Hearing #17.031X
(consolidated)

STATE OF MAINE
SPECIAL EDUCATION DUE PROCESS HEARING

PARENT	)	
	)	
v.	)	**ORDER**
	)	
BRUNSWICK SCHOOL DEPARTMENT	)	

A due process hearing was held at the Brunswick School Department Offices at 46 Federal Street, Brunswick, Maine on January 5 and 11, 2017. Present and participating throughout the hearing were: Hearing Officer David Webb, Esq; Atlee Reilly, Esq., counsel to the Parent; [redacted] Parent; Eric Herlan, Esq., and Isabel Ekman, Esq., counsel to [redacted] School Department; and Barbara Gunn, Director of Student Services, [redacted] School Department.

PROCEDURAL BACKGROUND

On December 2, 2016 the Parent ("Parent") filed an expedited due process hearing request against the [redacted] School Department ("School"). On December 8, 2016 the School filed an expedited due process hearing request. By Order dated December 12, 2016, the hearing requests filed by the parties were consolidated. On December 16, 2016 the School filed a partial motion to dismiss the Parent's Section 504 claims against the school. On, December 22, 2016 a prehearing conference was held with the Hearing Officer, counsel and parties. Documents and witness lists were exchanged in a timely manner. A Prehearing Report and Order was issued by the Hearing Officer on December 23, 2016, which was amended on January 3, 2017. The order reflected the Parent's consent to the dismissal of the Section 504 claims against the school for purposes of this expedited hearing. The Parent distributed 153 pages of documents (herein referenced as P-#) and

the School distributed 307 pages of documents (herein referenced as S-#).

The parties requested to keep the hearing record open to allow the parties to prepare and submit closing arguments. Pursuant to a post hearing order issued on January 12, 2017, the closing arguments were due on January 20, 2017 and limited to a maximum of 25 pages. The Parent then requested an extension to file her brief to January 23, 2017 which was granted without objection.

The record closed upon receipt of the briefs on January 23, 2017. The hearing officer's decision is due on February 2, 2017.

ISSUES: Evidence was taken on the following issues:

a. Would returning the Student to the Connections Program at [redacted] School be substantially likely to result in injury to the Student or others?
b. Did the School violate the IDEA by changing the Student's placement in excess of 10 days following a behavioral incident on November 3, 2016, without first conducting a manifestation determination?
c. Did the School violate the IDEA when it failed to return the Student to the placement from which he was removed once it was determined, on December 6, 2016, that the behaviors that led to his removal were manifestations of his disabilities?
d. Did the School violate the IDEA when it removed the Student for 45 days based on its assertion that the Student carried or possessed a dangerous weapon as that term is defined in 18 U.S.C. sec. 930(g)(2) at school on November 3, 2016?
e. If a violation is found, is the violation procedural or substantive (did the violation deprive the student of FAPE)?

Testifying at the hearing were:

- [redacted] the Student's Mother;
- Sarah Rogers, day care provider;
- Gena Vincent, Ph.D, Youth Risk Assessment Expert (by video conference);
- William Halikias, Psy.D. Youth Risk Assessment Expert (by video conference);
- Barbara Gunn, Director of Student Services, [redacted] School Department;
- Jennifer Mason, Special Education Teacher, [redacted] School Department (currently working at [redacted] School);
- Dr. Heather Blier, School Psychologist;
- Christine Schmidt, Special Education Consultant, [redacted] School Department.

All testimony was taken under oath.

1. FINDINGS OF FACT

1. The Student is [redacted] years old (d.o.b. [redacted]) and resides with his mother within the boundaries of the [redacted] School Department ("the School"), where he is enrolled as a [redacted]. [Parent Testimony]. The Student's father no longer lives in the home due to a protection from abuse order entered against him. [Parent Testimony]. The Student's father still has regular contact with the Student. [Parent Testimony].
2. The Student received early childhood special education through Child Development Services ("CDS") as a child with an Other Health Impairment ("OHI"). [S-88]. He has been identified as having a developmental delay that impacts his social and adaptive skills, spatial learning skills, and ADHD. [Parent Testimony, S-105].
3. During the 2015-2016 school year, the Student's preschool teacher reported that the Student can be "aggressive towards others, including hitting, kicking, taking things and attempting to choke peers, spitting on peers, and hitting adults." [S-101]. These aggressive behaviors occurred frequently at CDS, and were "challenging to predict" in nature.[S-101].
4. On April 25, 2016 the Student's IEP team ("Team") met to develop a transition plan for the Student from CDS to the [redacted] School Department.[S-88]. During this meeting, CDS staff reported that the Student had a hard time being in a large group, and that his behavior was often aggressive and unpredictable when he didn't have access to items he wanted. [Mason testimony]. The Student's mother also reported that the Student had "significant difficulties with defiance and aggression" at home, which had "gotten worse recently." [S-86].

5. The April 25, 2016 IEP stated that: "When The Student becomes upset, he has difficulty controlling his own behavior. He will become non-compliant and aggressive when he perceives unfairness, he perceives a task is too hard for him, he is tired, or he doesn't want to play with certain peers. [S-88-99].

