

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of:

OAKLAND UNIFIED SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT,

OAH Case No. 2017030950

PARENT ON BEHALF OF STUDENT,

v.

OAKLAND UNIFIED SCHOOL DISTRICT.

OAH Case No. 2017050146

EXPEDITED DECISION

On March 16, 2017, Oakland Unified School District filed with the Office of Administrative Hearings a request for due process hearing naming Parent on behalf of Student, in OAH Case Number 2017030950. On April 28, 2017, Student filed a request for due process hearing naming Oakland and Aspire Public Carter Schools, in OAH Case Number 2017050146.¹ On May 26, 2017, OAH granted Oakland's motion to consolidate the two matters.

¹ On June 7, 2017, OAH granted Student's request to dismiss Aspire.

On June 19, 2017, Oakland filed a motion to amend along with a first amended complaint which included an expedited issue. On June 23, 2017, OAH granted Oakland's motion to amend and calendared this expedited hearing within 20 school days of the filing of the expedited complaint.

Administrative Law Judge Theresa Ravandi heard the expedited portion of this matter in Oakland, California, on July 18, 19, 20, 25, 26, 27, and August 8, and 9, 2017.

David Mishook, Attorney at Law, represented Oakland.² Geri Baskind, Oakland's Director of Legal Support Services for Special Education, attended most of the hearing days, and Oakland's staff counsel, Andrea Epps, attended the remaining days.

Nicole Hodge Amey, Attorney at Law, represented Parent and Student with the assistance of paralegal Marie Fajardo.³ Mother attended the hearing with the exception of July 25 and 26, 2017. Student did not attend.

On August 9, 2017, the evidentiary record was closed and the matter submitted. At their request, the ALJ allowed counsel to file written closing arguments. These were due by August 15, 2017, and timely received.

ISSUES

1. Is maintaining Student's educational placement at Sequoia Elementary School substantially likely to result in injury to Student or others such that Oakland may remove Student to an appropriate interim alternative educational setting for not more than 45 school days pursuant to title 34 of the Code of Federal Regulations, section 300.532(b)(2)(ii)?

² Law Clerk Elizabeth Schwartz observed.

³ Assistant Shanelle Snipes observed.

2. Is Oakland's proposed intensive counseling enriched special day class, at either Sequoia or Prescott Elementary School, an appropriate interim alternative educational setting for Student?

SUMMARY OF DECISION

This Decision finds that maintaining Student's current general education placement would result in a substantial risk of injury to Student and others because of her increasingly dangerous behaviors. The genesis, maintenance, and escalation of Student's behavioral challenges are complicated and need not be determined herein. Oakland failed to implement Student's operative positive behavioral intervention plan from her prior placement and instead implemented a behavior plan to which Parent had not consented. Even so, this Decision finds that even if Oakland were to implement Student's current individualized education program in its entirety, including her operative behavior plan, remaining in her educational placement creates a current and substantial risk of injury. Student's psychological and behavioral profile, her dangerous behaviors, the physical environment of her current placement, and the lack of a dedicated de-escalation space and campus-wide behavior intervention program all contributed to this risk. As such, Student requires immediate placement in an appropriate interim alternative educational setting.

However, Oakland did not prove that either of its proposed counseling enriched special day classes would address the safety concerns necessitating Student's removal. Student proposed the non-public school at Edgewood as an alternative placement, but did not provide any evidence as to the location or physical layout of the campus, how this placement would address the immediate safety risks posed by Student's behaviors, or whether this placement had accepted Student.

Student's interim alternative educational setting must address the safety risks driving her removal. As such, it shall include, among other components, a campus-wide,

integrated behavior intervention system and a dedicated de-escalation space. Oakland shall be responsible for transportation. Oakland is ordered to identify and disclose to Student an appropriate interim alternative educational setting, consistent with the findings and conclusions herein, within three business days. Therefore, OAH shall maintain jurisdiction, re-open the record, and re-convene the expedited hearing within two weeks for the limited purpose of determining whether Oakland's newly proposed interim setting is appropriate in light of this Decision.

FACTUAL FINDINGS

JURISDICTION AND ELIGIBILITY FOR SPECIAL EDUCATION

1. Student is an intelligent, energetic, eight and a half year old girl, who resided with Parent within the jurisdictional boundaries of Oakland during the relevant time frame. During the 2014-2015 school year, Student attended kindergarten at Aspire College Academy, a charter school and member of the El Dorado County Charter Special Education Local Plan Agency. Parent referred Student for a special educational assessment at the start of her kindergarten year in August 2014 because of concerns with Student's diagnosis of attention deficit hyperactivity disorder and her display of sensory-seeking behaviors that were negatively impacting her peer and adult relationships at school.

2. In December 2014, Student became eligible for special education under the category of other health impairment because of weaknesses in attention and executive functioning. At that time, Student had sensory processing difficulties in many areas causing her to seek out whole body movement and tactile experiences. These processing deficits contributed to her behavioral challenges and lack of class participation. During the 2015-2016 school year, she completed first grade at Aspire. Student transferred to Oakland Unified School District during the summer of 2016.

3. Parent transferred Student to Oakland to provide her a more rigorous academic curriculum. During the 2016-2017 school year, Student attended second grade in a general education class at Sequoia Elementary School, an Oakland school. Through the time of hearing, Student had only attended school in a general education setting. The school year concluded prior to the start of this hearing. At the time of hearing, Student remained eligible for special education under the category of other health impairment.

OPERATIVE ASPIRE IEP AT START OF 2016-2017 SCHOOL YEAR

4. From the start of her educational career, Student exhibited behavioral challenges at school, including running out of the classroom and refusing to return, and kicking and pushing staff. Aspire convened Student's annual IEP team meeting on October 21, 2015, and completed the IEP over the course of four meetings from October through December 2015. Parent consented to this IEP on December 14, 2015. Oakland did not convene an IEP team meeting for Student prior to the start of the 2016-2017 school year. The December 2015 IEP from Aspire was the last agreed upon and implemented IEP at the time she entered Oakland. This IEP is summarized below.

5. Student's December 2015 IEP included three reading goals; a language arts writing goal; a visual-motor skills goal in handwriting; a vocational goal of remaining with her class; and a social-emotional goal of using appropriate coping skills to return to task. To support these goals, Student was offered individual occupational therapy, consisting of two 30-minute sessions per week, one session for Zones of Regulation work and one for handwriting.⁴ One week per month the sessions would be a push-in delivery model, meaning the therapist worked with Student in the classroom.

⁴ Zones of Regulation is a curriculum for developing self-awareness of feelings and appropriate coping strategies, such as taking a break.

Her IEP also called for 20 minutes per month of occupational therapy consultation services to the teachers. This IEP offered individual, specialized academic instruction of four 30-minute sessions per week, to work on academic goals. Two weekly sessions were to be delivered in the class and two were pull-out sessions to occur in a separate classroom. The final service was behavior intervention services, which required two 90-minute sessions of direct services per week, with 60 of these minutes on a pull-out basis, and an additional 30 weekly minutes of consultation by a non-public agency board certified behavior analyst. The IEP also provided Student a one-to-one paraprofessional throughout the school day.

6. Student's December 2015 IEP included numerous accommodations, modifications, and supports. In summary, she was to receive supports in the areas of sensory and behavior; academics, especially writing; and a home communication system. These supports included: movement and sensory breaks, as needed, with access to a designated break corner; sensory tools to provide proprioceptive, vestibular, and tactile input within all areas of the school environment; a personalized visual schedule, incentive chart, break system and self-regulation visual based on Student's need; no restriction to recess and physical education; reduced math and writing assignments and use of visual indicators like Handwriting Without Tears paper as needed; sentence starters; begin writing tasks with hand warm-up and deep pressure input; 10-15 minutes daily participation in hand and arm strengthening activities; personalized incentives for work completion; modified homework; and school to home communication through a daily written report card and provision of weekly session notes from the resource teacher and occupational therapist.

