

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

BERKELEY UNIFIED SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH Case No. 2018120695

EXPEDITED DECISION

On December 17, 2018, Berkeley Unified School District filed with the Office of Administrative Hearings, State of California, an expedited due process hearing request naming Student. The hearing request also contained issues not arising under the expedited provisions of the Individuals With Disabilities Education Act and corresponding state law. That matter proceeded to hearing on January 10, 2019, and a decision was issued on January 30, 2019.

Administrative Law Judge Tiffany Gilmartin heard this matter in Oakland, California, on January 29, 2019.

Attorney Jennifer Nix represented Berkeley. Dr. Jan Hamilton, Executive Director of Special Education attended the hearing on behalf of Berkeley. Mother represented Student. Student did not attend.

Berkeley's motion for oral closing arguments was granted. At the conclusion of testimony and closing arguments on January 29, 2019, the record was closed and the matter submitted for decision.

## ISSUE

May Berkeley move Student to a 45-school day interim alternative educational setting at Spectrum Center—Camden Campus, a nonpublic school located in Oakland, California because maintaining Student in his current educational placement is substantially likely to result in injury to Student, other students, and Berkeley's staff or agents as provided for in 20 U.S.C. §1415(k)(3)(A), and 34 C.F.R. § 300.532(a)?

## SUMMARY OF DECISION

This decision holds that Student's continued placement at Berkeley High School is substantially likely to result in injury to himself or others. Student's conduct during the 2018-19 school year was injurious to others and potentially injurious to himself, and Berkeley personnel were unable to manage Student's behavior. Berkeley prevailed on the sole issue, and may place Student at Spectrum Center—Camden Campus as an interim alternative educational setting for a period not exceeding 45 school days.

## FACTUAL FINDINGS

1. Student is a 14-year-old male who resided in the District at all relevant times, and is eligible for special education under the category of autism. Student enrolled in Berkeley in 2015. At the time of hearing, Student was in the ninth grade.
2. Berkeley High School is a large, urban, open campus located on busy streets in central Berkeley. The campus opens to People's Park on one side where illicit activity, transients, and political protests occur. There are approximately 3,300 students and close to 300 adult staff members on campus on a typical school day. There are six main entrances to campus. Only one entrance is monitored for most of the school day.
3. Student's most recently consented to and implemented individualized education program is dated May 14, 2018. The May 14, 2018 IEP placement and services consists of: attendance at a public high school with specialized academic instruction for

1800 minutes per week, speech and language two times per week for a total of 30 minutes, and group occupational therapy consult for 120 minutes per year. Student's program accommodations included a sensory diet, books on tape, and an opportunity for more frequent breaks. Student also received program modifications on functional math concepts, community based activities, and shortening spelling tests. The meeting notes from the May 14, 2018 IEP demonstrated the team discussed and agreed Student needed a one-to-one aide; however, the one-to-one aide was not memorialized on the service's page of the IEP. However, there is no dispute that Berkeley provided a one-to-one aide for Student. At the May 14, 2018 IEP team meeting, Mother expressed concern that the campus size was too large for Student.

4. Student began the 2018-2019 school year at Berkeley High. Student's maladaptive behaviors surfaced shortly after school started. Lena Sweeney, special education program supervisor at Berkeley, invited Mother to an IEP team meeting on October 10, 2018 to discuss Berkeley's IEP team members' beliefs that Student needed to be reassessed. Mother attended the IEP team meeting, but did not consent to any assessments. Student's case manager and teacher, Josh Austin, also recommended that Student have a behavior intervention plan. At the time, Mr. Austin, was concerned with Student's off-task behaviors, touching other students without their permission, and vocalizations during classroom instruction. Prior to the IEP team meeting, he consulted with the behavior specialist and developed a draft behavior plan to present to Mother at the IEP team meeting. Mother did not consent to the behavior plan Mr. Austin presented.