6. An IEP was developed with an effective date of 9/1/2016 which determined that the Student would attend the Connections Program at [redacted] School at the beginning of the 2016-2017 school year. [S-88]. The Team determined that he would receive 1810 minutes per week of specially designed instruction each week, participate with peers in PE, Music, Art and Library with adult support. [Mason Testimony, S-86, 98-99]. The Team determined that the Student would remain in a self-contained setting 92% of the time. [S-99]. The Team also determined that the Student would have the support of an individualized positive behavior support plan, 60 minutes per week of occupational therapy services, and the use of various calming strategies. [S-79-82, 97-98].

7. The Connections Program, offered at several different locations in the district, is a self-contained behavior program, designed to serve students with emotional and behavioral disabilities. [Gunn testimony, Blier testimony, P-42]. Connections offers students a smaller class-size as compared with the mainstream setting, individualized behavior plans, and a low student-to-adult ratio. [P-42, Mason testimony]. The Student was one of eight fulltime students supervised by one teacher and three educational technicians. [Mason testimony; Gunn testimony]. The School's clinical psychologist Dr. Heather Blier serves as a consultant to the Connections Program. [Blier testimony, Gunn testimony].

8. Jennifer Mason, the Student's Special Education teacher, designed an individualized crisis plan and behavior support plan for the student on September 15, 2016. [S-79-82]. Ms. Mason identified the Student's problem behavior as "physical aggression including hitting, kicking, pinching and throwing furniture towards peers and staff. He will often attempt to hurt the individual by targeting private areas." [S-79]. To respond to the Student's physically aggressive behavior, Ms. Mason and the Student's Educational Technicians would provide verbal prompts to the Student regarding classroom expectations and positive or negative consequences. [Mason testimony]. The behavior plan also offered coping strategies using a visual chart and alternative choices in order to redirect or distract the Student. [S-81, Mason testimony].

9. Ms. Mason tracked the Student's behavior by using "smiley-face charts" which pictorially indicated the Student's behavior every half hour and provided narratives. [S-C-7-49]. Ms. Mason tallied that behavior into weekly summaries which identified the number of times the Student physically aggressed against adults and peers, threw objects, and/or destroyed property. [Mason testimony; S-C-l-6]. On October 31, 2016, the Connections Program began using a School Wide Information System ("SWIS") form to track student behavior, which identified the problem behavior, whether it was a "major" or "minor" behavior, the possible motivation, and others involved. [Mason testimony; Blier testimony; [S-46-57, 62-68].

10. Jennifer Mason testified that she observed physical aggression behaviors by the Student "multiple times per day" directed towards both teachers and other children. In the less than 8 weeks that the Student attended the Program, he engaged in over 70 separate instances of physical aggression towards other students or adults. [S-C-14-48].

Behaviors included hitting, punching, elbowing, and/or kicking peers and adults, including targeting victims in private areas. [Mason testimony].

11. While behaving in this assaultive manner, the Student would "smile often" and would demonstrate no signs of empathy or responsibility for his actions. [Mason testimony; S-5]. She did not believe that she was able to keep other children in her classroom safe. [Mason testimony].

12. Ms. Mason testified that as a result of the Student's physical assaults, she "went home with new bruises almost every day", although she did not indicate her bruises in her reports. [Mason testimony].

13. Ms. Mason discussed these behaviors with the Student's parents regularly over the phone, in person and at IEP team meetings. [Mason testimony]. Ms. Mason understood from the Parents that the Student also had aggressive behaviors at home, including biting. [Mason testimony; S-5].

14. As of October 31, 2016, the IEP Team determined that "the Student's current programming was meeting his needs [and that the] current placement is the least restrictive environment". [S-59]. The Team also determined that more information was necessary and "agreed to conduct assessments to gather more information about the Student before making any changes to his programming." [S-59]. Recommended evaluations included a psychological evaluation, observations and a formal functional behavior assessment. [S-61, 61b]. The parent provided consent for additional evaluations. [S-61b].

15. On November 3, 2016, the Student placed a blanket over another student's head and tried to choke the other student. [S-45]. Jennifer Mason, the Student's teacher who witnessed the incident, testified that it occurred during the Student's rest time, just after

she called out to another student to praise his good behavior. [Mason testimony; S-45] The Student then placed a blanket over the other student's head, wrapped the blanket in a knot in front and pulled it backwards over the other student's head. [Mason testimony]. Ms. Mason said that she knew the blanket was tight as she could see the "outline" of the other student's face on the blanket as the Student moved the knotted area around to the back of his head. [Mason testimony; S-45]. As Ms. Mason intervened to remove the blanket, the Student then tried to trip the other student. Ms. Mason, who was the only adult present during the incident, guided the Student to the break room where the Student told Ms. Mason that "he was trying to choke" the other student. [Mason testimony; S-45].

16. While in the break room, Ms. Mason was joined by the two other school staff. [S-45]. At that time, the Student admitted trying to choke and kill the other student, and said "I know what killing means…it means putting someone in the ground so they can't breathe forever." [Mason testimony; S-45]. The Student told Ms. Mason that he wanted to kill the other child because that child would not play with him. [S-45]. Ms. Mason testified that she believed there was a substantial likelihood that the Student would harm another student if he returned to class.

