences frustration from not winning games. More importantly, the District, during the short period, has provided some evidence that the violent attacks by

Child occur not in the Special Educational Setting (where there is a significantly smaller teacher to student ratio) but in the regular classroom. District Exhibit 2. The undersigned reject any contention that the inappropriateness of the setting simply results of the placement of a One on One without mental health training. Simply put, there has been no causal connection made between any training or lack thereof or the behavior of Randy Jones and the physical attacks of Child. While Child may have a more trusting relationship with his former aide, Daniel Sen, the first and one of the more violent episodes occurred at a time when Daniel Sen was the aide. While Daniel Sen was not present at the time of the attack, this provides justification for the District's hire of an employee and not an independent contractor. Simply put, the District had the ability to dictate to its own employee that they be there early in the morning. They lacked this sort of control over Daniel Sen ( not that this in itself was a precipitating cause of the

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attack). Moreover, in the 3rd grade Child had a trusting relationship with an aide, but his aggressive attacks of other students continued.

C. The District Made Reasonable Efforts to Minimize the Risk of Harm in the Child's Current Placement.

Child was in the Terry Center the summer preceding current school year. The School District from its first IEP meeting concerning reentry on August 23, 2004 until the Child's final day in school took reasonable efforts. First and foremost it hired a one on one aide within a month of learning of the reentry and from the Child's start of school took advantage of the Fact program's supply of David Sen as a One on One aide; Additionally, District provided classroom accommodations which include but are not limited to, offering Child breaks, providing preferential seating in the front of the class, using a point card system, reminding Child of rules, walking and talking with Child in an attempt to deescalate Child when he started to act aggressively, removing time restrictions on tests, conducting a functional behavioral assessment, ensuring the Aide it hired went to Mental Health Training. Mother's contention that the District hire of a One on One Randy Jones without Mental Health Training shows a lack of reasonable effort does not have merit. As a preliminary manner at best it is conjecture to suggest that Mental Health Training for the One on One hired less than a month after the need presented when another One on One with Mental Health Training assisted in the Training of Randy Jones is conjecture. At worst, it is scapegoating. By way of example, none of Mother's witnesses were present

when Child violently attacked others. Dr. Alice Fan never observed Child in School at

all. Moreover, when Dr. Fan's testimony that she had no reason to believe placement in

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Present School would not succeed with a One on One paraprofessional with Mental Health Training was nothing more than an admission to the obvious, Dr. Fan, like the rest

of us is not clairvoyant. This is not the same as offering an opinion that utilizing any

resource or One on One was a fix of the problem.

Moreover, it is noted that the School District apparently had a policy that its One

on One paraprofessional are employees. This in of itself coupled with the time pressures

made a specialized selection, difficult, if not impossible. Moreover, the District promoted

the Aides Mental Health education at the Terry Center. The fact that this did not occur

instantaneously is merely a reflection of reality that Regular School lacks the specialization of a specialized educational institution geared to serve students with

mental health disabilities that manifest in the violent physical attacks of others. Lastly,

having a One on One as an employee leads to a greater degree for District to control that

Employee. It gives the District the ability to condition employment on training, attendance when the child gets off the bus, not after the Child starts school.

D. High Roads, the Interim Alternative Educational Setting Meets the Statutory Requirements.

20 U.S.C. Section 1415 (k)(3) (B) states:

Any interim alternative educational setting in which a child is placed under paragraph (1) or (2) shall-

- (i) be selected so as to enable the child to continue to participate in the general curriculum, although in another setting, and to continue to receive those services and modifications, including those described in the child's current IEP, that will enable the child to meet the goals set forth in that IEP; and
- (ii) include services and modifications designed to address the behavior described in paragraph (1) or paragraph (2) so that it does not recur.

The High Roads School, after careful examination, provides a suitable setting for

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Child. The IEP is set forth as Exhibit 8 as modified 8/26/04. See also, District Exhibit 26. It provides for special education services 300 minutes for Math Only and the remainder in a general curriculum. The District provided testimony that the services could be implemented at the High Roads School. Transcript 11/16/04 at 152 Indeed, High Roads with its one on one teaching for twenty minutes an hour could individualize the Child's curriculum to his academic progress. Transcript 11/16/04 at 153-154. Furthermore special education services for Child's particular need in Math as enunciated the IEP set forth as District exhibit

8 could be met at High Roads, Transcript 11/16/04 at 156. Child's General education clearly testified that the individualized attention at High Roads for



Child was something designed to lessen Child's aggression. Transcript, 11/16/04 at 270. Sam Dane, a school psychologist who has provided service to Child in the past, testified that more Counseling and behavioral support services, as well as a smaller class size were available to Child at High Roads than were available Present School. Transcript 11/16/04 at 403-404.