5. Heber Santos was assigned to work with student as his one-to-one aide for three periods per day. From October 15 to October 17, 2018 Student was involved in two behavioral incidents where he struck another student and drew blood. During the first incident, while in the special education classroom, Student unexpectedly punched

the other student in the mouth, without provocation. A behavioral emergency incident report was generated by Mr. Austin, and Mother was contacted in an attempt to mediate the concerns Student's behavior created. Two days later, on October 17, 2018, Student again attacked the same student in class. This time, striking him in the eye. Mr. Santos removed Student from the room for the rest of the class period. Student attempted another physical attack on the same student on October 19, 2018, but this time an instructional aide was able to physically stop him. Student was asked to leave the classroom, but Student refused to comply, and Student was directed to the on-campus intervention room.

6. Student's physical size, speed, and agility made controlling him difficult for Mr. Santos. Mr. Santos had to restrain Student on numerous occasions by holding his arms. Mr. Santos had to remain no more than four feet away from Student at all times to redirect his behavior. Mr. Santos arranged for Berkeley High to reimburse other students when Student stole their food. Student was also caught stealing money from other students' backpacks. Mr. Santos negotiated with Student to return the money and apologize each time. Student also struck another student with a badminton racket before Mr. Santos could redirect him. Finally, Mr. Santos, due to Student's unpredictable behavior, requested a break during the school day. Mr. Santos had never requested a schedule dispensation in the previous seven years he had worked at Berkeley. Mr. Santos' testimony was thoughtful and given substantial weight.

7. On November 13, 2018, D.S., an instructional aide assigned to another student was leaning over the desk assisting that student. Student approached D.S. from behind and without provocation stuck his finger into D.S.'s anus through D.S.'s pants and underwear. D.S., is a large man, turned to Student, raised his voice and threatened Student in response to Student's actions. Student quickly stepped back from D.S. D.S. then exited the classroom to compose himself. D.S. contacted the Berkeley police

department and a report was taken. D.S. took two weeks off of work after the incident to recover from the mental and emotional shock, and is still struggling with the repercussions.

8. This was not the only incident of sexualized behavior from Student. D.S. described another time while in the lunchroom, Student looked at him and started masturbating. D.S. and another instructional aide corrected Student who ceased the behavior. D.S. believes Berkeley High is no longer able to meet Student's needs emotionally or behaviorally. D.S.'s testimony was thoughtful and given significant weight.

9. As a result of the incident with D.S., Student was suspended from school for four days. Berkeley High was closed for Thanksgiving the week of November 19-23, 2018. Student was eligible to return to campus on November 27, 2018. Due to the severity of the incident with D.S., Student was recommended for expulsion. Ms. Sweeney attempted to schedule a manifestation determination review prior to Student's return to school. Ms. Sweeney scheduled the first meeting on November 27, 2018 at 8:45 a.m. Ms. Sweeney emailed Mother the day prior to remind her of the meeting. Mother did not appear; the team rescheduled the manifestation determination review for the following day, November 28, 2018 at 2:00 p.m. Ms. Sweeney sent Mother an updated meeting invitation and a copy of parent's procedural safeguards. Mother again did not appear. Ms. Sweeney scheduled a third manifestation determination review for December 3, 2018 at 10:00 a.m. Mother responded to Ms. Sweeney's email and informed her she would not attend the meeting and she wished Berkeley would move forward on the expulsion determination. Ms. Sweeney scheduled a final manifestation determination review meeting on December 6, 2018. Mother did not attend. After four attempts to invite Mother to the meeting, Berkeley proceeded in her absence.

10. The manifestation determination review meeting convened on December

6, 2018. The team reviewed Student's IEP. One area of significant concern for the Berkeley team members was that Student was last assessed when he was eight years old. Mr. Austin, a level two credentialed education specialist, with 18 years' experience, argued that in his experience working with students with autism spectrum disorder, the behavior that precipitated the manifestation determination review had no relationship to Student's disability. However, others on the team, believed Student's behavior could have a direct relationship to his disability. The team was split evenly on whether Student's behavior had a direct relationship with his disability. As a result, the expulsion proceedings were terminated and Student was returned to school.