17. As a result of the choking incident, the Student was initially given a four day suspension which was then extended to 10 days by the School in order to obtain input on the Student's behavior from the School's psychologist, Heather Blier. [S-43-44; Gunn testimony].

18. The Student's IEP team met on November 16, 2016 and determined that the Student required a clinical placement in an out of district setting. [Gunn testimony; S-32]. The School offered tutoring for the Student until a placement was found. [S-32].

19. The School requested that Dr. Blier, its consulting psychologist, conduct a Risk Behavior Screening Report which was explained to the Team on November 18, 2016. [Gunn testimony; S-34-42]. The goal of this report was not to perform a formal risk assessment, but to do an initial consultation to gather descriptive information including concerns relative to the Student's aggressive behavior, and to make initial recommendations. [Blier testimony].

20. In her report, Dr. Blier noted the Student's significant history of aggression and "difficulty with both behavioral and emotional regulation in the context of both school and home." [S-39]. Dr. Blier's report noted that the Student continued to "present with serious violations of school rules and targeted aggression toward other students and staff in the school setting." [S-39].

21. Dr. Blier's recommendations included interventions such as using "alternative locations for instruction to minimize access to peers," providing an environment "that offers highly involved and integrated clinical supports," providing programming that has the capacity to work with the Student "during times of behavioral escalation ... without the need for removal from the school setting," and afford "frequent opportunities for communication and collaboration among school staff and other team members" to ensure consistency. [S-39-40].

22. The interventions recommended by Dr. Blier could not be provided within the School's Connection program due to the physical limitations, programmatic structure, and staff makeup, but would be available in a private day-treatment setting [Gunn testimony; Blier testimony].

23. Special purpose day-treatment schools offer their students a full therapeutic program, with higher level of support than can be offered within the public school setting. [Blier

testimony]. Generally, all staff members who work within a private special purpose day-treatment school have a higher degree of behavioral training and are clinically-informed about each student's progress. [Blier testimony].

24. On November 18, 2016, Sarah Hillary, Special Education Department Chair, contacted the parent to offer an abridged interim alternative educational setting consisting of tutoring for 3 hours each day, including transportation to and from the Student's home. [S-27, S-30, P-100]. The written notice indicated that the Parent "wanted to share the proposal with her attorney and could not agree to it immediately." [S-27].

25. On November 23, the Parent filed a request with the Department of Education for a Complaint Investigation, specifically requesting that the Student be returned to the Connections Program. [P-44-48].

26. On November 30, 2016, the School notified the Parent that the Student would be removed from school for 45 school days in response to the Student using the blanket as a weapon on school grounds. [S-18]. Barbara Gunn testified that the School did not issue this decision earlier as she previously thought that the Parent agreed with the out of district placement proposal, and only saw need when the Parent filed for due process.

27. On December 1, 2016, the Parent filed a due process hearing request to challenge the School's decision to remove the Student for 45 days. [P-49].

28. The District held a manifestation determination meeting on December 6, 2016 and determined that the Student's behavior was a manifestation of his disability. [S-007]. This meeting was held 11 school days after the School's decision to change the Student's placement on November 16, 2016. [S-2]. The School postponed this meeting at the request of the Parent in order to accommodate the Parent's attorney. [Gunn testimony]. At this meeting, the Parent notified the School that she was rejecting the

School's offer of an abridged-day program. [S-7; S-27]. The Parent also requested that any interim alternative educational setting provide access to a full day of services and supports, provide opportunities for interaction with peers, include related services such as psychological services and social work services [P-098-98a].

29. On December 8, 2016, the School filed a due process hearing request seeking removal of the Student for 45 days. [P-56].

30. Since the Student was removed from school, he is being treated for ADHD and his father has been removed from the home as a result of abusive behaviors. [Parent testimony]. The Student has responded well to this treatment and his behavior has improved. [Id].

31. The Student has had positive behavior at his day care setting where he has been described as a model student, as a helper to younger students, and good with the animals. [Rogers testimony]. The Student also plays soccer and the Parent reports positive interactions with other children on the team. [Parent testimony].

32. The Student's abridged-day program began on December 8, 2016. [Schmidt testimony]. The program consists of 3 hours per day of 1:1 work with Christine Schmidt, the School's behavioral consultant who is also a trained special education teacher. [Schmidt testimony]. While with Ms. Schmidt, the Student works on general [redacted] academics including spelling, math, and literacy, as well as behavioral regulation/social skills using a Michelle Garcia Winner program. [Schmidt testimony]. The Student also receives 1 hour per week of occupational therapy. [Schmidt testimony].

33. While he has been in the interim program, the Student's behavior has been manageable, other than minor incidents where he "pushes and tests" adults. [Schmidt testimony].

Ms. Schmidt attributes the improvement in behavior due in part to the fact that the Student does not have to compete with other peers. [Schmidt testimony].