7. The December 2015 IEP called for Student to be placed in a general education classroom for 86 percent of the time. Student was to receive related services

in a separate classroom for 14 percent of the school day. This IEP remained operative until September 12, 2016, when Parent consented to Oakland's 30-day transition IEP.

OPERATIVE BEHAVIOR INTERVENTION PLAN FOR THE 2016-2017 SCHOOL YEAR

8. Student's December 2015 IEP indicated that a behavior intervention plan was attached. Neither party introduced into evidence a copy of this plan. Nevertheless, the evidence showed that Michelle Modrich, a board certified behavior analyst from the non-public agency STE Consultants, prepared a March 5, 2015 positive behavior intervention plan for Student. Parent consented to this behavior plan on April 15, 2015, by way of an IEP amendment page.⁵ Parent did not consent to any other behavior plan.⁶

9. The STE Consultants' behavior plan identified Student's target behaviors as elopement and task refusal. In summary, the antecedent strategies were to be implemented throughout the day and called for staff to try to prevent Student from eloping by: (1) providing a visual schedule of daily activities with preferred rewards as reinforcers and choices of academic tasks; (2) identifying highly preferred items prior to task; (3) varying high demand/low demand and high preference/low preference activities; and (4) reinforcing independent requests such as for a break or for help. To prevent task refusal, staff were to: (1) provide warnings of transitions with use of a timer if necessary; (2) make behavioral expectations clear and review them often with visual supports; and (3) allow a choice of which activity to complete first if possible.

⁵ Three different versions of an STE Positive Behavior Intervention Plan dated March 5, 2015, were introduced into evidence. The plan to which Parent consented is found in Oakland's Evidence Binder at Tab 9.

⁶ No findings are made as to whether this plan or any other behavior plan was appropriate in light of Student's needs.

10. The behavior plan instructed staff to provide functional communication training and engagement in coping and problem-solving strategies; to teach Student the replacement behaviors of using her words to request a break or attention, and to provide immediate and consistent reinforcement for such efforts; and to conduct frequent preference assessments to ensure effective reinforcement items and activities.

11. In general, the behavior plan's consequence-based strategies for both target behaviors consisted of: (1) wait three seconds absence of challenging behavior and remind Student what she is working for; (2) use first/then language; (3) implement three-step guided compliance: re-state instruction and provide model prompt; wait three seconds for compliance; if no response, restate instruction with physical prompt (hand-holding). An earlier version of the plan included the strategy of blocking doors but STE Consultants removed this upon Parent request, based on her concern that Student would become physically reactive to this technique. The behavior plan included detailed instructions for implementing a differential reinforcement token system with a visual chart, token board, rule chart, and timer. Student would receive a token for each direction followed and for every five tokens she would earn five minutes with her preferred item or activity. Student would also earn tokens for every two minutes she remained with the class. As she progressed, she would incrementally earn up to 10 minutes of access to a reward but would need to earn the corresponding number of tokens first. Aspire had a crisis plan for Student that included, despite Parent's opposition, calling the police as a safety measure if she was a risk to herself or others.

12. At an amendment IEP team meeting on June 10, 2015, Ms. Modrich presented an amended behavior plan (also dated March 5, 2015), which added two target behaviors - aggression and tantrums; included additional replacement behaviors; removed physical prompting for task refusal; and added different consequence strategies including blocking access to preferred items during a behavior. At that time,

Student had significantly regressed in her behavior goals since spring break, and was out of class up to 60 percent of the day. Ms. Modrich informed the team that guided compliance had not been effective. Even with the behavior plan in place, Aspire struggled to de-escalate Student. On June 12, 2015, Parent refused to consent to the proposed amendments to the behavior plan. She acknowledged on the IEP amendment signature page that the current plan was not successful, but she did not agree to the changes proposed by the board certified behavior analyst.

13. At a March 17, 2016 IEP amendment team meeting, Ms. Modrich presented an updated behavior plan. This plan was not introduced into evidence. However, the March 17, 2016 IEP team notes capture the amendments. Student was no longer leaving the classroom but was leaving her work area. As such, the updated behavior plan distinguished between out-of-class and in-class elopement, and included the strategies of reminding of reward, and offering additional break time with use of timer, if not ready to return to work. It also modified the token system to reinforce work duration, rather than instances of compliance. Student would earn a token for every four minutes of work, and a reward for 20 minutes of work. The March 5, 2015 STE Consultants Positive Behavior Intervention Plan, attached to the April 9, 2015 IEP Amendment page, consented to on April 15, 2015, modified on March 17, 2016, and consented to on March 22, 2016, was the last agreed upon and implemented behavior plan at the time Student transferred to Oakland. This remained Student's operative behavior plan at the start of the 2016-2017 school year.

STUDENT'S PROGRESS AT ASPIRE

14. Based on her June 2016 goal progress reports, Student was participating in class and making progress on her academic goals. Her engagement and patience with creative writing had improved significantly. However, Student remained frustrated with the task of handwriting and often refused to participate, though her legibility had

improved. She was remaining with her class more often, but made minimal progress in stating her feelings and needs and using coping strategies. In the context of extended school year programming, Student's IEP team discussed how environmental changes such as new staff, a new classroom, and new routines would create challenges for Student. Student struggled with transitions of all kinds. This same challenge awaited Student at her new second grade classroom at Sequoia for the 2016-2017 school year.

15. Student's responses to the same behavioral strategies varied.⁷ At hearing, Student's expert Dr. Shawn Frugé and Oakland witnesses all agreed that Student had mental health needs such that her behaviors were unlikely to respond to a behavior plan alone.⁸ Further, Dr. Frugé agreed with Oakland witnesses that many factors, including circumstances at home, impacted her behavior. As an additional complication, Student had missed a significant amount of academic time at Aspire due to her behavioral challenges. As the curriculum became more advanced, the more she fell behind, resulting in frustration and anxiety. This remained a concern of Parent and one identified by Student's independent assessor Kristin Gross during Student's first grade year, as reflected in the October 21, 2015 IEP team meeting notes.

⁷ Whether this resulted from Oakland's inconsistent use of reinforcement strategies need not be determined.

⁸ Dr. Frugé is a licensed psychologist and the founder and clinical director of Frugé Psychological Associates Inc., established December 2003. He received his doctorate of psychology in 2000 with an emphasis in multi-cultural assessments. Since receiving his license in 2002, he has conducted over 1,000 psychological evaluations of children. At hearing he was recognized as an expert in the psychological and behavioral condition of children.

STUDENT'S TRANSITION TO SECOND GRADE

16. At the start of the 2016-2017 school year, Student entered Melissa Catalano's second grade class at Sequoia.⁹ From the first day, Ms. Catalano noted Student's work avoidance. This behavior was particularly notable given that the first few weeks focused on getting acquainted and fun activities, with low academic demands. If Student remained in class for an hour, it was a good day. Student would come into class, put her backpack down, and, when presented with a task, she would refuse and ultimately leave the classroom. When Student was present for instruction, Ms. Catalano provided various academic accommodations such as: reduced work; working at her own pace; use of manipulatives and a personal dictionary; dictation in lieu of writing; and preferred seating. She offered sentence starters when appropriate to the writing task. Student was not provided with daily hand exercises or hand pressure massage prior to writing tasks.

17. Parent discussed Student's Aspire IEP and behavior plan with Oakland staff the week before school started. She sent several follow-up emails informing staff of Student's needs, what strategies had served her best at Aspire, and reminding them of her understanding of what Student's operative IEP required. After a day of confusion about the availability of a paraprofessional, Oakland assigned a resource specialist aide to serve as Student's one-to-one aide beginning August 23, 2016, the second day of school. By the second week of school, Oakland provided Student with the support of a

⁹ Ms. Catalano has taught second grade for a total of 12 years, specifically at Sequoia since January of 2011. She received a master's degree in education in 1996 in curriculum and teacher education, and holds a multiple subjects credential. For the past two years she has served as the co-leader of Sequoia's Positive Behavior Intervention Support Team.

full time, trained, one-to-one behavioral aide¹⁰ from the non-public agency Juvo Autism and Behavioral Health Services.¹¹ Michaelynn Woodrow began to deliver twice weekly occupational therapy services to Student beginning the second week of school.¹² Mason McKinley, resource specialist, and his aide, delivered Student's specialized academic instruction on a push-in model, beginning the third week of school, and incorporated pull-out sessions by the end of September 2016, to the extent Student was available for and willing to participate in the instruction.¹³

18. Ms. Catalano used a class-wide visual schedule of the daily events. At the beginning of the school year, Student's aides used an individual visual schedule for Student, showing her the daily activities and which preferred reward she was working towards. Over time, this visual schedule was not effective for Student and was discontinued.