This brings us to a One on One para professional. Notwithstanding, the lower student to teacher to student ratio, Child should still have a One on One para professional as he attends the High Roads School on an Interim Basis for the following reason. It is not known, what the eventual placement for Child will be after the forty- five (45) days. What is known is that Child needs time to adjust to people and to trust them. What is further known is a general need of Child for consistency and trust. David Sen and the undersigned believe that this takes time and the One on One's adeptness at intervening and preventing aggressive

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misbehaviors should grow over time. Likewise, this promotes a constant for Child . Moreover, a One on One was provided at Present School and should continue if appropriate arrangements can be made. It is anticipated that District will make all necessary efforts to make this occur.

Any argument that an interim placement in High Roads is not appropriate as it does not place Child in the least restrictive setting fails.

Firstly,

this is an interim forty five day placement. Secondly, 20 U.S.C. Section 1412(a)(5) clearly provides for inclusion "to the maximum extent appropriate...".

Here Child's violent actions towards other Students while a One on One was supplied controls and placement on an interim basis in the Present School is not "appropriate." Reasonable efforts were made to determine if Child could attend a regular classroom. The educational benefits at this time for Child in High Roads due to his assaultive behavior are greater as they can provide more one on one attention and lessen a significant trigger, the Child's need to respond first. Moreover, District has presented testimony that other Children were scared by Child's behavior and the chilling effect that the possibility of a sudden assault on

their education seems obvious. *Oberti v. Board of Education of Clementon*, 995 F.2d 1204, 1220 (3rd Cir.1993).

#### IV. Governing Statute for Readmission of Child.

20 U.S.C. Sec. 1416(j) states that:

Except as provided in subsection (k)(7) of this section, during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the

then-current educational placement of such child, .....

This is commonly and referred to throughout these proceedings as the "Stay Put Rule"

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The exceptions to the "Stay Put Rule" apply to the extent the suspension is less than ten

(10) days. 20 U.S.C. Sec. 1415(1)(A)(i) and provide for suspension or change in placement up to forty - five (45) days in two enumerated circumstances:

(1) when a child carries a weapon to or at school premises or to or at a school function; or

(2) the child uses or sell illegal drugs at school premises or at a school function.

Neither of the above exceptions applies. What is clear is that as of September 19,

2004, Child should have been allowed to attend Present School and was not.

Apparently,

the very order not to allow the Child to return to school came from the

Superintendent of

the School District. Mother knew Child should have been returned to school and

ample

testimony exists that she attempted to have the Child admitted. Even the

simplest of

courtesies were denied Mother. For example, Child was not allowed to have a

school

picture taken and was present for that rejection. This flies in the face of the

very purpose

of IDEA to treat children equally and fairly. Further, one of the triggers for

this Child's

particular disability is when he feels treated unfairly. Mother has testified at

Child's

understandable disappointment. While sympathetic to the District's obligation to

provide

a safe environment for all children, the law was clear and the District knew or

should

have known that Child should be in school. Instead, the District merely offered

homebound instruction, knowing that Mother wanted Stay Put. This was an

inappropriate attempt to leverage the situation. For this reason, it is found

that the

District's violation of Stay Put continued beyond November 4, 2004 until this decision.

The District is ordered to promptly provide an application to Mother to High Roads who

is to promptly complete the application. Any delay by the School District in providing the

Application shall be added to the number of days due Child for Compensatory Education.

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However, any delay by Mother in completing and returning the application and any necessary documents for Child to attend High Roads shall not be added to the number of days.

"Compensatory education" is a form of equitable relief available when an educational agency knows, or should know that a student's IEP is inappropriate or that the student has received only minimal benefit from his program and fails to correct the

deficiencies in the programming. M.C. and G.C. v. Central Reg'l Sch. Dist., 81 F.3rd

389, 397 (3d Cir. 1996). Child, since October 19, 2004 has received at best only minimal benefit from his program.

It is further noted that the decision District made to deny Child's readmission to school was with reckless disregard to the State Board of Education's expressed wishes.

To the extent this affects the District's receipt of financial contribution as within the

respective rights of the State and District or any remedy the State appropriately chooses,

so be it. However, that issue is not before this tribunal.

Lastly, this tribunal has the authority to Order an Independent Educational Evaluation under 34 C.F.R Sec. 300.502(d) to be conducted at District Expense by

a

Board Certified Child Psychiatrist who either employs or is associated with a doctorate in

education and has a practice concentration for children with special educational needs.