34. On January 9, 2017 the Student took Saran Wrap from the kitchen and covered his nose and mouth with it. [Schmidt testimony; S-131-136]. Ms. Schmidt was able to intervene before the Student was injured. [S-131-136]. She felt that the behavior was "attention-getting", and did not know if the Student was trying to hurt himself. [Schmidt testimony].

2. SUMMARY OF THE PARTIES' ARGUMENTS

Brief summary of the position of the School: The Individuals with Disabilities Education Act (IDEA) specifically authorizes a hearing officer to order a change of placement to a 45 day interim alternative educational setting if the hearing officer determines that maintaining the current placement of the child is "substantially likely to result in injury to the child or to others." This Student's lengthy history of frequent and significantly unsafe aggressive behaviors makes it clear that he cannot safely attend a placement at the School. Case law interpreting the definition of "injury" for the scope of this provision clarifies that serious physical harm need not be caused before students can be can be deemed "substantially likely to cause injury." Additionally, a statutory change in 2006 removed the requirement of a finding of "reasonable efforts to minimize," injury by a school before a Student can be removed.

Even if the Student had not demonstrated such frequent assaultive behaviors, the School was still entitled to remove the Student from school for 45 school days after he used a blanket as a weapon, knotting it and pulling it tight around the throat of another five-year old student, with the stated intent of choking and killing his classmate.

Although a school district must usually return a student to their former placement in the event the IEP team determines that the conduct in question was a manifestation of a student's

disability, this is not required where a student possesses or uses a weapon in school, or where the school believes a student is substantially likely to injure him or herself or others if continuing in the current placement. MUSER XVII.l. F.(2); G.(l) 34 C.F.R. § 300.530(f)(2). Although the School held the Student's manifestation determination on the eleventh school day after they decided to change his placement to a therapeutic day-treatment setting, such a discrepancy would represent only a *de minimis* variation from the 10 day requirement. Furthermore, that delay was due to the Parent's rejection of an earlier team meeting in an effort to accommodate her attorney's schedule. The School's filing of an expedited due process hearing request on the grounds that the Student was substantially likely to cause injury to himself or others also justified placement in the child's interim setting, and not the Connections Program. MUSER XVII.4; 34 C.F.R. § 300.533.

A. Brief summary of the position of the Parent:

The Parent argues that the School has failed to prove that returning the Student to the Connections Program, with the provision of appropriate services and supports, would be substantially likely to result in injury to himself or others. The Student's behavior was not sufficiently significant to justify the extraordinary relief of removal from his placement. Furthermore, there was no credible evidence that the Student's behaviors caused injuries to himself or others nor has the School shown that it has done all it reasonably can do to reduce the risk of injury, as described in *Light v. Parkway*. 41 F. 3d 1223, 1228 (8th. Cir. 1994).

Additionally, the placement change implemented by the School was invalid as the Written Notice was not provided to the Parent until November 28, 2016, after the Student's placement had already been changed. The School violated the IDEA by failing to conduct a manifestation determination within 10 school days of its decision to change the placement of the Student.

The IDEA requires a student to be returned to their educational placement upon a determination that the behavior that served as the basis for the removal is a manifestation of their

disability. However, by the time the District held a manifestation determination, it improperly asserted authority to remove the Student for up to 45 additional school days due to the weapons exception. The blanket used by the Student in this case, does not fall into the category of weapons exception, which should be interpreted solely on the question of whether an object possessed at school is used for, or readily capable of, causing serious bodily injury. Here, there is no evidentiary basis from which a Hearing Officer could conclude the blanket used by the Student was readily capable of causing death or serious bodily injury.

3. LEGAL STANDARD AND ANALYSIS

A. Burden of Proof

Although the IDEA is silent on the allocation of the burden of proof, the Supreme Court has held that in an administrative hearing challenging an IEP, the burden of persuasion, lies with the party seeking relief. *Schaffer v. Weast*, 126 S.Ct. 528, 537 (2005). Accordingly, the School bears the burden of proof as the party alleging that returning the Student to the Connections Program at [redacted] School is substantially likely to result in injury to the Student or others. *Schaffer v. Weast*, 546 U.S. 49, 58 (2005). However, the Parent bears the burden of proof with regard to the remaining issues addressing the School's alleged violations of the IDEA in removing the Student from his placement. *Howard v. Green*, 555 F.2d 178, 181 (8th Cir. 1977); *In re Bressman*, 327 F.3d 229, 237-38 (3d Cir. 2003); *Merrill v. Sugarloaf Mountain Corp.*, 745 A.2d 378, 383 (Me. 2000).

B. Expedited hearings and discipline

Expedited due process hearings are available only for persons who have been removed from school for disciplinary purposes. MUSER §XVI.21.C.(4). Specifically, a parent can request an expedited hearing if he or she disagrees with any decision regarding a disciplinary change of

placement or interim alternative educational setting under §§ 300.530 and 300.531, or to challenge a manifestation determination under §300.530(e); MUSER §XVI.21.4. A school may also request an expedited hearing if it believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others. MUSER §XVII.3.A.; 34 CFR § 300.511.