11. Student returned to school on December 10, 2018. Around noon that day, Student approached the school resource officer, Berkeley Police Officer Geoffrey Mitchell. Officer Mitchell was trained to slant his body to keep his duty weapon on the far side of a student when approached. Officer Mitchell noticed Student looking at his duty belt. Officer Mitchell wears his duty weapon on his right side. Student walked past Officer Mitchell then quickly turned around and lunged for Officer Mitchell's duty weapon, placing both hands on Officer Mitchell's right arm. Officer Mitchell protected his duty weapon from Student's reach. Mr. Santos and another security officer stepped in to separate Student and Officer Mitchell. Berkeley Police Department officers carry loaded weapons with one round racked in the chamber. Officer Mitchell's testimony was thorough, persuasive and given significant weight.

12. Student was suspended from school for three days beginning on December 11, 2018. Berkeley initiated a second manifestation determination review concerning Student's behavior on December 10, 2018. Berkeley notified Mother the team would meet on December 14, 2018. Mother again refused to participate. Ms. Sweeney scheduled another manifestation determination review meeting for December 17, 2018. The evidence is unclear whether Mother notified Berkeley of her unavailability

or if she failed to appear. Ms. Sweeney scheduled a third manifestation determination review meeting on January 8, 2019. This time Berkeley convened the meeting although Mother was absent. At this meeting, the team agreed due to the lack of current assessments of Student, there was not enough information to determine if Student's behavior was a manifestation of his disability. Although no expulsion proceedings are pending, Student had not returned to Berkeley at the time of hearing.

13. Berkeley board certified behavior analyst, Andrea Jason, conducts functional behavior assessments for Berkeley and works with IEP teams to develop behavior intervention plans. Ms. Jason has 25 years' experience working in education and has worked with more than 100 students in the eight years she has been a behaviorist. Ms. Jason, originally consulted with Mr. Austin about developing a behavior intervention plan for Student in October 2018. However, as previously discussed, Berkeley did not implement the behavior plan Ms. Jason and Mr. Austin developed because Mother did not consent. Berkeley also proposed conducting a functional behavioral analysis on Student and provided Mother an assessment plan on November 5, 2018. As part of developing a functional behavior assessment, Ms. Jason will interview people close to the student, do a record review, observe the student, develop a hypothesis as to why the behavior is occurring, and develop replacement behaviors. Student's sexualized behavior and his attempt to take a police officer's weapon were most concerning maladaptive behaviors to Ms. Jason. She identified three common areas students entering Berkeley High often have behavior changes: hormonal, environmental, and increased work load. Due to her inability to fully assess Student she was unable to have an opinion why Student's behaviors had recently increased.

14. Berkeley proposed Student be enrolled at Spectrum Schools—Camden Campus as an interim alternative educational setting for Student for not more than 45

school days. Ms. Sweeney personally toured Spectrum—Camden. The Camden Campus, has smaller buildings than Berkeley, a lower student-to-staff ratio, and staff has been specifically trained to work with students with disabilities and maladaptive behaviors. The staff and students were engaged with each other. The facility is significantly smaller than Berkeley and conducive to safely containing Student. The evidence established that Camden Campus would be appropriate for Student. Specifically, it will enable Student to participate in the general education curriculum while making progress on his IEP goals. Further, the functional behavior assessment that was recently ordered in the non-expedited portion of this hearing, can be conducted. In the meantime, the Camden Campus can implement behavior strategies designed to address Student's behavior. Ms. Sweeney's testimony was thorough, supported by the evidence and given significant weight.

15. Ms. Jason, while she had never toured Camden Campus, was familiar with its methodology of using applied behavior analysis, an evidence-based practice successful in working with autistic children. Because the school is smaller, staff at Camden will better be able to identify antecedents to Student's maladaptive behaviors, and then manipulate the environment so these behaviors can be prevented. Ms. Jason's testimony was thorough and given significant weight.

16. Berkeley filed for due process on December 17, 2019 requesting an order from OAH to place Student at Camden Campus as an interim alternative educational placement for not more than 45 school days.



## LEGAL CONCLUSIONS

### INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA<sup>1</sup>

1. This hearing was held under the Individuals with Disabilities Education Act (IDEA), its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)<sup>2</sup> et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's

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<sup>1</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

<sup>2</sup> All subsequent references to the Code of Federal Regulations are to the 2006 version.

procedures with the participation of parents and school personnel that describes the child's needs, academic, and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs.