19. Ms. Woodrow provided a box of sensory tools for Student including fidgets, stress balls, thera-putty and playdough, a weighted medicine ball, bean bags,

¹⁰ Juvo interchangeably referred to the one-to-one as a behavior technician, therapist, and aide. Aide is used throughout this Decision.

¹¹ Prior to February of 2017, Juvo was known as Ed Support Services. For consistency, this agency is referred to by its current name.

¹² Ms. Woodrow is a registered occupational therapist and has worked in this capacity with Oakland for the past 18 years, serving an average of 30 students per year.

¹³ Mr. McKinley has been a credentialed resource specialist for over 20 years, working at Sequoia for the last 17 years. He has worked for Oakland for over 34 years, including as a special day class teacher. He holds a mild/moderate and moderate/severe teaching credential.

two lap pads one of which was weighted, a wiggle cushion, and elastic bands as a foot support on her chair. These tools provided proprioceptive input to help regulate the body and tactile input to Student. Ms. Woodrow used other proprioceptive strategies including chair push-ups, sit-ups, taking a walk, carrying the weighted medicine ball as a transition to therapy services, and carrying books in the class to provide the body feedback and help with regulation. Ms. Woodrow used a scooter board a few times with Student, which she seemed to like. This provided vestibular input, which stimulates the inner ear to help with balance. Yoga poses and hanging from the bars provided Student similar input. Ms. Woodrow established that such activities or tools are part of a sensory strategy developed to meet possible sensory needs. Sensory strategies are Student-driven, meaning Student has to find benefit from them. Student stopped using the medicine ball, complaining it was heavy and throwing it at Ms. Woodrow. Similarly, she was not interested in "chewelry," jewelry she could safely mouth, or the weighted lap pad.

20. Prior to January 2017, Valencia Thomas, Student's first long-term aide, was not consistently keeping Student's sensory box close at hand. Allowing Student access to the sensory tools was a strategy to help prevent Student from eloping from the classroom. Ms. Woodrow spoke with Ms. Catalano and Ms. Thomas three-to-four times about making sure Student's sensory box was accessible to her and within reach. She noted this concern in her service log three times in November 2016. This concern was specific to Ms. Thomas, who stopped working with Student in December 2016.

21. Student's aides provided her frequent breaks in class to help her attend. Student was allowed free access to the library corner in the classroom, where she could access 10 large plush pillows, lie down, hide under the pillows, crawl, read books, or play. Classmates viewed the library as Student's personal space as she spent long periods of time there when she was in class. Ms. Woodrow established that a sensory

break schedule, just like the sensory strategies, is Student-driven. Student would seek out what she needed whether movement or tactile, when she needed it. Ms. Woodrow opined that a fixed schedule was not effective as a student's needs varied day to day. Student would request a break or effectively demonstrate her need for one. In general, Student was on break for every five minutes of being on task. Student was able to participate in preferred activities for at least 30 minutes without a break.

22. Student frequently engaged in animal walks, described as walking on her hands and feet like a bear or at times crawling like a wolf or cat. Dr. Frugé and Ms. Woodrow established that animal walks are often taught as a behavioral strategy to engage gross body movement and prepare the mind for work. Student had engaged in this behavior from a young age. According to Parent, Student's private occupational therapist encouraged this activity.¹⁴ Student typically used animal walks when escalated and as part of an elopement. Ms. Woodrow and other Oakland witnesses did not consider this to be a sensory-seeking behavior, as it did not serve to regulate her; she only engaged in it when escalated; and she liked to pretend that she was an animal. Their testimony was not as persuasive as that of Dr. Frugé who explained that Student eloped to escape an anxiety-producing stimulus. Her manner of elopement, use of animal walks, engaged her sensory input to bind the anxiety and this made her feel good, resulting in a repetitive behavior. His testimony made sense and was consistent with past reports of Student's sensory needs. That this behavioral strategy was not functional in terms of helping her to return to task, but rather used as a means to escape, did not render it any less sensory.

¹⁴ Student received occupational therapy services from Children's Hospital and Research Center in Oakland during the spring of 2015.

23. Ms. Woodrow did not teach Student coping skills, as she saw this to be the role of the behaviorists. However, she did try to work with Student on the Zones of Regulation and identifying her feelings and what her body was telling her. She was not successful, as Student was not willing or able to cooperate. Often, Student would refuse to come in from the playground, where she had been eloping, to attend her occupational therapy sessions. Ms. Woodrow worked with her at times on the playground and in class. She was most successful with having Student participate in preferred fine motor activities such as connecting the dot worksheets and puzzles. Student had good hand strength and did not require deep pressure exercises prior to writing. Her handwriting had progressed. Student did not require special writing paper and did not want to use, nor did she require, a pencil grip.

24. Monica Piedrahita, a board certified behavior analyst and the clinical director of Juvo, was assigned to Student's case beginning September 2016.¹⁵ Her predecessor observed Student at Aspire and drafted a new behavior plan, dated August 30, 2017. Oakland contracted with Juvo to create, implement, and revise behavior plans for students when the needs of the student exceeded its own staffing resources. Ms. Piedrahita provided three hours per week of behavior services, overseeing the implementation of Student's behavior plan, supervising her aides, and working directly with Student and her aide. Initially, she also provided an additional 10 hours of services to facilitate Student's transition. At first, Juvo implemented the operative STE Consultants' behavior plan from Aspire, but removed the strategy of physical prompting

¹⁵ Ms. Piedrahita became board certified as a behavior analyst in 2015. Prior to this, she served as a behavior technician for various schools. She has a master's in education with a focus on elementary education, and is licensed by the state of Massachusetts in the area of applied behavior analysis.

at Parent's request. Following Student's September 2016 30-day IEP team meeting at Sequoia, Juvo implemented its own plan. Parent never consented to Juvo's proposed behavior plan.

JUVO'S AUGUST 30, 2016 BEHAVIOR PLAN

25. The details of Juvo's behavior plan, which was implemented without Parent's consent, provide a context for understanding the amount of time Student was spending outside of her classroom. This is relevant in light of Student's defense that Oakland failed to maintain her educational placement, which required that she participate in the regular class setting and activities for 86 percent of her time.

26. Juvo's August 30, 2016 behavior plan identified three target behaviors displayed by Student: elopement, tantrum, and mouthing which was defined as any instance of placing a non-edible item beyond the plane of her lips. There were several similarities with the March 2015 STE Consultants' positive intervention plan in terms of the antecedent strategies, replacement behaviors, and reinforcement system. For instance, Juvo's plan also required the use of a visual schedule and token board, and prompting and reinforcing functional communication. This plan varied slightly in that it called for the use of a timer to deliver social praise to Student for every 30 seconds that she remained inside the classroom. There was, however, a fundamental difference in the consequence-based strategies.

27. Juvo's plan was based on ignoring Student's behaviors unless they presented a risk of injury. As such, Student was allowed to determine how she would spend her time after eloping from class. The plan specifically prohibited the use of any physical prompting outside of the crisis plan described below. If Student did not comply with the initial directive, or the reminder with a gesture, or with visual reminders of what was expected and what she was trying to earn, staff were to reduce the expectation or offer a different motivator to encourage compliance. In essence, this strategy consisted

of asking for less and rewarding more, in the face of non-compliant behavior. If this failed, the plan directed staff to: ignore the challenging behavior by limiting verbal, visual, and physical attention; follow Student to monitor her safety; and allow her to engage in play while directing others to ignore her. The plan called for these steps to be repeated until successful. Student quickly learned that she could spend much of her day in the garden or on the playground and not have to participate in academic tasks.