A hearing officer's authority in expedited hearings is also limited. MUSER §XVII.3.B. provides that the hearing officer may (a) return the child with a disability to the placement from which the child was removed if the hearing officer determines that the removal was a violation of § 300.530 or that the child's behavior was a manifestation of the child's disability; or (b) order a change of placement of the child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of the child is substantially likely to result in injury to the child or to others. MUSER §XVII.3.B, 34 CFR § 300.532.

The IDEA provides detailed procedures that a local educational agency must follow when dealing with discipline issues. The Act gives schools the authority to suspend a student with a disability for up to 10 days without providing the child with an "alternative educational setting". *See* 20 U.S.C. § 1415(k)(1)(A)(i). The IDEA also permits a school to discipline a student with a disability for more than 10 days, just as it would discipline a non-disabled child, provided the disabled student's misbehavior was not a "manifestation" of his disability. *See* 20 U.S.C. § 1415(k)(5)(A).[1]

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[1] Maine has issued regulations regarding the manifestation determination process, in connection with the federal mandates, in MUSER §XVII:

1. Authority of School Personnel

E. Manifestation Determination.

The IDEA provides that school personnel may remove a student to an interim alternative educational setting (IAES) for no more than 45 school days under certain "special circumstances," without regard to whether the behavior is a manifestation of the student's disability, including when the student "carries a weapon to or possesses a weapon at school...." 20 U.S.C. 1415(k)(1)(G)(iii); 34 C.F.R. 300.530(g)(3), MUSER §XVII.3.B.

4. DISCUSSION

A. Returning the Student to the Connections Program at [redacted] School is substantially likely to result in injury to the Student or others.

As reflected in the state and federal regulations noted above, the Supreme Court has authorized a very narrow judicial exception to the "stay put" requirement, where school officials can establish that the current placement is "substantially likely to result in injury either to (the handicapped child) or to others." *Honig v. Doe,* 484 U.S. 305, 328, 108 S.Ct. 592, 606, 98 L.Ed.2d 686 (1988).

The IDEA codified this exception by specifically authorizing a hearing officer to order a change of placement to a 45 day IAES if a hearing officer determines 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)(B)(ii)(II); 34 C.F.R. § 300.532 (b)(2)(ii). Although neither the IDEA nor

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(1) Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the SAU, the parent, and relevant members of the child's IEP Team (as determined by the parent and the SAU) must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine
(a) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or
(b) If the conduct in question was the direct result of the SAU's failure to implement the IEP.
(2) The conduct must be determined to be a manifestation of the child's disability if the SAU, the parent, and relevant members of the child's IEP Team determine that a condition in either paragraph (E)(1)(a) or (1)(b) of this section was met.
(3) If the SAU, the parent, and relevant members of the child's IEP Team determine the condition described in paragraph (E)(1)(b) of this section was met, the SAU must take immediate steps to remedy those deficiencies.

state or federal regulations define "substantial likelihood of injury," a number of cases, including those cited by the parties, identify factors a hearing officer should consider in determining whether such a likelihood exists.

In *Light v. Parkway C-2 Sch. Dist.*, 41 F.3d 1223, 1228-29 (8th Cir. 1994), cited by both the School and the Parent, the 8th Circuit Court of Appeals held that a student was substantially likely to cause injury where she "hit, kicked, and slapped other disabled and non-disabled students and staff; threw pencils and other objects at other students' eyes, ears and faces; and attempted to overturn desks and tables." *Id.* In *Light*, the court noted: "we emphatically reject the contention that an 'injury' is inflicted only when blood is drawn or the emergency room visited. Bruises, bite marks, and poked eyes all constitute 'injuries' in the context of this analysis." *Id.* at 1230. Furthermore, the court rejected the proposition that a student must have actually inflicted harm before he or she can be "can be deemed substantially likely to cause injury." *Id.* In *Light*, the court addressed the objective nature of this standard and noted:

> This test looks only to the objective likelihood of injury. We reject as tautological the contention of [the student's] parents that a disabled child must be shown to be "truly dangerous" as well as substantially likely to cause injury. Their argument derives from a misreading of Honig and warrants no extensive rebuttal. More importantly, we reject their suggestion that schools can only remove children who intend to cause injury. The Lights argue that a mentally disabled child cannot be a "dangerous" child within the meaning of Honig when that child's disability renders her unable to intend the injuries she inflicts. A child's capacity for harmful intent play no role in this analysis.

Light v. Parkway C-2 Sch. Dist., 41 F.3d 1223, 1228-29.

Light also held that in addition to the "substantially likely" test, a school district must also show that it has made "reasonable efforts to accommodate the child's disabilities" in order to minimize the likelihood that the child will injure herself or others. *Id.* at 1230. Following the *Light* case, Congress enacted 20 U.S.C. § 1415(k)(2) which mirrors this 2 prong analysis, specifying that the removal of a child to an interim alternative educational setting could only

occur if a hearing officer also determined that the school district had made "reasonable efforts to minimize the risk of harm in the child's current placement, including the use of supplementary aids and services ...."; 20 U.S.C. § 1415(k)(2); 34 C.F.R. § 300.521(c).