4. The Supreme Court recently clarified the *Rowley* standard in *Endrew F. v. Douglas County Sch. Dist. RE-1* (2017) 580 U.S. \_\_\_, 137 S.Ct. 988 [197 L.Ed.2d 335] (*Endrew F.*). The Court explained that when a child is fully integrated into a regular classroom, a FAPE typically means providing a level of instruction reasonably calculated to permit a child to achieve passing marks and advance from grade to grade. (*Id.*, 137 S.Ct. at pp. 995-996, citing *Rowley*, 458 U.S. at p. 204.) In cases in which a student is not fully integrated into a regular classroom, the student's IEP must be reasonably calculated to enable the student to make progress appropriate in light of his circumstances. (*Endrew F.*, *supra*, 137 S.Ct. at p. 1001.)

5. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited

to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D); Ed. Code, § 56505, subd. (l).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii).) Here Berkeley bears the burden of proof.

6. Title 20 United States Code section 1415(k) and title 34 Code of Federal Regulations, part 300.530, et seq., govern the discipline of special education students. (Ed. Code, § 48915.5.) A student receiving special education services may be suspended or expelled from school as provided by federal law. (Ed. Code, § 48915.5, subd. (a).) If a special education student violates a code of student conduct, the local educational agency may remove the student from his or her educational placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 school days (to the extent such alternatives are applied to children without disabilities.) (20 U.S.C. § 1415(k)(1)(B); 34 C.F.R. § 300.530(b)(1).) A local educational agency is required to provide services during periods of removal to a child with a disability who has been removed from his or her current placement for 10 school days or less in that school year, if it provides services to a child without disabilities who is similarly removed. (34 C.F.R. § 300.530(d)(3).) If a special education student violates a code of conduct and the local educational agency changes the educational placement of the student for more than 10 days the local educational agency must meet the requirements of Section 1415(k).

7. A special education student's educational placement is that unique combination of facilities, personnel, location or equipment necessary to provide

instructional services to the student. (Cal. Code Regs., tit. 5, § 3042, subd. (a).) A “change of placement” is a fundamental change in, or elimination of, a basic element of a student’s educational program. A change of placement is defined as (a) a removal for more than 10 consecutive school days, or (b) a series of removals that accumulate to more than 10 school days and constitute a pattern based on listed factors. (34 C.F.R. § 300.536(a).)

8. Parents and local educational agencies may request an expedited due process hearing of claims based upon a disciplinary change of educational placement under title 20 United States Code section 1415(k). An expedited hearing must be conducted within 20 school days of the date an expedited due process hearing request is filed and a decision must be rendered within 10 school days after the hearing ends. (20 U.S.C. § 1415(k)(4)(B); 34 C.F.R. § 300.532(c)(2).) The rules for a due process hearing under title 20 United States Code section 1415(k) must be consistent with those of other IDEA hearings. (34 C.F.R. § 300.532(c).)

ISSUE: MAY BERKELEY PLACE STUDENT AT SPECTRUM CENTER—CAMDEN CAMPUS FOR NOT MORE THAN 45 SCHOOL DAYS AS AN INTERIM ALTERNATIVE EDUCATIONAL SETTING?

9. Berkeley contends that maintaining Student’s current educational placement at Berkeley High School is substantially likely to result in injury to Student or others. Berkeley seeks an order that Student be placed in an interim alternative educational setting for not more than 45 school days. Student contends that Berkeley has not adequately managed Student’s behaviors, and as a result, made a decision to change Student’s placement without fully involving Mother. Student further contends that Berkeley did not explore alternative options and made a rash decision to file for due process.

## Potential Injury To Self Or Others

10. A local educational agency may request a due process hearing to authorize a change of placement if the district “believes that maintaining the current placement of the child is substantially likely to result in injury to the child or to others. . . .” (20 U.S.C. § 1415(k)(3)(A); 34 C.F.R. § 300.532(a).) If it is determined following a hearing that a special education student's behavior in his or her current placement is substantially likely to result in injury to the student or to others, the student may be placed in an appropriate interim alternative educational setting for not more than 45 school days. (20 U.S.C. § 1415(k)(3)(B)(ii)(II); 34 C.F.R. § 300.532(b)(2)(ii).)