28. Juvo drafted and implemented a related crisis management plan, described within its behavior plan, for use when Student's safety was in danger. The crisis plan directed staff to escort Student back onto school grounds, block doors and windows, and remove small items from her hand or mouth. If these measures could not be safely implemented, the plan directed staff to call the clinical director unless there was an immediate risk, for which they were to call 911. The testimony of Juvo witnesses established that they implemented the core components of the August 30, 2016 behavior plan and crisis management plan.

OAKLAND'S SEPTEMBER 2016 30-DAY IEP AND IMPLEMENTATION

29. On September 12, 2016, Oakland convened Student's IEP team to develop a 30-day transition IEP for Student, pending her October 2016 annual IEP. Oakland proposed two new reading goals; a math goal; two new writing composition goals; a separate handwriting goal; and a spelling goal. The team continued Student's vocational goal of remaining in class and her coping skills goal. Although Student pointed to her lack of coping skills as evidence that Oakland failed to implement this goal, the evidence showed that Ms. Woodrow worked with Student, when she was willing, on the Zones of Regulation. Further, Student's Juvo aide, Clara Ackerman, who was assigned to Student from January 2017 through the end of the school year, worked with Student on

functional communication.¹⁶ Student was verbal but needed to be encouraged to use her words to express her needs. Ms. Ackerman would prime Student, or coach her to ask for breaks or request preferred items. She would model this and reinforce Student's use of verbal requests.¹⁷ Juvo aides were trained in teaching these replacement behaviors. Juvo required that all of its aides have prior experience working with children, and all aides received 80 hours of training upon hire, including 40 hours of applied behavior analysis training. The aides worked directly with a board certified behavior analyst, Ms. Piedrahita, and received weekly support and supervision.

30. Oakland continued to offer placement in a general education setting for 86 percent of the time, with academic, behavioral, and occupational services delivered outside the classroom for the remaining percentage of time. Student's specialized academic instruction had the same duration and frequency of 30 minutes, four times per week, but Oakland's IEP specified this would now be in a group format without reference to pull-out or push-in delivery. Student's occupational therapy was reduced to

¹⁶ Ms. Ackerman has worked as a behavior aide with Juvo for two years. Prior to this, she worked in the United Kingdom as a behavior aide and substitute teacher. She is participating in the registered behavior technician program, a new applied behavior analysis certificate program, consisting of 40 hours on-line instruction, supervision hours, and an examination.

¹⁷ In her closing brief, Student argues that several data log entries show she was not given a break or candy when requested. Without further evidence of the circumstances, her argument that this proves Oakland failed to reinforce functional communication is not persuasive. Regardless, specific findings of implementation failures are not required to adjudicate the expedited issues in light of the unique facts of this case.

one weekly session of 45 minutes, but her behavior services remained the same. One change to the accommodations was the insertion of the qualifier "as needed," with regard to the use of tools to support writing and the provision of Handwriting Without Tears paper.

31. Parent signed consent to the September 12, 2016 IEP the day of the meeting. Her usual practice was to sign Student's IEP's, with or without consent or exception, after a further review and at a later date. Parent's testimony that Mr. McKinley changed Student's specialized academic instruction services from individual to group, and her writing accommodations to "as needed," after she signed consent, was not persuasive. Parent likely did not notice these subtle changes proposed by Oakland at the time of signing and assumed all wording would remain as delineated by Aspire.

32. Ms. Piedrahita testified that she presented Juvo's August 30, 2016 behavior plan at the September 12, 2016 IEP team meeting, and that Parent consented to this plan. However, her testimony was refuted by the meeting notes and Parent's testimony. The September 2016 IEP meeting notes state that the positive behavior support plan will be updated, a crisis plan will be added to it, and the plan will be presented at the annual IEP in October 2016. These notes corroborated Parent's testimony that Ms. Piedrahita did not present the August 30, 2016 behavior plan. Parent did not consent to implementation of Juvo's behavior plan.

33. The September 2016 IEP includes a behavior intervention plan dated November 6, 2014. This was Student's kindergarten behavior plan. At the time Parent signed the IEP, she was not aware that this document was attached. The signature page of the behavior plan itself is unsigned. While Sequoia Principal Donald Bertola testified that he followed this attached, outdated plan, he also testified that he recognized and

followed the crisis management plan from Juvo's August 2016 behavior plan.¹⁸ In light of the staleness of this plan and the multiple updated plans, there was no intent on the part of the IEP team that this plan be implemented. Further, Juvo staff established that they did not implement this plan. The number of behavior plans and revisions created confusion, and there was the potential that different staff followed different plans. Equally concerning was the fact that Student's class teacher, her special education resource teacher, her principal, and her occupational therapist all testified that it was not their job to implement Student's behavior plan, but rather the sole job of the one-to-one aide. As of the time of hearing, the STE Consultants' behavior plan from Aspire remained in effect.

STUDENT'S DANGEROUS BEHAVIORS DURING THE 2016-2017 SCHOOL YEAR

Danger to Self

34. From the start of the school year, Student engaged in behaviors that presented a substantial risk of injury to herself and to others. Student's self-injurious behaviors fell into three categories: elopement, climbing, and mouthing. She frequently removed her shoes and socks which contributed to a risk of injury during her elopements. To appreciate the risk presented, it is important to understand the physical environment of the Sequoia campus which afforded Student many opportunities to place herself in danger.

¹⁸ Mr. Bertola has served as an administrator for seven years, and as the principal at Sequoia for the past two years. He was a teacher for 12 years. Mr. Bertola has a master's in education in school leadership and holds a teaching and administrative credential.

Physical Layout of the Sequoia Campus

35. Sequoia was built in the mid-1920's, and is situated on rolling, hilly ground. It has steep staircases located inside and outside the school building. The school is located on a busy, two-way street with cars traveling at times between 30-40 miles per hour. There is a set of steep stairs that leads from the sidewalk adjacent this busy street to the front door of the school. Student's second grade classroom was located on the first floor of the building. All third grade classes are located on the second floor. On the campus, there are two sets of outside stairs with a top and bottom double railing located on each side of the stairs. These stairs accommodate for the uneven ground on which the campus is situated. The railings rise approximately three to four feet above the ground with a steep drop-off on the other side. One such railing is outside the cafeteria and drops down to the garden, four to seven feet below. Another is on the other side of the cafeteria, and there is a steep drop-off to the playground below. There are also at least two, tall, chain link perimeter fences on the playground. One is located in the back of campus near the portables, which serve the intensive counseling enriched special day class students. That fence is from 10 to 12 feet tall. Another fence sits atop an eight-foot high retaining wall, adjacent to one of the external stairway railings, and next to the playground bordering the sidewalk. The fence rises another 10 feet above the retaining wall.

36. The physical layout of this campus creates a substantial risk of injury to Student given her climbing and elopement behaviors. Student ran out the front door of the school three times. In December 2016, she started down the stairs but went no further. On May 9, 2017, a police report notes that she was running in and out of the main entrance towards the stairs on her hands and feet. On May 31, 2017, she ran out the front door, headed down the stairs, and made it to the sidewalk before she was physically escorted back to safety. During her on-campus elopements from the

classroom, Student would engage in climbing behaviors. She climbed the outdoor railings adjacent to the steep drop-offs approximately 100 times. At times, she had one foot and both hands on the top railing, and other times she would hang upside down. She climbed the fences five to seven times during the year. She also stood atop the playground climbing structure in an unsafe manner, creating a risk of falling.

Dangers Located Within the School Buildings

37. Within the school itself, Student placed herself at risk by climbing up the stairwell railings that led to the second floor. While she never made it to the top of the flight of stairs, she risked falling four-to-five feet from the railing and then tumbling down the steep steps. In a corner of the hallway just outside Student's classroom, the school stored a four-foot high rolling cart for transporting computers. Student frequently climbed and stood on top of this rolling cart. She also climbed on the rolling breakfast cart and rode it up and down the hallways. Her aide would have to block her from riding the cart down stairs located within the building. Inside Ms. Catalano's classroom, two 10-foot tall bookshelves created a risk of injury. Student climbed these to the top approximately 10-15 times, towards the end of the school year. Her aide would attempt to block her and hold the bookshelves to reduce the risk of them crashing to the ground with Student. At times, her own behavior would scare her, but Student would not accept assistance in coming down to safety.