In 2005, however, Congress removed from the IDEA the requirement that a hearing officer must find that a school made "reasonable efforts" to minimize risk. 20 U.S.C. § 1415(k)(2)(C) (repealed 2004), *and* 34 C.F.R. § 300.52l(c) (repealed 2006). The current statute and regulations give a hearing officer the authority to temporarily change a student's placement upon a determination 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), *and* 34 C.F.R. § 300.532(b)(2)(iii). There is no statutory or regulatory requirement that requires a finding that the school district had made reasonable efforts to minimize the risk of harm in the child's current placement.[2]

In *Braintree Public Schools* 108 LRP 16708 (Mass. 2008) a hearing officer found that a first-grader was "substantially likely to cause an injury" in his general education classroom as a result of evidence of pushing, tripping, and punching other children, as well as threatening children with scissors or a pencil. *Id.*

The Parent argues that there is insufficient evidence to support a finding that there was a substantial risk of injury in the present case citing *Clinton County R-III School District v. C.J.K.*

[2] Notwithstanding this revised standard, the record supports a finding that the School made reasonable efforts to minimize the risk of harm in the Student's placement. First, the School placed the Student in the Connections Program, offering students a smaller class-size, individualized behavior plans, professional support and a low student-to-adult ratio. [P-42, Mason testimony]. The Parent apparently believes this is an appropriate program for the Student as she is requesting that he be returned to this program. [P-47]. In September 2016, the School designed an individualized crisis plan and behavior support plan for the student. [S-79-82]. The School tracked the Student's behavior every half hour by using "smiley-face charts" and narratives, [S-C-7-49]; tallying that behavior into weekly summaries which identified the number of times the Student physically aggressed against adults and peers using a School Wide Information System ("SWIS") form to track student behavior, which identified the problem behavior, whether it was a "major" or "minor" behavior, the possible motivation, and others involved. [Mason testimony, Blier testimony, S-46-57, 62-68]. Based on the behavior concerns, the School recommended evaluations including a psychological evaluation, observations and a formal functional behavior assessment. [S-61, 61b].

896 F. Supp. 948, (W.D. Mo. 1995).[3] In *Clinton,* the court characterized the "risk of injury" of the student's outbursts as either an "average" propensity or incidental to other behaviors as follows:

> ...apart from a few school-boy fights, in which [the student] was not shown to have been the aggressor, the record, apart from threats, shows no more than an average propensity to actual violence against persons. In one instance a teacher felt she was about to be attacked when another student blocked [the student's] approach to her, but it seems doubtful that a physical attack would otherwise have occurred. The unintended injury during the chair-throwing incident seems to be something of a fluke. *Clinton County R-III School District v. C.J.K.* 896 F. Supp. 948.

The facts in the present case, however, reveal that the Student was intentionally and repeatedly targeting staff and other students. The School produced a preponderance of credible first-hand testimony and documentary evidence which identifies over 70 separate instances of aggressive physical acts against others, including hitting, punching, elbowing, and/or kicking between September 2016 through November 2016. [S-C-14-48 S-C-15-42]. The Student's aggression seemed unprovoked by external circumstances. [Mason testimony]. Ms. Mason, the Student's teacher, testified that as a result of the Student's physical assaults, she "went home with new bruises almost every day." While behaving in this assaultive manner, the Student would "smile often" and would demonstrate no signs of empathy or responsibility for his actions. [Mason testimony]. In addition, the Student would often target victims in their private areas. [Mason testimony]. The Parent also noted during the November 16, 2016 meeting that the Student was "hitting and biting" other students at the daycare program he had been attending during his suspension. [S-32].

Ultimately, the Student's behaviors escalated to a more serious level on November 3,

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[3] The Parent also supports her position citing *Phoenixville Area School District v. Marquis B.* 25 IDELR 452 (E.D. Pa. 1997). In that case, however, the conduct in question involved only three incidents of physical touching over a five-month period. The hearing officer concluded that while the behavior was "not appropriate," it did not rise to the level demonstrating a substantial likelihood of causing injury in the "immediate" future. Id.

2016, when the Student placed a blanket over another student's head and tried to choke him. [S-45]. Jennifer Mason witnessed the incident and testified that after the Student placed a blanket over the other student's head, he wrapped the blanket in a knot and pulled it backwards over the other student's head allowing her to see the "outline" of the other student's face on blanket. [Mason testimony; S-45]. As Ms. Mason intervened to remove the blanket, the Student then tried to trip the other student. The Student later admitted to Ms. Mason and two other staff members that "he was trying to choke" the other student and said "I know what killing means...it means putting someone in the ground so they can't breathe forever." [Mason testimony; S-45].

This frightening incident, along with the numerous other behavior incidents, presents persuasive evidence that the Student's current behavior is substantially likely to cause injury to himself or others.