11. In *Light v. Parkway C-2 School District* (8th Cir. 1995) 41 F.3d 1223, the student engaged in a “steady stream of aggressive and disruptive behaviors,” including hitting other children, biting her teacher, throwing pencils and other objects at children, and attempting to overturn desks and tables. (*Id.* at pp. 1225, 1229.) The Eighth Circuit Court of Appeals rejected the parents’ argument that a disabled child must be “truly dangerous” as well as substantially likely to cause injury, and commented that the “substantially likely” test “looks only to the objective likelihood of injury.” (*Id.* at p. 1228.) The court also rejected the contention that “injury is inflicted only when blood is drawn or the emergency room visited,” and “[m]ore broadly . . . reject[ed] the proposition that a child must first inflict serious harm before that child can be deemed substantially likely to cause injury.” (*Id.* at 1230.) The Eighth Circuit held that there is no requirement that a child must intend to cause injury, reasoning, “Even a child whose behaviors flow directly and demonstrably from her disability is subject to removal where that child poses a substantial risk of injury to herself or others.” (*Id.* at 1228.)

12. Berkeley established that Student is substantially likely to injure himself or others if he continues to attend school at Berkeley High. The risk of harm is clear. The evidence convincingly established Student’s placement at Berkeley High has already

caused injury to others, and it is substantially likely that allowing Student to continue to attend Berkeley High makes it likely that he will continue to cause injury to others or himself. In four months of enrollment at Berkeley High, Student physically assaulted another student at least twice. He stole from other students. He was also involved in two major behavioral incidents. First, Student inflicted unwanted sexual contact toward a staff member. The staff member required two weeks off from work prior to being able to return to duty and continues to suffer residual impacts of the trauma. Then Student attempted to grab the service weapon of Officer Mitchell. Had Student been successful, the potential loss of life from an unrestrained service weapon in the hands of Student could have been catastrophic.

#### Proposed IAES

13. If the ALJ deciding the case determines that maintaining a student's current placement is substantially likely to result in injury to the student or to others, the ALJ may order a change in placement. (20 U.S.C. § 1415(k)(3)(B)(ii)(II).)

14. The interim alternative educational setting must enable the student to continue to participate in the general education curriculum and to progress toward meeting the goals set out in the student's IEP. (20 U.S.C. § 1415(k)(1)(D)(i); 34 C.F.R. § 300.530(d)(1).) The interim alternative educational setting must also enable the student to receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications that are designed to address the behavior violation so that it does not recur. (34 C.F.R. §300.530(d)(1)(ii).)

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

and a proposed IAES. Mother chose not to participate after receiving numerous invitations to provide input.

16. Berkeley met its burden of persuasion and establishing Spectrum Center—Camden Campus, a nonpublic school is an appropriate alternative educational placement for not more than 45 school days. Student’s placement at the Spectrum Center will provide Student a smaller, more controlled environment, a smaller student-to-staff ratio, and less risk of harm to himself or others. The evidence established that at Camden Campus, Student will participate in the general education curriculum and make progress on his IEP goals.

17. Berkeley does not have current assessments of Student; recent OAH Decision resulted in an order that allows Berkeley to assess Student without Mother’s consent. That ordered assessment includes a functional behavior assessment which can be conducted at Camden Campus. Further, the evidence established that while the assessment is pending, behavioral interventions and modifications can be implemented to avoid Student’s conduct from reoccurring.

18. All of Student’s other contentions were carefully considered. The evidence, however, did not support the arguments.

## ORDER

Berkeley may place Student at Spectrum School—Camden Campus, a nonpublic school located in Oakland, California for not more than 45 school days, starting from the first day of attendance at Spectrum School.

## PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Berkeley prevailed on the sole issue presented.

## RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

DATED: February 7, 2019

\_\_\_\_\_/s/\_\_\_\_\_  
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TIFFANY GILMARTIN

Administrative Law Judge

Office of Administrative Hearings