38. Even within the relative safety of the principal's office, there was a hidden danger posed by his window. This window overlooks a 15-foot to 20-foot drop to dirt and gravel below. The first time Student attempted to climb out his window, Mr. Bertola was able to get there first and prevent her from falling out. Once aware of this danger, he blocked her escapes, though she attempted to climb out his window at least five times. Student would additionally climb and run on top of tables in the classroom where the students had their work stations, and in the cafeteria.

39. Student frequently placed inedible items in her mouth such as pens, paintbrushes, staples, rocks, and sharp thumb tacks or push-pins, which she pulled from the bulletin boards on the walls. Although staff moved all tacks from the lower boards and placed them up high, Student frequently climbed on objects such as book shelves or the computer cart to remove the tacks and place them in her mouth. In April and May 2017, Ms. Ackerman recalled at least 10 times when Student attempted to place tacks in her mouth, and was successful on at least five occasions. While she had the tacks in her mouth, Student would climb, run, animal walk, and snarl like a dog or wolf, all of which created a risk of ingestion. The tack would remain in her mouth from 10 to 60 minutes. Twice, Sequoia called 911 as they could not convince Student to remove the tack. The first 911 call was placed in September 2016. Emergency medical services responded and transported Student to the hospital where it was determined she had not swallowed the tack. During an April 2017 incident of Student placing a tack in her mouth, Oakland staff considered calling a mobile crisis unit to assist. However, they were able to convince Student to remove the tack. In early May 2017, Oakland again called 911 due to a tack mouthing incident. This time the 911 operator sent the Oakland police. Parent arrived shortly after the police. No one was able to convince Student to remove the tack from her mouth, and Parent brought her home.

40. Student's psychological and emotional condition during her behaviors increased the risk presented. Student appeared to not be herself but rather was in a different mindset as described by several witnesses. She would laugh, snarl like an animal, state that she did not care, present as out-of-control and unable to help herself, and refuse assistance. Scared for Student's safety, school psychologist Nina Garrovillo physically removed Student from hanging down from an outside railing.¹⁹ She got down

¹⁹ Ms. Garrovillo just completed her third year as a school psychologist at Sequoia. She received her master's in education, school psychology in 2013, and holds

to eye level with Student and expressed her concerns. Student laughed. When the police arrived during the May 2017 tack incident, Student was laughing as she moved in and out of the front entrance with a tack in her mouth.²⁰ Student's inability to appreciate the seriousness of her risky behaviors created an increased danger.

41. Whether Student was climbing the railings or mouthing tacks as a sensory regulation strategy may be relevant to an issue regarding the provision of a free appropriate public education and whether Oakland was meeting her needs. However, for this expedited hearing, the motivations driving Student's dangerous behaviors are not at issue. She placed herself in danger and seemed to do so to obtain adult attention. This worked as her dangerous behaviors could not be ignored given the physical environment and risks. Student exhibited emotional lability - quickly moving from extreme sadness to anger to excitement. She would quickly re-escalate without any known trigger such that staff needed to make sure they did not put their guard down. Student's response to the same intervention strategies varied.

Danger to Others

42. Student also engaged in behaviors that caused a significant risk of injury to others, namely adults. Student would push, hit, kick, climb on, and bite her aides. Many times she threw school supplies at others. On at least one occasion she used an overhand throw to throw a chair at Ms. Ackerman, narrowly missing her. Student's

an education specialist degree in school psychology, and a pupil personnel services credential.

²⁰ The police report referred to the object as a blue push pin. Most witnesses used the term tack; others used the term push pin. Both refer to a small, sharp object used to affix items to bulletin boards.

aggression intensified towards the end of the year. She hit her aide with greater force and kicked her harder and repeatedly. When biting, Student began to push and clamp down necessitating a grasp release to dislodge her.

DISCUSSION OF ALTERNATIVE PLACEMENT

43. By the time of Student's annual IEP team meeting on October 19, 2016, Juvo had revised Student's behavior plan and their behavioral interventions several times, without significant change in her behaviors. Oakland and Juvo IEP team members expressed confusion as to the function of Student's behaviors. At that time, the main challenge was keeping Student in the classroom and available for learning. She was eloping 80 percent of her school day, on average. Parent continued to inform Oakland that Student's behaviors were sensory in nature and that she required consistency with her sensory schedule, writing accommodations, one-to-one instruction, a curriculum that taught her coping skills, and direct services from the board certified behavior analyst to support regulation. Despite Student's IEP calling for direct service hours by the behavior analyst, the October 2016 IEP team notes reflect that Oakland had not been providing this service and that it believed it "may be counterproductive to trying to keep her in class and it may not generalize to the classroom."

44. By way of email on October 19, 2016, Parent requested that Oakland consider a special day class for Student. Oakland agreed that such a setting would better meet Student's needs. The annual IEP revised some of the goals and added a goal to prepare Student to safely participate in field trips. Student's challenging behaviors presented a safety risk in terms of leaving campus to participate in field trips, so Oakland restricted these when it could not ensure her safety. The October 2016 IEP continued to offer the same placement, services, and accommodations as the September 2016 30-day IEP. Parent did not consent to the October 2016 IEP.

STUDENT'S OUT-OF-CLASS TIME

45. Given the focus of the Juvo behavior plan of ignoring challenging behaviors that did not create a risk of injury, Student spent more and more time out of class and on the playground. When she was not on the playground, Student was spending inordinate amounts of time in the principal's office. She was not in the office as part of a disciplinary process, but rather to de-escalate, or to greet Mr. Bertola and visit, or to access preferred items or snacks as a reward. Although Oakland contracted with Juvo to provide professional behavior services to Student, many times, Juvo staff contacted Mr. Bertola to physically prompt and remove Student from her classroom or hallways when she was demonstrating tantrum behaviors and disrupting the learning environment. Mr. Bertola last attended a behavioral training over ten years ago and did not have training or experience in the field of applied behavior analysis. Ms. Ackerman frequently had to remind him not to reinforce Student's challenging behaviors by way of providing her with attention.

46. Ms. Catalano texted Mr. Bertola approximately 8-10 times to remove Student from her class throughout the school year. Student was in Mr. Bertola's office on a daily basis. From the start of the school year through spring break, the week of April 3, 2017, Student was in his office from two-to-four times each day, for up to two hours total. Following spring break, Student would spend half the school day in his office. The general education placement at Sequoia did not have a de-escalation space so Mr. Bertola's office served this use for Student, as it was closed, quiet, and relatively safe once he learned to block the window. At other times, Student was brought to the resource room to de-escalate or to complete work away from her peers and outside of her scheduled instruction time.

47. After Student was calm, Mr. Bertola would discuss the behavior incident with her and plans for how to cope better next time. He would allow her to access two

different kinds of preferred magnetic putty, snacks, toys, puzzles, games, and stuffed animals that he bought and kept for her in his office as a reward to de-escalate and to return to class. Despite good intentions, this sent Student the message that she could act out in class, escape academic demands, and spend time in the office where she could access sensory tools and also play. Recognizing this, Juvo began to offer time with Mr. Bertola, and his office, as rewards for participating in class activities. This strategy was implemented following spring break.

48. Throughout most of her second grade year, Student was not with her peers learning in her classroom and accessing her many required academic or sensory accommodations; she did not participate in specialized academic instruction or work on her academic goals; and she did not engage in occupational therapy sessions. Her aides prepared and provided Parent with daily report cards as required by the IEP. The IEP did not specify that the classroom teacher was responsible for these daily reports. Ms. Mason and Ms. Woodrow attempted to send home weekly session notes, but they did not consistently provide these, nor did Student consistently attend. While Parent did not approve of the format of the notes which were often emailed to her, there was no requirement that Oakland provide these by way of a particular form.