The Parent argues that her expert witnesses, Dr. William Halikias and Dr. Gina Vincent both found substantial methodological flaws in Dr. Blier's Risk Behavior Screening Report, supporting her argument that the School inappropriately relied on this report to determine that the Student posed a substantial risk to other students or himself. While Dr. Blier's initial report was limited, the evidence supports a finding that the School also relied substantially on the factual information gathered from teachers and staff working with the Student. Furthermore, the Parent points to no authority that requires that a school perform a formal risk assessment before determining that a student poses a substantial risk of harm. On the contrary, the *Light* court rejected the contention that a disabled child must be shown to be "truly dangerous". *Light v. Parkway C-2 Sch. Dist.*, 41 F.3d 1223, 1228-29. Moreover, as *Light* made clear, it is not necessary for a student to have actually caused physical injury before he or she can be found to be substantially likely to cause injury. *Light v. Parkway C-2 Sch. Dist.*, 41 F.3d 1223, 1228-29.[4]

[4] While the Parent argues that no other children were physically injured, an additional consideration must be the

Furthermore, while there is evidence that the Student's behavior has improved since his suspension and placement in an abridged day program, it is unclear if he can demonstrate safe behavior around other students. Even in his restricted setting without other students present, the Student has demonstrated dangerous behavior, as noted by the January 9, 2017 incident where he took Saran Wrap from the kitchen and covered his nose and mouth.

B. The School's changing the Student's placement in excess of 10 days following the November 3, 2016 behavioral incident without first conducting a manifestation determination was a harmless error.
C. The School did not violate the IDEA when it failed to return the Student to the placement from which he was removed once it was determined, on December 6, 2016, that the behaviors that led to his removal were manifestations of his disabilities.

Maine regulations require that a manifestation determination process occur within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct. MUSER §XVII.E. If the Team makes the determination that the conduct was a manifestation of the child's disability, it must:

> (1). a. Conduct a functional behavioral assessment, unless the SAU had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the child; or
>
> b. If a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior; and
>
> (2) Except as provided in paragraph (G) of this section, return the child to the placement from which the child was removed, unless the parent and the SAU agree to a change of placement as part of the modification of the behavioral intervention plan.

G. Special Circumstances.

> School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, if the child

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acknowledgement that the Student's behavior has undoubtedly been frightening to the children who were attacked. These young children, who are also just beginning their school experience, are particularly vulnerable and at risk of forming a negative first impression of school.

(1) Carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function under the jurisdiction of an SEA or an SAU

MUSER §XVII F and G.

The Student's IEP team met on November 16, 2016 and determined that the Student required a clinical placement in an out of district setting. [Gunn testimony; S-32]. The Student's manifestation determination review (MDR) occurred on December 6, 2016, and determined that the Student's behavior was a manifestation of his disability. [S-7]. The MDR meeting was held on the 11th school day after the School decided to change the Student's placement to a therapeutic day treatment setting on November 16, 2016.[5] The School postponed this meeting at the request of the Parent in order to accommodate the Parent's attorney. [Gunn testimony].

The School, however, did not return the Student to his current placement based on its position that the blanket used by the Student to choke another student constituted a "dangerous weapon" pursuant to MUSER §XVII G. (1). Accordingly, the School took the position that it could remove the Student to an interim alternative educational setting for 45 additional school days. MUSER §XVII G. (1).[6]

Holding the MDR on the 11th day after the School determined that the Student required a clinical placement in an out of district setting was a de minimis variation from the 10 day requirement and a harmless error. *Farrin v. Maine School Ad. Dist., No. 59*, 165 F. Supp. 37 (D. Me 2001); Moreover, there is unrebutted testimony that the delay was attributed, in part, to the

[5] The Parent notes that the Student had been out of school for a total of 18 days before the Manifestation Determination was conducted. However, MUSER §XVII provides that the Manifestation Determination must be conducted within 10 school days *of any decision to change the placement* of a child. In the present case, the evidence supports a finding that no affirmative decision to change the Student's placement occurred until November 16, 2016. (emphasis added).

[6] As discussed above, the School additionally filed a due process hearing request on December 8, 2016 seeking removal of the Student for 45 days under the "substantially likely to result in injury to the child or to others" standard. 20 U.S.C. § 1415(k)(3)(B)(ii)(II); 34 C.F.R. § 300.532 (b)(2)(ii). [P-56].

Parent's request to have her attorney present. *C.G ex rel. A.S. v. Five Town Comm. Sch. Dist.*, 513 F. 3d 279, 286 (1st Cir. 2008).

Even though it was determined that the behaviors that led to his removal were manifestations of his disabilities, the School did not violate the IDEA when it failed to return him to the Connections Program in light of its due process filing under 20 U.S.C. § 1415(k)(3)(B)(ii)(II); 34 C.F.R. § 300.532 (b)(2)(ii).[7] Specifically, MUSER §XVII.4 makes clear that when an appeal under § 300.532 has been made by either the parent or the SAU or until the expiration of the time period specified in §300.530(c) or (g), whichever occurs first, *the child must remain in the interim alternative educational setting unless the parent and the SEA or SAU agree otherwise*. (emphasis added).[8]

D. The School procedurally violated the IDEA when it removed the Student for 45 days based on its assertion that the Student carried or possessed a dangerous weapon as that term is defined in 18 U.S.C. sec. 930(g)(2).

The IDEA adopts the definition of "weapon" provided in the U.S. Criminal Code. 34 CFR 300.530 (i)(4). That provision defines the term "dangerous weapon" as "a weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than 2 1/2 inches in length." 18 USC 930 (g)(2).

