

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. 2019020288

DECISION

Berkeley Unified School District filed a due process hearing request with the Office of Administrative Hearings, State of California, on February 6, 2019, naming Student.

Administrative Law Judge Cynthia Fritz heard this matter in Oakland, California, on March 5, 2019.

Jennifer Nix, Attorney at Law, represented Berkeley Unified School District. Jan Hamilton, Executive Director of Special Education, attended the hearing on behalf of Berkeley.

Parent and Student did not attend the hearing.

On March 5, 2019, the record was closed and the matter was submitted for decision.

ISSUE

Does Berkeley Unified School District's individualized education program, dated November 29, 2018, offer Student a free appropriate public education in the least

restrictive environment such that Berkeley may implement the IEP without parental consent?

## SUMMARY OF DECISION

The IEP dated November 29, 2018, was not an IEP but an amendment to an IEP. This Decision holds that Berkeley failed to establish that the November 29, 2018, IEP, which incorporated and revised components of the March 15, 2018, IEP, and the September 20, 2018, IEP, offered Student a FAPE. The goals in November 29, 2018, IEP had been unchanged since originally developed in the March 15, 2018, IEP. Berkeley failed to establish that the goals were measurable. Further, Berkeley sought an order permitting the IEP be implemented without parental consent. Even had the IEP been found to offer a FAPE, the IEP expired by its own terms on March 15, 2019, before this Decision issued. Berkeley did not provide authority permitting an IEP, even had it offered a FAPE, be implemented after it expired.

## FACTUAL FINDINGS

### JURISDICTION AND BACKGROUND

1. Student is a 13-year-old eighth grade girl who resided with Parent within the boundaries of Berkeley at all relevant times, and is currently eligible for special education under the categories of other health impairment and emotional disturbance. Berkeley initially found Student eligible for special education in fourth grade under the category of specific learning disability.

2. During the 2016-2017 school year, in sixth grade, Student transitioned from Longfellow Arts and Technology Middle School general education with resource support services, to a counseling enriched class, via her March 16, 2017, consented-to IEP. The counseling enriched class included mental health support from an outside public agency, Seneca Family of Agencies. In July 2017, Berkeley conducted Student's

triennial assessments in the areas of: academic achievement, intellectual development, social and emotional, adaptive functioning, and behavior.

### 2017-2018 SCHOOL YEAR – SEVENTH GRADE

3. Berkeley convened an amendment IEP team meeting on August 24, 2017, to review Student's triennial assessments, and recommended changing her primary special education eligibility to other health impairment, with emotional disturbance as a secondary category. Parent did not consent to the August 24, 2017, amendment IEP, and Student continued to attend the counseling enriched class at Longfellow for seventh grade.

#### The March 15, 2018 Annual IEP Team Meeting

4. On March 15, 2018, Student's IEP team convened for an annual meeting. Student's Parent; Marcos Garcia, principal; Elizabeth McPhee, Seneca supervisor; Lynesha Kately, school therapist; Carolyn Tedder, Student's special education teacher; Melody Royal, special education supervisor; and Gregory Ward, Student's general education teacher; attended the legally comprised and noticed meeting. Berkeley provided Parent with procedural safeguards; Parent participated in the meeting. Student's primary special education category was designated as other health impairment, with emotional disturbance as her secondary eligibility category.

5. Student's present levels of academic and functional performance were discussed. Based on an online reading assessment, Student read independently at a third grade level, and her 2017 triennial assessment composite score in reading was low. In regard to writing, Student struggled to produce any written work with support or independently. Her 2017 triennial assessment scores in writing were in the average to below average range. Based on an online math intervention assessment, Student understood number systems with 35 percent accuracy and fractions and decimals with

10 percent accuracy. Her triennial assessment scores in math ranged from very low to below average. Student struggled to attend class consistently and complete tasks, which impacted her academic progress.

6. Student had social and emotional, and mental health needs based on her maladaptive behaviors. She previously participated in the counseling enriched classroom individual mental health counseling but it had become increasingly irregular due to attendance issues and emotional dysregulation. Student communicated appropriately at times but was also verbally aggressive and struggled to appropriately advocate her needs. At times, she took belongings of others. She also continued to elope and disrupt other classrooms and students. Student had attended 31 percent of classes and was present on campus 55 percent of the time.

