08-079

CASE CLOSURE SUMMARY REPORT

(This summary sheet must be used as a cover sheet for the hearing officer's decision at the end of the special education hearing and submitted to the Department of Education before billing.)

Public Schools	
School Division	Name of Parent(s)
	June 5, 2008
Name of Child	Date of Decision or Dismissal
	, Esq.
John F. Cafferky, Esq.	, Esq.
Counsel Representing LEA	Counsel Representing Parent/Child
Parents	School Division
Party Initiating Hearing	Prevailing Party

Hearing Officer's Determination of Issues(s):

1. Whether the LEA Superintendent's Hearing Officer improperly invoked the 45-day interim alternative placement regulation, as the student was not in possession of a dangerous weapon as defined under Virginia and federal law;

2. Whether the LEA Superintendent's Hearing Officer exceeded her authority under IDEA and Virginia law by effectively determining the interim alternative educational setting for the student.

Hearing Officer's Orders and Outcome of Hearing:

Awls brought by child to school were a dangerous weapon as defined in applicable law and regulations;

Superintendent's Hearing Officer did not violate 20 U.S.C. § 1415(k)(2) by ordering that child's interim alternative educational setting not be on regular LEA public school property.

This certifies that I have completed this hearing in accordance with regulations and have advised the parties of their appeal rights in writing. I have also advised the LEA of its responsibility to submit an implementation plan to the parties, the hearing officer, and the SEA within 45 calendar days.

Peter B. Vaden	
Printed Name of Hearing Officer	Signature

cc: , Esq.
, Esq.
John F. Cafferky, Esq.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EDUCATION

In Re: .	}	**Findings of Fact**
Expedited Due Process Hearing	}	**and**
	}	**Decision**

Counsel for Child and Parents, and :	Counsel for Public Schools:
, Esq. . Esq. & ., Ste , VA 22030	John F. Cafferky, Esq. BLANKINGSHIP & KEITH 4020 University Dr., Ste 312 Fairfax, VA 22030

This matter came to be heard upon the Request for an Expedited Due Process Hearing filed by the parents, and ("the Parents"), under the Individuals with Disabilities Education Act (the "IDEA"), 20 U.S.C. §1400 et seq., and the Regulations Governing Special Education Programs for Children with Disabilities in Virginia ("Virginia Regulations"). This due process complaint arises out of Public Schools' (" PS") 45 school day removal of (the "Child") to an interim alternative educational setting for allegedly bringing a dangerous weapon to school. The Parents allege that PS's 45-day removal was unlawful because the object carried by the Child to school was not a dangerous weapon. In addition, the Parents contend that the PS review officer improperly

limited the authority of the Child's IEP team to determine the interim alternative educational setting. The requirements of notice to the Parents have been satisfied.

The due process hearing was held before the undersigned hearing officer on May 21, 2008 at PS's in , Virginia. The hearing, which was closed to the public, was transcribed by a court reporter. The Parents appeared at the hearing and were represented by counsel. PS was represented by Monitoring and Compliance Coordinator and by counsel. Counsel for both sides made opening and closing statements.

ISSUES FOR DECISION

The parties stipulated that the only issues to be decided in this hearing are the following:

1. Whether the PS Disciplinary Review Officer[1] ("DRO") improperly invoked the 45-day interim alternative placement regulation, as the student was not in possession of a dangerous weapon as defined under Virginia and federal law;

2. Whether the DRO exceeded her authority under IDEA and Virginia law by effectively determining the interim alternative educational setting for the student.

BURDEN OF PROOF

The substance of the Parents' claim in this case is that PS wrongfully removed the Child to an interim alternative education setting. In *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of proof in

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[1] In PS terminology the Superintendent's designee charged with reviewing recommendations for student expulsions and long term suspensions is known as the Hearing Officer for the Superintendent. To avoid confusing that employee with the due process Hearing Officer, I will refer to her as the Disciplinary Review Officer ("DR0") in this decision.

an administrative hearing challenging an Individualized Education Program ("IEP") is properly placed upon the party seeking relief. *Id.*, 546 U.S. at 62, 126 S.Ct. at 537. Here the Parents are not challenging an IEP, but seek relief for the disciplinary removal of the Child from his regular public school. In the Fourth Circuit Court of Appeals' decision affirmed by the U.S. Supreme Court in *Schaffer*, the Fourth Circuit endorsed "the normal rule of allocating the burden to the party seeking relief" in IDEA due process hearings. *See Weast v. Schaffer ex rel. Schaffer*, 377 F.3d 449, 453-456 (4th Cir. 2004), *aff'd*, 546 U.S. 49, 126 S.Ct. 528 (2005). Here the Parents are the parties seeking relief. Accordingly, I find that in this case, the burden of proof is upon the Parents.