OAKLAND'S RECOMMENDATION FOR A CHANGE IN PLACEMENT

49. Juvo collected data on the duration and frequency of Student's elopement, tantrum, and mouthing behaviors. During the first two months of school, Student engaged in four instances of mouthing. By the time of her November 2016 goal progress reports, Student's time out of class increased to approximately 90 percent of her school day. Juvo aides also collected "ABC Data." These handwritten logs noted what happened prior to the target behavior or the antecedent; a description of the behavior; and what happened in response to the behavior, or the consequence. Student called Delaina Martinez, a licensed educational psychologist, to testify as to whether Oakland

implemented Student's IEP and the August 2016 Juvo behavior plan. Dr. Martinez formulated her opinions based on a record review, including the ABC data. Her testimony that the ABC data was not properly recorded, and her conclusion that Oakland did not implement Student's IEP and behavior plan because there was nothing to indicate implementation from the ABC data, were of little relevance and given little weight.

50. Oakland conducted a triennial assessment of Student, including a functional behavior assessment, in preparation for her December 2016 IEP team meeting.²¹ At the December 14, 2016 IEP team meeting, Oakland offered Student placement in an intensive counseling enriched special day class setting. Parent did not consent. Oakland offered placement at the Prescott campus because it perceived Student to be overly attached to a young boy in the special day class at Sequoia.

DECREASE IN ELOPEMENT FROM WINTER BREAK TO SPRING BREAK

51. Juvo changed its behavioral approach following the winter recess by removing all academic demands from Student, in an attempt to get her back into class. Staff identified a new reinforcer for Student of Hershey's kisses, a highly motivating reward. Also, Juvo implemented a new environmental arrangement of limiting attention from those surrounding Student by way of a red card/green card system. Student's aide wore a card around her neck and displayed the green side of the card when Student was compliant, indicating the aide was available and signaling that others could engage with Student. Conversely, when Student was noncompliant, the card was switched to red to discourage engagement. In addition, Student experienced a change in aides as Ms. Thomas left. Student began to work with a substitute aide in January 2017, until Ms.

²¹ The appropriateness and conclusions of these assessments are not at issue in this hearing.

Ackerman was assigned near the end of the month. Student's in-class time dramatically increased following winter break. Based on data reports, Student spent more than 80 percent of her school day in her classroom during a two month period spanning February and April 2016. From January through April 17, 2016, Student engaged in eight instances of mouthing.

52. Student spent the majority of her day in the classroom from January to early April 2017. However, she was not participating in her academics. She continued to engage in aggression towards her aide; climbed on furniture; threw objects; and otherwise disrupted the learning environment, which resulted in Mr. Bertola bringing her to his office to de-escalate.

STUDENT'S BEHAVIORS FROM SPRING BREAK THROUGH THE END OF THE SCHOOL YEAR

53. Following spring break, Student's dangerous behaviors of elopement, climbing, and mouthing dramatically increased in terms of frequency, duration, and intensity. Oakland witnesses consistently testified to this escalation. There appeared to be no consistent triggers, and Student's behavior was unpredictable. School and Juvo staff were not sure of the cause for this increased trend and the explosive nature of her behaviors, which occurred quickly and without warning. Past reports from Aspire showed a similar trend of an increase in challenging behaviors following spring break, and Parent confirmed that Student generally had more trouble following the spring recess. During this time, Student shared that she was tired and had been commuting from Stockton where she was staying with a relative.

54. Student contended that Oakland's use of Mr. Bertola's office, first as a de-escalation space and then as a reward, caused the increased behaviors along with the use of the red/green card system. However, the card system was discontinued prior to the spring recess. It is clear that Student engaged with increased frequency in behaviors

that placed her and others at substantial risk of injury during the last couple months of the school year. It is not clear what caused the increase, including whether it was internal to Student or associated with home or school. Student's behaviors were complicated. Whether the function of her behaviors was attention seeking, escape, to meet sensory needs, or a combination thereof, need not be determined in this expedited hearing. Given the unique circumstances of this case, whether Oakland's behavioral approach caused or reinforced Student's behaviors need not be determined. The undisputed evidence was that by the end of the school year, maintaining Student's educational placement, even with perfect adherence to her operative IEP and behavior intervention plan, would result in substantial risk of injury.

The May 31, 2017 Incident

55. An incident the last day of May 2017 illustrates the seriousness of Student's behavior and mindset at that time, and the substantial risk of injury presented. The school year ended the following week on June 9, 2017, but Student did not attend following this incident. Dr. Frugé and multiple Oakland witnesses established that Student had unaddressed mental health needs driving her behaviors. There was no evidence that Student's behaviors had subsided, that her emotional dysregulation had decreased, or that the mental health needs driving her behaviors had been addressed. As such, there remains a current and substantial risk of injury in maintaining her educational placement.

56. On May 31, 2017, two of Student's witnesses, Malaca Jones²² and Yvonne Hodge,²³ were scheduled to observe her in class. Ms. Piedrahita's supervisor, Kristin

²² Ms. Jones obtained a master's degree in social work in 2003. She worked as a social worker and case manager for Oakland during the 2007-2008 and 2008-2009

Ojala, was present as well.²⁴ This was the third time Ms. Ojala had observed Student. Close to 10:30 a.m., Student eloped from her class, climbed on top of the computer cart in the hall, and refused to come down. At that point, Ms. Jones and Ms. Hodge were allowed to observe Student. Student was picking tacks from the board and placing them in her mouth; staff called Mr. Bertola to assist. Student pretended to be a cat, and asked Mr. Bertola for milk. He agreed in exchange for the tack. Student removed the tack from her mouth and handed it to him. The group went to get milk from the cafeteria. Although Student was upset that there was no chocolate milk, she calmed and drank her milk outside by the cafeteria.

57. Ms. Ackerman, Ms. Ojala, and Ms. Hodge walked back into the hall with Student. Without warning, Student darted for the open front door. Ms. Ojala made it down the front steps in advance of Student who proceeded to head down the stairs to the sidewalk. Fearing that Student's life was in danger given the passing cars and the unpredictability of Student's actions, Ms. Hodge grabbed Student's arm and attempted to pull her back up the stairs. At the same time, Ms. Ojala informed Student that

school years. She next worked for Oakland in a counseling enriched classroom at a middle school from March 2012 through June 2013.

²³ Ms. Hodge obtained a master's in education in curriculum and instruction and a resource specialist credential in 1996. She worked as a traveling special education, resource specialist for Oakland from 1995 until she retired in June 2016. She previously taught for four years, from 1971-1975.

²⁴ Ms. Ojala is a senior clinical director with Juvo. She holds a master's in education in child and adolescent development, and has been board certified as a behavior analyst for almost five years.

entering the street was not an option; she blocked Student from the street; physically removed Student's hand from the railing; and used an escort hold to walk Student back up the stairs as she guided her from behind.

58. Once inside the building, Student entered her empty classroom. She climbed on the tables and kicked her classmates' supply boxes to the floor. Ms. Ackerman motioned for her to stop and attempted to block her access to the supply boxes. Ms. Hodge informed Student that she needed to stop and that this type of behavior was why her classmates did not like her. Ms. Hodge took Student's hand and convinced her to come down. Student calmed and was speaking with her aide when Ms. Hodge left. Ms. Jones remained. Student re-escalated, climbed to the top of the bookshelves and threw books around the room. Ms. Catalano entered and addressed Student, attempting to appeal to her about how sad the others will be, and informing her that her behavior had to stop. Student did not appear to be herself and said she did not care. The incident ended with Mr. Bertola bringing Student to his office.