7. The IEP team reviewed Student's progress on her annual goals from March 2017. Out of seven goals, Student met one goal in respectful communication. Student did not meet her goals in the areas of behavior management, on-task behavior, attendance, reading, writing, and math.

8. As of March 15, 2018, Student had needs in the following areas: following directions, respectful communication, self-regulation/coping skills, attendance, task completion, reading, writing, and math. The team developed eight new goals to address her identified needs.

9. One goal was measurable, goal five. Goal five required Student attend school for 60 percent of her classes, as measured by attendance reports and teacher records. To measure progress toward this goal, one could identify the total number of school days and classes as compared to the number of days and classes Student attended and determine an attendance percentage. This is an objective measure of observable behavior. Accordingly, this goal is measurable.

10. The majority of the goals in the March 15, 2018, IEP are not measurable.

For example, goal two addressed behavior. The goal stated: when given visual/staff-modeled social/coping strategies and a positive reinforcement plan, Student will use these tools to self-regulate her emotions/anxiety to engage in school-appropriate behavior 60 percent of the time in two of three trials as measured by teacher/staff records. This goal has no definition of school-appropriate behavior. To be measurable, the goal should specify what the school-appropriate behavior is in order for it to be monitored and tracked. As stated, the term is subjective. The evidence in this case established that when dysregulated or experiencing anxiety, Student displays outward behaviors such as profanity, theft, and physical aggression to staff and peers. The specific outward manifestation of these behaviors could be measured and tracked during a specified period of time, such as during a school day, but a subjective phrase like school-appropriate behavior, without further explanation, cannot. Accordingly, this goal is not measurable.

11. Another example is goal four that addressed task completion. This goal requested that, when given visual/staff-modeled social/coping strategies and a positive reinforcement plan, Student will use these tools to remain on-task and maintain behavior, and work-completion grades of 60 percent in all classes, in two of three trials. The goal, however, is not measuring task completion but the accuracy with which she completes the assignment. For example, Student could have a math assignment with 100 problems and finish them all. That would be a completed task; however, if she only gets 25 correct, she will not meet the goal, because it is measured by her grade in the class. Accordingly, the goal measures subject matter accuracy and not task completion. Therefore, as a task completion goal, it is not measurable.

12. The March 15, 2018 IEP offered Student accommodations including:

extended time on test and quizzes, chunked assignments,<sup>1</sup> shortened homework assignments, access to computer for writing and other tasks, breaks as needed, use of calculator, visual step-by-step examples, writing frames, preferential seating, flexible setting for tests and assignments, a visual schedule, the ability to rework missed problems, take-home or open-book tests, provision of possible answers for fill-in-the-blank questions, use of pass-fail or an alternative grading system, partial grades based on effort, use of alternate books at easier reading levels, instructions to be rephrased and repeated to check for understanding, a graphic organizer, and focus on mastery of more functional math concepts.

13. The IEP team reviewed placement options. Berkeley team members concluded based upon Student's then present levels of performance that she needed a more restrictive setting, a non-public school, to make progress on her goals. Parent disagreed.

14. Berkeley's March 2018 offer of a free appropriate public education included: specialized academic instruction provided by a non-public school, 300 minutes daily, from March 15, 2018, to March 15, 2019; individual counseling provided by a non-public school, 60 minutes weekly, from March 15, 2018, to March 15, 2019; and group counseling and guidance provided by a non-public school, 60 minutes weekly, from March 15, 2018, to March 15, 2019. For the extended school year, Berkeley offered specialized academic instruction provided by a non-public school, 240 minutes daily, from June 25, 2018, to July 20, 2018; and individual counseling provided by a non-public school, 60 minutes weekly, from June 25, 2018, to July 20, 2018. Berkeley also offered transportation to and from the non-public school. Student would spend 100 percent of

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<sup>1</sup> Chunking is breaking skills or information into smaller, more manageable segments.

her time outside a general education setting. Parent consented to all aspects of the March 15, 2018, IEP, except placement.

15. In June 2018, Berkeley filed for due process to defend its March 15, 2018, IEP offer. The matter did not proceed to hearing, and ultimately, the parties agreed to allow Student to attend Berkeley's counseling enriched class for eighth grade, at Martin Luther King Middle School, with transportation provided. The parties believed that a change in school setting may help with Student's behaviors.