FINDINGS OF FACT

PS called as witnesses , an Assistant Principal at Middle School, Officer of the Police Department, PS Superintendent's Hearing Officer [Disciplinary Review Officer] and PS employee . The Parents called no witnesses. A number of documents, including written statements of the Child and other students and a photograph of the alleged weapon, were offered by the parties and received into evidence without objection. I make the following findings of fact based upon the preponderance of the evidence adduced at the hearing:

. was born on September 25, . It is not disputed that he is a child with a disability in need of special education services. In his most recent special education reevaluation in December 2005, the Child was found eligible for special education services based upon the disability criteria for Other Health Impairment ("OHI"). For the 2007-2008 school year, the Child was placed in the Eighth Grade at School a regular PS middle

school. His IEP provided that he was to receive 20 hours per week of learning disability services and five hours per month of autism services, both in a self-contained classroom.

On March 13, 2008, some students reported to Assistant Principal that the Child had threatened to kill a student, saying that the student would be dead the next day. After obtaining additional statements from other students, Mr. and another assistant principal summoned the Child to question him about the incident. Mr. asked the Child to empty his pockets, and discovered that he had a large-barrel ballpoint pen with him. When Mr. unscrewed the barrel of the pen, he found that the ink cartridge and spring had been removed and that the barrel contained two identical sharp metal spikes. The metal objects resemble headless nails, each about 1 3/4 inches long. The Child told Mr. that the metal objects were "alls" he used for working on a belt in his father's shop. Based upon the Child's statement and my examination of the objects, I conclude that the objects are awl tools used for piercing holes in leather, which would normally be attached to a handle.

Several students reported to Mr. that they had seen the Child pull out the pen containing the awls at school on repeated occasions. Mr. and other administrators obtained statements from several students. One student ("Student A") reported that the Child had threatened to "shank" him if he did not give the Child money at lunch. Student A stated that the Child said he had a sharp pen and had shown it to him twice in the past month. The same student said that the Child had earlier threatened that if Student A did not buy him lunch, the Child would "shank" him, and that the Child had put the awl on his (Student A's) shoulder for 2-3 seconds. Another student ("Student B") stated that the Child had shown him the awl and said that if another student (with whom the Child had a verbal altercation) tried to jump him, the

Child would "shank" him. A third student ("Student C") reported that the Child always carried the pen with the awls in it. According to Student C, the Child threatened to "shank" him with the instrument because he heard Student C was talking about him. Another student ("Student D") reported that he saw the Child taking the "shank" out and saying he was going to kill [another student]. Another student ("Student E") stated that the Child had the "pen with shanks in it" and that on two occasions, March 11, 2008 and March 13, 2008, he pulled it out and told Student C that he was going to kill him. A final student ("Student F") reported that he heard the Child say to Student C, "Tomorrow your dead" [*sic*] and that the Child keeps an empty pen with a nail in it in his pockets. He had seen the Child pull out the pen with the nail before.

In a written statement, the Child wrote that he had the awls in his pen for working on a belt at his father's shop. He stated that Student C said "F U Jew" to him and that he [the Child] threatened to stab Student C with a "pencil."

After investigating the March 13, 2008 incident, the administrators at Middle School suspended the Child out of school and recommended that the Child be expelled from PS. At a Manifestation Determination Review ("MDR") meeting on March 27, 2008, the MDR committee determined that the Child's misconduct involving the awls was not a manifestation of the Child's IDEA disability. (The correctness of the MDR determination is not an issue in this hearing.)

DRO, , convened an administrative hearing on April 3, 2008 to consider the school's expulsion recommendation. At the hearing, the Child repeated that he had threatened to stab Student C with a pencil, not the awls. He acknowledged attempting to scare Student C with the pen that held the awls. The Child also acknowledged that even though he did

not consider the pen containing the awls to be a weapon, he wanted other students to believe it was, that he had shown the object to a number of classmates and that his motivation to was to impress and scare them

After receiving the information, the DRO ordered the child's removal to an interim alternative educational setting for 45 school days. She directed that the alternative education setting would be selected by the Child's IEP team and expressly ordered that the interim placement be in a setting "not located on the property of any regular public school." The DRO informed the Parents by letter that in any PS setting or program, the Child would be considered a probationary student subject to number of requirements including satisfactory school work and compliance with school rules and regulations. The Child's readmittance to regular public school was made dependent upon his demonstration that he could abide by the rules and regulations applicable to all students.

Following the DRO hearing, the Child was allowed to return temporarily to Middle School where he was taught his core classes in a school conference room apart from other students. After the DRO issued her decision, the IEP Committee placed the Child at School, a PS public day school limited to special education students, for a 45 school day alternative interim placement. As of the hearing date, the Child was still enrolled at School.