INABILITY TO SAFELY MAINTAIN STUDENT

59. Juvo and Oakland staff were unable to find a strategy that worked to keep Student and others safe by the end of the school year. By then, Student was engaging in increasingly risky behaviors no matter what strategy was implemented. By spring of 2017, Ms. Piedrahita rated Student's behaviors a 9 on a scale of 1 to 10, with 10 being the most extreme. Dr. Frugé was convincing in his testimony that Student eloped to escape in a manner that addressed her need for sensory input, such as when she engaged in animal walks. Even so, the characterization of her elopements as sensory-seeking behavior does not reduce the substantial risk presented by her behaviors. Whether Oakland appropriately met Student's needs is not at issue in this expedited hearing, apart from whether any implementation failure directly caused her dangerous behaviors, such that proper implementation of her IEP and behavior plan, would have

eliminated the risk and any need to remove her to an interim setting. Student did not establish this causal link.

60. It was Oakland and Juvo witnesses' firm belief that Student engaged in dangerous behaviors to get adult attention. Dr. Frugé agreed this could be a secondary function of her behaviors. In her general education setting at Sequoia, staff needed to pay attention to her behaviors to address the safety risk, which at times served to reinforce the challenging behaviors. The size, openness, and physical layout of the Sequoia campus, the fact that doors were left open at times, and that not all furniture was bolted to the wall, all contributed to the risk of injury. Oakland and Juvo staff engaged in a constant battle to keep the environment safe for Student, but had exhausted their strategies to do so within this environment. Dr. Frugé and Ms. Ojala both established that environment, in terms of physical facilities and staffing, and the ability to modify the environment, is critical to the success of any behavioral strategy. Environment can cause behaviors, reinforce and continue behaviors, or contribute to the extinction of behaviors.

61. Dr. Frugé established that Student's behaviors were difficult to address in her current general education placement because this setting created an element of risk, by providing her the opportunity to engage in dangerous behaviors given the limited staffing in terms of personnel, and experience, and the limited facilities. In this environment, her behaviors were reinforced, as they could not be safely ignored. Oakland witnesses shared this same opinion. To the extent Student's behaviors could be ignored, it was impossible to ensure consistency among all staff, many of whom had no behavioral or mental health training. Dr. Frugé's opinion was the same in terms of a typical special day class setting, which, in his experience, did not have dedicated de-escalation rooms, appropriately staffed by trained professionals.

62. Dr. Frugé testified that Student required certain key elements in an educational placement to address her safety and modulate her behaviors. In particular, to reduce the risk of injury, Student required a dedicated de-escalation space given her psychological and developmental profile, which made transitions difficult for her. She also required a setting with an integrated campus-wide behavior modification system. Dr. Frugé's testimony was well-reasoned and convincing. Additionally, it was corroborated by Ms. Piedrahita, who established that reducing Student's behaviors required the implementation of consistent, predictable consequences by all adults in her environment.

63. Dr. Frugé considered the many behavior plans, which were developed for Student, to be so similar in nature that he referred to them as "cut and paste" plans. Overall, he found the plans to be vague, superficial, and disjointed. The quality of the offered behavior plan is not at issue in this hearing. However, Dr. Frugé's testimony showed that maintaining Student's educational placement would create a substantial risk of injury, because implementation of any of the behavior plans would not be sufficient to extinguish her behaviors. There was no evidence that if Student's IEP, including her behavior plan, was implemented in its entirety, that this would reduce the substantial risk of injury at this time. By May 2017, given Student's psychological and behavioral dynamics, in combination with the physical environment of the Sequoia campus, maintaining Student's educational placement would create a present, substantial risk of injury to herself and others.

OAKLAND'S PROPOSED INTERIM ALTERNATIVE EDUCATIONAL SETTINGS

64. Oakland proposed its counseling enriched special day class at either Sequoia or Prescott as an interim alternative educational setting. Both programs share the same core components. They are self-contained classrooms for first through third grade special education students, with a variety of mild-to-moderate disabilities. The

programs utilize the general education core curriculum with supplemental curriculums, and each student is taught at their individual level, with differentiated individual and small group instruction. The students participate in lunch and physical education with general education peers who attend class on the same campus. Based on their individual IEP's, students may be mainstreamed for other classes.

65. The focus of the programs is to serve students with social and emotional needs who also require behavior interventions and supports. Academic, therapeutic, and behavioral supports are embedded throughout the programs with tiered rewards and clearly defined expectations. The programs teach students social and emotional coping skills. There is a high adult-to-student ratio, with a teacher and two behavior aides for a class of generally no more than 12 students, to maintain the designed staffing ratio. A qualified special education teacher with a mild-to-moderate credential, or a qualified individual who is enrolled in a credentialing program, teaches the class. Each program was in the process of hiring a teacher to serve in this capacity. If a teacher is not hired prior to the start of the school year, Oakland has the option of re-assigning a current teacher, bringing in a retired teacher, or using 30-day substitutes until a new teacher is on board. Oakland contracts with a non-public agency, East Bay Agency for Children, to fully staff these programs. Each of the counseling enriched programs has a classroom aide from Oakland, along with the following non-public agency staff: a support aide; a full-time therapist located on campus and available throughout the day; a clinical supervisor; and a psychiatrist. Many of the non-public agency staff are trained in crisis prevention intervention, which authorizes them to safely support the students with physical restraint as needed.

66. In terms of physical facilities, each special day class has a separate room for class instruction and another room for de-escalation and therapy sessions. The programs provide daily individual and group therapy sessions. The Sequoia program is

located on the same campus as Student's general education classroom. Student frequently eloped to the portables that house the special day class program and enjoyed interacting with the students outside. The proposed intensive counseling programs clearly offered far more therapeutic and behavioral supports than Student's current general educational placement. Even so, known risks, whether inherent to the campus itself or in combination with Student's propensities, must be addressed.

67. No witness persuasively addressed the issue of Student's safety within the Sequoia special day class counseling enriched program, given her open access to the same physical dangers of the tall fences and railings with dangerous drop offs that she enjoyed climbing, and her ability to easily elope to the main school building and either up the stairs to her classmates in the third grade, or again out the front door to the street. Oakland failed to present any evidence as to the physical layout of the campus housing the Prescott program. No physical setting can guarantee a student's safety, and an educational program is more than the actual campus. Even so, Oakland highlighted the risk presented by the physical structures and layout of the Sequoia campus in presenting its case that maintaining Student's placement would result in substantial risk of injury. It subsequently failed to establish how either of its proposed alternative settings would address this physical safety risk driving the need for Student's removal.

68. Additionally, neither proposed program has a behavior modification system integrated across the entire campus. Dr. Frugé persuasively opined that a general education setting, and a special day class setting on a public campus, both create a level of difficulty in effectively implementing a behavior plan. For instance, not all of the campus staff are informed of, involved in, or trained to assist in the implementation of Student's behavior plan. Further, there are inherent limitations in modifying such environments to support Student. His opinion was sound and convincing. In summary, Oakland failed to prove that either of its proposed settings

would sufficiently address the safety risk necessitating an interim alternative educational setting.

Access to the General Education Curriculum

69. Multiple Oakland witnesses, familiar with the intensive counseling enriched special day class settings, testified that the proposed programs would allow Student to access the general education curriculum and afford her an opportunity to make progress on her goals. Their testimony was persuasive and found to be more convincing than that of Dr. Frugé and Ms. Jones, who testified that Student would not be able to access the curriculum in the settings offered, given the profile of the students served and her rote learning style.

70. Ms. Jones' testimony that that special day class students feed off of each other, such that Student would only be able to access the curriculum if every student was on task, was not persuasive for several reasons. Ms. Jones was not upfront about the basis for her opinions or her limited personal knowledge. For instance, she was unable to account for the discrepancy between her testimony that she worked for Oakland for 10 years, and her resume which detailed a total of 2 years and 10 months with Oakland. She had not worked in a counseling enriched class for over four years and had no personal knowledge of the offered programs. Further, she evinced a bias against Oakland. Ms. Jones left her position with Oakland in 2013 because it would not transfer a student, who had attacked her twice, to a higher level of care. She offered no support for her opinion that the counseling enriched classes are supposed to provide a higher level of support than the typical special day class, but they do not. Ms. Jones observed Student twice at Sequoia for less than an hour total, yet she testified emphatically that Student was unable to learn at Sequoia because the students did not like her, and the administration wanted her out. Only on cross examination did she admit that this opinion was based on Parent report.