16. Berkeley convened an amendment IEP team meeting on August 24, 2018, to amend the March 15, 2018 IEP, to reflect Student's placement at Martin Luther King's counseling enriched program. Berkeley also added 250 minutes daily of behavior intervention services, from August 27, 2018, through March 14, 2019. The behavior intervention services were provided through the counseling enriched class in order to have behavior support available to Student throughout the day. No other services, accommodations, or goals changed except for designating the setting as a public day school and the addition of the 250 minutes daily of behavior intervention services. Student would spend 90 percent of her time outside of the general education setting, and 10 percent in a general education setting. Parent consented to the August 24, 2018, amendment IEP.

#### 2018-2019 SCHOOL YEAR – EIGHTH GRADE

17. Soon after, Student began eighth grade at Martin Luther King's counseling enriched program. Alexander Rice, a credentialed and experienced special education teacher, taught Student language arts, math, and history at Martin Luther King and was also her case manager. The counseling enriched classroom was similar to the Longfellow counseling enriched classroom.

18. Mr. Rice testified at hearing and explained that Student met expectations the first week of school and almost immediately thereafter began to exhibit behaviors

similar to those at Longfellow including eloping, evading staff, and disrupting classrooms. She also continued to use profanity and aggressive behavior with increased frequency and intensity.

She was found on occasion using a video on her phone to talk with unknown adult males. She had challenges on a regular basis which now included safety issues such as leaving the campus and escalating assaultive behavior on staff and students. Mr. Rice was knowledgeable about Student and his presentation and testimony was thorough.

#### The September 20, 2018 IEP

19. On September 20, 2018, Student's IEP team convened. Student's Parent; Ms. McPhee; Liam Early, school psychologist; Mr. Rice; Javier Mendieta, Martin Luther King School Vice Principal; and Ms. Royal attended the meeting. A general education teacher did not attend the IEP meeting. Parent participated in the meeting. The IEP was designated as "other", a 30-day review. The purpose of the IEP was to review Student's program.

20. Student's present levels of academic and functional performance were examined, and her progress on the March 15, 2018, IEP goals, were discussed. Student was out of class approximately 75 percent of the time, an increase from 69 percent as identified in March. She failed to complete any assessments in reading and in math, a decrease from what was identified in March. Student's behaviors of eloping, evading counselors, and wandering around campus presented safety concerns. Student was not making progress on goals. Despite the increasing needs and lack of progress on goals, no changes were made to the March 15, 2018 goals, and the IEP continued to have the same expiration date, March 15, 2019, for Student's special education services.

21. The IEP team determined that a functional behavior assessment was warranted to which Parent agreed. The IEP team continued Student in the Martin Luther



King CEC program 67 percent of the time outside of general education for math, English, history, science, and life skills, and 33 percent of the time in the general education setting. No evidence was presented as to why Student's general education participation increased. Parent consented to the IEP.

#### Functional Behavioral Assessment

22. A functional behavior assessment is a formal assessment conducted by a behaviorist. The behaviorist collects data during multiple observations at different times concerning maladaptive behaviors. The purpose of the assessment is to determine what events or circumstances trigger maladaptive behaviors and determine the true purpose behind each behavior. A plan is then developed to decrease the frequency of the targeted behavior, determine one or more appropriate replacement behaviors, and develop reinforcement strategies to encourage replacements behaviors.

23. Andrea Jason, board certified behavioral analyst and school psychologist, and former general education teacher with 25 years of experience in education, conducted the functional behavior assessment during September and October 2018. The assessment focused on Student's elopement issues. Ms. Jason collected data by reviewing the file, interviewing staff, and observing Student on multiple occasions. Ms. Jason determined that that the primary function of Student's elopement was to escape school work. With this information, Ms. Jason developed functionally equivalent replacement behaviors for pro-social ways to leave the classroom, such as using passes, limiting break times, and offering designated places to go while out of class. She also developed opportunities for Student to choose what she was learning while in class and how she learns it. Ms. Jason also recommended increasing the magnitude and frequency of positive reinforcement by staff. Ms. Jason was a knowledgeable witness.