DECISION

I. Did the pen barrel and awls carried by the Child constitute a weapon?

The first issue raised by the parents is whether PS improperly found that the pen barrel and awls carried by the Child to school were a "weapon" within the meaning of the IDEA and the

Virginia Regulations. The Virginia Regulations permit a school system to remove a student with a disability to an interim alternative educational setting for up to 45 calendar days under special circumstances, including having a weapon at school:

> School personnel may remove a student with a disability to an appropriate interim alternative educational setting for the same amount of time that a student without a disability would be subject to discipline, but for not more than 45 calendar days, if:
>
> The student carries a weapon to or possesses a weapon at school or a school function under the jurisdiction of a local educational agency or the Virginia Department of Education . . .

8 VAC 20-80-68.C.2.b(1) .[2] See, also, 20 U.S.C. § 1415(k)(1)(G); 71 Fed. Reg. 300.530(g)(1). In the Virginia Regulations, the term "weapon" is given the same meaning as the term "dangerous weapon" in 18 USC § 930 (g), paragraph 2, as well as any weapon defined as a dangerous weapon in the Code of Virginia. 8 VAC 20-80-68.C.2.b(2)(c). The referenced federal statute[3], 18 U.S.C. § 930(g)(2), defines "dangerous weapon" to mean:

> [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

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[2] Under the Virginia Regulations, which were issued in 2002, the interim placement is limited to "not more than 45 calendar days." When the IDEA was amended in 2004 by passage of the *Individuals with Disabilities Education Improvement Act of 2004* ("IDEA 2004"), federal law was changed to permit removal to an interim alternative educational setting for "not more than 45 school days." *See* Public Law 108-446, § 615(k)(1)(G). In its *Guidance Document On the Implementation of Idea 2004 – Part B Requirements* (Virginia Department of Education, Division of Special Education and Student Services, May 2005), the Virginia Department of Education affirmed that IDEA 2004's provisions supercede current state special education regulations when there is an impact on the regulation. The parents have not raised the duration of the removal as an issue in this hearing.

[3] The Code of Virginia does not contain an independent definition of dangerous weapon.

> that such term does not include a pocket knife with a blade of less than 2 1/2 inches in length.

Id.

PS contends that the weapon in this case is, alternatively, (i) the pen barrel and awls together or (ii) just the awls themselves. In the first construct, the awls would be fixed to the pen in such as way as to rig the pen barrel as a shank handle. The Parents contend that the evidence does not establish that the Child ever attached the awl to the pen barrel in this fashion. I agree. Officer demonstrated how the awls could have been jammed into the pen barrel so as to fix them in place with one sharp point extending through the pen point opening. However, none of the student witness statements allege that the awl was fastened to the pen barrel. The assistant principal who led the investigation testified that the administrators did not determine whether the Child used the pen barrel as a handle for the awls and that he believed the Child just used the barrel to store the awls. Therefore I find that the evidence does not establish that the Child made a weapon out of the awls fixed to the pen barrel.

The evidence does establish that the Child showed the awls to other students at school on multiple occasions, and he threatened to stab (shank) at least three students with the awls. The Child successfully used the awls to intimidate one of them, a smaller student, to buy him food or give him money and on one occasion briefly pressed an awl against that student's shoulder. The Parents contend that even if this occurred, the awls cannot be deemed weapons within the meaning of 8 VAC 20-80-68.C.2.b(2)(c) and 18 U.S.C. § 930(g)(2). I disagree and I find that definition of weapon is broad enough to

include the awls.

One of the definitions of "weapon" in 18 U.S.C. § 930(g)(2) is a device or instrument that is readily capable of causing serious bodily injury. The term "serious bodily injury" is defined elsewhere in Title 18 to mean:

> [B]odily injury which involves--
> (A) a substantial risk of death;
> (B) extreme physical pain;
> (C) protracted and obvious disfigurement; or
> (D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

18 U.S.C. § 1365(h)(3)[4]. The term "bodily injury, " means, *inter alia*, a cut, abrasion, bruise, burn, or disfigurement or any injury to the body, no matter how temporary. *Id.*

Under the facts in this case, I find that the awls carried by the child to school were readily capable of causing serious bodily injury. The awls are short metal spikes, approximately 1 3/4 inches long, with sharp points intended to pierce leather. If misused by the Child, the awls were undoubtedly capable of injuring his victims, including notably causing the loss or impairment of an eye. Moreover, the Fourth Circuit has held that "an object need not be inherently dangerous to be a dangerous weapon. Rather, innocuous objects or instruments may become capable of inflicting serious injury when put to assaultive use." *U.S. v. Sturgis*, 48 F.3d 784, 787 (4th Cir.1995). The evidence in this case establishes that the Child put the awls to "assaultive use." He brandished the

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[4] Title 18 repeatedly references this definition, which is part of the statute pertaining to unlawful tampering with consumer products, for offences containing the element of serious bodily injury.