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[7] On November 30, 2016, the School notified the Parent that the Student would be removed from school for 45 school days in response to the Student using the blanket as a weapon on school grounds. [S-18]. Ms. Gunn testified that the School did not issue this decision earlier as she "thought that the Parent agreed with the out of district placement proposal." The Parent, however, notified the school that she did not agree to the proposal but was planning to speak to her attorney. [S-27]. Although there were communication issues and apparent misunderstandings around the Parent's response, it is incumbent on the School to properly notify the parent and file for an expedited hearing within the regulatory time frame.

[8] 34 CFR § 300.532 (g) specifies that school personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, if the child -(1) Carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function under the jurisdiction of an SEA or an LEA. While this 45 day period expired on February 1, 2017, prior to the issuance of this decision, the difference in time periods would constitute only several school days and any harm to the Student is de minimis.

In *Scituate Public Schools*, 47 IDELR 113 (Mass. SEA 2007), a school district argued that a necktie grabbed by a student was a "dangerous weapon" justifying an automatic 45-day placement in an independent alternative educational setting. (IAES). In the *Scituate* case, the student grabbed the principal's necktie, pulled it hard and hung onto it to the point where the principal could not breathe and had red marks on his neck for several days. The hearing officer determined that the necktie did not cause serious injury, so proceeded to consider whether it was "readily capable" of causing serious bodily injury:

> The statutory definition of "weapon" first describes the range of possible objects that could fit the definition: "weapon, device, instrument, material, or substance, animate or inanimate." This part of the definition is sufficiently broad to include a necktie. The definition then provides the following, limiting language: "that is used for, or is readily capable of, causing death or serious bodily injury." In seeking to fall within this statutory standard, Scituate did not present evidence that a necktie in general "is used for, or is readily capable of, causing death or serious bodily injury" but instead focused on the facts of the particular incident involving Student and Mr. Grassie... In the present dispute, the necktie did not cause serious injury to Mr. Grassie. I therefore consider only the "readily capable" language of the definition. The word "readily," in combination with the word "capable" implies that if the attacker actually engages his victim with the weapon, serious injury would likely occur. For example, a gun, knife (in excess of 2 1/2 inches in length), or baseball bat might be found to meet this definition of weapon because each of these instruments could readily cause serious bodily injury if the attacker actually engaged his victim with the gun, knife, or bat, even if only for a few seconds. In the present dispute, Student actually engaged Mr. Grassie with the alleged weapon for a few seconds but no serious bodily harm occurred. After being attacked with the necktie, Mr. Grassie was able to push Student away, causing Student to release the necktie. In short, in the factual context of the present dispute, I have no evidentiary basis from which I could conclude that the necktie was readily capable of causing death or serious bodily injury to Mr. Grassie. For these reasons, I find that the necktie does not fall within the statutory definition of "weapon."

In *Scituate,* a case involving a "weapon" within the context of the IDEA, the hearing officer determined that the necktie was not a weapon under 18 USC 930 (g)(2) as it was not "readily capable of causing injury" and therefore the school did not have the authority to place the student in an IAES for 45 days. *Id.* In the present case, the blanket, like the necktie in *Scituate,* did not readily cause serious bodily injury upon the Student's engagement of his victim. While the School is correct that a blanket could potentially be a "dangerous weapon" depending

upon how it is used, the "readily capable of causing injury" analysis excludes the blanket used by the Student under 18 USC 930 (g)(2).[9] Accordingly, I have no evidentiary basis from which I could conclude that the blanket used by the Student was a weapon as it was not "readily capable of causing death or serious bodily injury" to the other student during the incident on November 3, 2016.

Although I find that the School did not have authority to remove the Student under the "weapons" exception pursuant to 20 U.S.C. § 1415(k)(1)(A), this amounts to a procedural and not a substantive error in light of its simultaneous request for an expedited hearing under 20 U.S.C. 1415(k)(3)(A); 34 C.F.R. 300.532(a).[10]

ORDER

After consideration of the evidence presented during this due process hearing, I find that continuing Student in the Connections Program at [redacted] School is substantially likely to result in injury to the Student or to others. Accordingly, **it is hereby ORDERED that** the Student should be placed in an appropriate interim alternative educational setting (IAES) for not more than 45 school days pursuant to the above-quoted federal and state regulations.

Dated February 2, 2017

David C. Webb, Esq., Hearing Officer

[9] This finding is consistent with the "pocket knife" exception in 18 USC 930 (g)(2), which excludes from consideration as a "weapon" a "pocket knife with a blade of less than 2 1/2 inches in length. It is not a logical interpretation of this statute that a pocket knife with a 2" blade would be excluded as a "weapon" but that a blanket or other soft object could be considered a weapon.

[10] As noted, MUSER §XVII.4 makes clear that when an appeal under § 300.532 has been made by either the parent or the SAU or until the expiration of the time period specified in §300.530(c) or (g), whichever occurs first, the child must remain in the interim alternative educational setting unless the parent and the SEA or SAU agree otherwise.