24. While Ms. Jason was conducting her functional behavior assessment, Student demonstrated escalating behaviors. On October 9, 2018, Student left campus by

evading a counselor and getting on a bus. She was later found by the counselor at a nearby park. On October 16, 2018, Student squirted flammable hand sanitizer on another student's body and clothes and held a lit lighter up to his face, which required three Seneca staff and the principal to deescalate the situation. On October 24, 2018, Student evaded staff and left campus in a car with an unknown male. Berkeley called police; Student returned 30 minutes later.

#### The October 25, 2018 Amendment IEP

25. Student's IEP team met on October 25, 2018, for an amendment IEP. In attendance were: Student; Parent (by phone); Dr. Jan Hamilton, the executive director of special education; Janet Levenson, principal; Ms. McPhee, Seneca director; Louise Paige, general education teacher; Mr. Rice; Ms. Jason; Megan Flom, school psychologist; and Ms. Royal.

26. Ms. Jason reviewed the results of her functional behavior assessment and presented a new proposed behavioral intervention plan for Student. The IEP team agreed to implement the new recommended behavior strategies, collect data over the next 15 to 20 days, and reconvene to talk about how the plan was working.

27. In the ensuing month, Student's behavior ameliorated for a few days then regressed back to typical behaviors such as: using profanity, insulting teachers, disrupting classrooms, cursing the principal, and pushing the vice principal. School personnel continued to have concerns with Student's lack of success and safety issues.

#### The November 29, 2018 Amendment IEP

28. On November 29, 2018, an amendment IEP team meeting convened. In attendance were Parent (by phone); Ms. Levenson; Mr. Rice; Ms. Jason, Ms. McPhee; Liam Early, school psychologist; Ms. Royal; and Carrie Sundstrom, Catalyst representative. The IEP document stated that it was an amendment IEP to the

September 20, 2018, IEP. The September 20, 2018, IEP, however, continued to utilize the unchanged March 15, 2018, goals, and did not update the expiration date of the special education services from March 15, 2019.

29. The team reviewed the behavior intervention plan strategies and discussed Student's engagement. Student had initial success to the new behavioral supports for a few days. Soon after, Student regressed and continued to engage in maladaptive behavior. Berkeley team members believed that the counseling enriched class at Martin Luther King could no longer support Student's intense learning, social-emotional, and behavioral needs, and required a higher level of support to access her education.

30. The IEP team discussed placement options. Berkeley team members determined that the counseling enriched classroom at Martin Luther King was unsuccessful in meeting Student's educational needs. The IEP team, with the exception of Parent, recommended a small structured school environment with high levels of supervision. Berkeley offered as an amendment to Student's placement, a non-public school, Catalyst Academy, with embedded behavior supports and counseling, along with curb to curb transportation. Student would spend 100 percent of her time outside of a general education setting. Other than placement and the percentage of time out of general education, no changes were made to Student's November 29, 2018, amendment IEP. The present levels of performance were not updated despite Student's continued academic and behavioral decline. No changes were made to Student's goals, services, or accommodations. Parent did not consent to the IEP.

## LEGAL CONCLUSIONS

### INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA<sup>2</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>3</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 that emphasizes special education and related services designed to meet their unique needs and prepare them for 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 individualized education program. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "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 California, related services are also called

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<sup>2</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

<sup>3</sup> All subsequent references to the Code of Federal Regulations are to the 2006 edition.

designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's 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. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as "educational benefit," "some educational benefit" or "meaningful educational benefit," all of these phrases mean the *Rowley* standard, which should be applied to determine whether an

individual child was provided a FAPE. (*Id.* at p. 951, fn. 10.)

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.) 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) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) By this standard, Berkeley had the burden of proof for the sole issue decided.

#### NOVEMBER 29, 2018 IEP

6. Berkeley contends the November 29, 2018 IEP, offers Student a FAPE in the least restrictive environment such that Berkeley should be allowed to implement the IEP without Parent's consent. The November 29, 2018, IEP was not a stand-alone IEP. The November 29, 2018, IEP amended the placement offer contained in the September 20, 2018, IEP, and simply incorporated the goals that were unchanged from the March

15, 2018, IEP. Despite determining that Student's needs increased, it did not update Student's present levels of performance and the goals in November 2018. Further, the time period of the IEP mirrors the March date in that all components of the IEP were offered through March 15, 2019.