awls, and the pen in which he carried them, to threaten and intimidate other students and to extort money. The Child admitted that he carried the awls to school to scare some of his peers and that he wanted other students to believe that the pen containing the awls was a weapon. In sum, I find both that the awls were inherently readily capable of causing serious bodily injury and that the Child put the awls to assaultive use to threaten other students. Under the facts of this case, I find that the awls constituted a "weapon," as used in 8 VAC 20-80-68.C.2.b.2, and "dangerous weapon" as defined in 20 U.S.C. § 1415(k)(1)(G)[5] and that the Child carried the weapon to and possessed it at Middle School.[6]

II. Was it unlawful for the Disciplinary Review Officer to foreclose the IEP Team's option to place the Child at a regular public school?

The Parents next argue that the DRO's order, that the Child's interim alternative educational setting not be on the property of any regular public school

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[5] The parents also cited the exception from the definition of dangerous weapon in 18 U.S.C. § 930(g)(2) for a "pocket knife with a blade of less than 2 1/2 inches in length" as applying to the awls carried by the Child. Simply put, the awls are not a pocket knife. I find that the pocket knife exception does not apply.

[6] The Parents cite several special education decisions from other jurisdictions where the devices at issue were found not to be weapons. I find the facts in those cases make the decisions readily distinguishable. In *Anaheim Union High School District*, 32 IDELR 129 (2000), the alleged weapon was an ordinary paper clip. The decision in *Independent School District #831*, 32 IDELR 163 (1999), concerned an incident of a student accidently poking his friend's hand with a pencil. In *Scituate Public Schools*, 47 IDELR 113 (2007), the student pulled on the school principal's necktie. The hearing officer in *Independent School District No. 279*, 30 IDELR 645 (1999), found that a paintball gun brought on a school bus (but not taken out of the backpack) was not a weapon because it did not contain any paintballs or CO_2 cartridges needed to propel the paintballs. None of the cited cases involved objects comparable to the sharp metal tools used in this case or the intentional use of those objects to intimidate other students.

violated IDEA and the Virginia Regulations because the order took placement options away from the IEP team. Both the IDEA and the applicable section of the Virginia Regulations provide that the Child's interim alternative educational setting must be determined by the IEP team. *See* 20 U.S.C. § 1415(k)(2); 8 VAC 20-80-68.C.2.c. The Parents interpret this provision to mean that when a school system removes a special education student from a particular school for special disciplinary circumstances, it must not limit at all the continuum of alternative educational setting options to be determined by the IEP team.

In this case, the DRO determined that by bringing a dangerous weapon to school and threatening other students, the Child exposed his fellow students to grave danger. On that basis, she determined that to permit the Child to return to a regular PS public school would jeopardize the safety and welfare of other students. Pyramid Resource Specialist testified that when the IEP team met to determine the Child's interim alternative educational setting, she understood that the only option excluded was placing the Child at a regular public school. The team had a number of other placement settings it could consider, including home based services, alternative learning centers, public day schools and private schools. The IEP team decided to place the Child at School, a public day school.

In essence, the Parents argue that when removing a child to an interim alternative educational placement, the school system must, notwithstanding the perceived risk to safety and welfare of other students, permit the IEP team to place the Child at another regular education school. I find this interpretation of the statute and regulations

unpersuasive and illogical in the context of the "Special Circumstances" of § 1415(k)(1)(G) (where a child has carried a weapon to school, possessed or sold drugs on school property or inflicted seriously bodily injury upon another person at school).[7] Under the facts of this case, I find that the § 1415(k)(2) requirement that the interim alternative educational setting be determined by the IEP team was not violated by the DRO's order that the interim setting not be located on the property of a regular public school.

ORDER

For the reasons set forth above, it is hereby ordered as follows:

1. The relief requested by the parents, and , herein is denied in its entirety.

2. Public Schools shall develop an implementation plan within 45 calendar days of the date of this decision which must state how and when this decision will be put into operation. The implementation plan shall include the name and position of a case manager charged with implementing the decision. Copies of the plan shall be forwarded to the parties to the hearing, the hearing officer and the Virginia Department of Education.

3. Public Schools is the prevailing party in this due process hearing.

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[7] The Parents were unable to cite any judicial or hearing decisions adopting this interpretation of 20 U.S.C. § 1415(k)(2).

Right of Appeal Notice

This decision is final and binding unless a party appeals in a federal district court within 90 calendar days of this decision, or in a state circuit court within one year of the date of this decision.

Peter B. Vaden, Hearing Officer
600 Peter Jefferson Pkwy, Ste 220
Charlottesville, Virginia 22911-8835
Telephone: 434-923-4044
Telecopier: 434-923-4045

Date of Decision: June 5, 2008