#### General Requirements for Individualized Education Programs

7. There are two parts to the legal analysis of a school district's compliance with the IDEA. First, the tribunal must determine whether the district has complied with the procedures set forth in the IDEA. (*Rowley, supra*, 458 U.S. at pp. 206-207.) Second, the tribunal must decide whether the IEP developed through those procedures was designed to meet the child's unique needs and was reasonably calculated to enable the child to receive educational benefit. (*Ibid.*) Whether a school district offered a FAPE is determined by looking to what was reasonable at the time, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1041.)

8. As is discussed more fully below, Berkeley failed to meet its burden that the November 29, 2018, IEP, which both incorporated and revised components of the March 15, 2018, IEP, and the September 20, 2018, IEP, substantively offered Student a FAPE. Accordingly, the procedural compliance is not discussed herein.

9. The IEP is the "centerpiece of the [IDEA's] education delivery system for disabled children" and consists of a detailed written statement that must be developed, reviewed, and revised for each child with a disability. (*Honig v. Doe* (1988) 484 U.S. 305, 311 [108 S.Ct. 592, 98 L.Ed.2d 686]; 20 U.S.C. §§ 1401 (14), 1414 (d)(1)(A); Ed. Code, §§ 56032, 56345.) It is the "modus operandi" of the IDEA, "a comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs." (*School Comm. of Town of Burlington, Mass. v. Department of Educ.* (1985) 471 U.S. 359, 368 [105 S.Ct. 1996].)

10. An IEP includes a statement of the present performance of the student, a statement of measurable annual goals designed to meet the student's needs that result from the disability, a description of the manner in which progress of the student towards meeting the annual goals will be measured, the specific services to be provided with the projected initiation date and anticipated duration, the extent to which the student can participate in regular educational programs, and the procedures for determining whether the instructional objectives are achieved. (20 U.S.C. § 1414 (d)(1)(A)(i), (ii); 34 C.F.R. § 300.320(a)(2), (3); Ed. Code § 56345, subds. (a)(2), (3).) Annual goals must meet "the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum" and "[meet] each of the child's other educational needs that result from the child's disability." (20 U.S.C. § 1414(d)(1)(A)(ii); Ed. Code, § 56345, subd. (a)(2).)

11. The IEP shall also include a statement of the program modifications or supports for school personnel that will be provided to the student to allow the student to advance appropriately toward attaining the annual goals, to be involved and make progress in the general education curriculum, and to participate in extracurricular activities and other nonacademic activities. (34 C.F.R. § 300.320(a)(4)(i), (ii); Ed. Code, § 56345, subds. (a)(4)(A), (B).)

12. In developing an IEP, the IEP team must consider the strengths of the child, the concerns of the parents for enhancing the child's education, the results of the most recent evaluations of the child, and the academic, developmental, and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. § 300.324 (a).)

13. Here, Student's present levels of performance were accurately identified in and included in her IEP dated March 15, 2018. From March through November 2018, Student's maladaptive behaviors increased. Despite Student's needs increasing, her existing goals from March 2018 were not revised in November 2018, and no new goals



were proposed. Moreover, the majority of the goals were not measurable when drafted. The lack of measurability was not addressed and her goals were not revised to become measurable in the November 29, 2018, IEP. The forgoing constitutes substantive flaws in the November 29, 2018, IEP. As the goals on which the placement determination is predicated were flawed, Berkeley failed to meet its burden that the IEP offered Student a FAPE. Accordingly, the appropriateness of the other components of the IEP, such as placement, are not reached in this Decision.

14. Additionally, Berkeley requested a prospective remedy of implementing the November 29, 2018, IEP, without parental consent. By the time this Decision is issued, the goals and related services offered in the November 2018 IEP amendment were set to expire on March 15, 2019, before this decision is issued. Berkeley presented no legal authority authorizing implementation of an IEP without parental consent after the IEP expired by its own terms. Accordingly, even had Berkeley established its IEP offered Student a FAPE, it presented no legal authority entitling it to its requested remedy.

## ORDER

1. Berkeley's November 29, 2018 IEP, is not deemed to offer Student a free and appropriate education. It may not be implemented without parental consent.

## 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. Parent prevailed on the single issue heard and decided.

## 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: March 25, 2019

\_\_\_\_\_/s/\_\_\_\_\_

CYNTHIA FRITZ

Administrative Law Judge

Office of Administrative Hearings