71. Dr. Frugé testified that Student would not be able to access the curriculum in a special day class because of the hardened clientele and their undesirable behaviors. His testimony was not persuasive in this regard. He provided no support for his conclusion that special day classes are supported by inpatient psychiatric institutions, and primarily serve students with conduct disorders and co-occurring substance abuse disorders. He further speculated that these students were headed to the juvenile justice system. Dr. Frugé's professional experience has focused on at-risk youth, in particular, juvenile offenders. His testimony did not take into account that Oakland was seeking to place Student in a class with first, second, and third graders. Furthermore, his testimony was inconsistent in that he proposed placing Student at Edgewood's non-public school, while noting that the students there frequently step down to programs like the counseling enriched special day class programs.

STUDENT'S PROPOSED INTERIM ALTERNATIVE SETTING

72. Through Dr. Frugé's testimony, Student proposed the non-public school at Edgewood as an alternative to Oakland's proposed interim settings, in the event this Decision found safety grounds for her removal. In Dr. Frugé's opinion, based on Student's current functioning, in order to address safety issues presented by her behavior and to assist her to self-regulate and be available for learning, she required an educational setting with a high staff-to-student ratio; a campus-wide integrated behavior modification program; a dedicated de-escalation space; milieu rooms wherein Student would be taught social-emotional skills and social interaction; and experienced staff trained to work with children with Student's learning, psychological, and behavioral profile, and trained in the use of physical restraint. His testimony was convincing. In his experience, the non-public school at Edgewood offered all of these components. No one from Edgewood testified at hearing. Oakland did not refute Dr. Frugé's testimony, nor present any evidence that Edgewood would not be an appropriate interim

alternative educational setting. However, Student did not present any evidence as to the physical layout of the Edgewood campus or how her immediate safety needs would be addressed on that campus. Further, there was no evidence that Edgewood had accepted Student or had an immediate opening for her.

73. To be appropriate, an interim 45-day setting must account for the safety risks motivating Student's removal. Based on all the evidence at hearing, an appropriate interim alternative educational setting for Student must include a therapeutic component; a high staff-to-student ratio; a campus-wide integrated behavior modification program; a dedicated de-escalation space; a campus with physical features conducive to keeping Student safe in light of her behaviors; and a safety plan, specific to the physical layout of the setting, which includes blocking of exits and physical interventions when needed to protect Student or others.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA FOR CHANGING AN EDUCATIONAL PLACEMENT DUE TO SUBSTANTIAL RISK²⁵

1. This hearing was held under the Individuals with Disabilities Education Act, 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)²⁶ 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

²⁵ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

²⁶ All references to the Code of Federal Regulations are to the 2006 edition.

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. Title 20 of the United States Code at section 1415(k), and title 34 of the Code of Federal Regulations, part 300.530, et seq., govern the discipline of special education students. (Ed. Code, § 48915.5.) A school district may request an expedited 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).) 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).) 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 of the United States Code section 1415(k) must be consistent with those of other IDEA hearings. (34 C.F.R. § 300.532(c)(1).)

3. The party requesting a due process hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); 34 C.F.R. § 300.511(d).) 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. 56-62 [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].) Here, Oakland is the filing party and has the burden of persuasion as to both issues.

Is Maintaining Student's Placement Substantially Likely to Result in Injury?

4. Oakland contends that Student has exhibited increasingly dangerous behaviors since April 2017 through the end of the 2016-2017 school year. Oakland asserts these behaviors, including eloping to dangerous areas, placing sharp tacks in her mouth, and climbing dangerous fences and railings on the campus, and bookshelves in her classroom, place Student at substantial risk of injury. Additionally, Oakland contends that Student displayed increasingly aggressive behaviors, including hitting, kicking, and biting her aide with greater force. Oakland argues that maintaining her current educational placement is substantially likely to result in injury to Student and to others, as it has exhausted all strategies to keep her safe in the general education setting.

5. Student alleges that maintaining her educational placement is not substantially likely to result in injury to others as she has never caused injury to, nor intended to injure, her aide or others. In terms of injury to herself, Student argues that her behaviors of mouthing, climbing, and elopement are sensory in nature and only create a risk because of Oakland's refusal to acknowledge this, and its policy of not physically re-directing Student to prevent a safety risk. Student asserts, as an affirmative defense, Oakland's failure to implement her IEP and operative positive behavior intervention plan. Student's defense is addressed in a separate section below. In her closing brief, Student concedes that maintaining her placement is substantially likely to result in injury because Oakland is unlikely to implement her IEP and behavior plan.

6. If the ALJ deciding the case determines that maintaining the current placement of the child is substantially likely to result in injury to the child or to others, the ALJ may order a change in placement to 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); *Letter to Huefner* (OSEP Mar. 8, 2007) 47 IDELR 228.)

7. Under the prior 1997 version of the IDEA and its 1999 implementing regulations, a hearing officer could order removal only if she: determined that the district had demonstrated by substantial evidence that maintaining the current placement was substantially likely to result in injury to the child or others; considered the appropriateness of the child's current placement; considered whether the district had made reasonable efforts to minimize the risk of harm in the child's current placement, including the provision of supplementary aids and services; and determined that the interim setting was proposed by personnel who consulted with the child's special education teacher and that it met appropriate requirements. The current regulations do not require that the hearing officer consider the appropriateness of the current placement or whether the district made reasonable efforts to minimize the risk of harm. The United States Department of Education in its 2006 commentary regarding the final regulations regarding removal decisions stated,

We are not making changes to the regulations, regarding a hearing officer's decision-making, to require a hearing officer to consider such factors as those suggested by the commenters [the factors delineated in the 1999 regulations] because a hearing officer must have the ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice and exercise his or her judgment in the context of all the factors involved in an individual case.

(Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, 71 Fed. Reg. 46,540, at 46,724 (Aug. 14, 2006).)

8. There is little or no case authority discussing what is meant by the phrase "substantially likely to result in injury to the child or to others" as it is used in the current federal statute and regulations. However, there are several cases that address this

standard in the context of school districts seeking injunctive relief in court to remove a child from her placement.

9. In *Light v. Parkway C-2 School District* (8th Cir. 1995) 41 F.3d 1223 (*Light*), 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.)

10. Conduct that has been found substantially likely to result in injury to self and others include throwing furniture and other objects at classmates, attempting to stab another child in the back with a pencil, attacking a classmate with a plastic knife, kicking staff, hitting a classmate in the face with a lunch pail, and eloping into a street. (*San Leandro Unified School Dist. v. Student* (OAH, Dec. 16, 2013, No. 2013100168).) Behaviors that resulted in, or were substantially likely to result in, injury to children and district personnel include kicking, hitting, and throwing chairs at staff, threatening another child with a pair of scissors, and hitting things and threatening to hit children with drumsticks. (*Rialto Unified School Dist. v. Student* (OAH, Nov. 19, 2013, No. 2013090966).) Eloping into a parking lot, bolting from the classroom, climbing onto the

top of a filing cabinet, running and falling while attempting to escape with scissors, and attempting to pull a file cabinet onto himself, were found to be substantially likely to injure the student. (*Ibid.*)

11. The evidence amply supports that maintaining Student's current educational placement is substantially likely to result in injury to herself and to others. Based on the undisputed testimony of many witnesses, Student's behaviors include aggression towards her aide in the form of biting and clamping down; hitting and kicking her hard and repeatedly; and throwing a chair at her. Student also threw school supplies including rulers at her classmates. That Student may not have intended to cause injury does not mitigate the substantial risk.

12. Student placed her life in danger on May 31, 2017, when she bolted through the front door of the school and headed down the steep stairs toward the busy street where cars were traveling over 30 miles per hour in both directions. Ms. Hodge, Student's observer, was so frightened by the danger presented that she grabbed Student by the arm and tried to pull her up the stairs. Student's acts of climbing the 10-foot tall bookshelves in her classroom and the internal stair railings; attempting to climb out an office window with a 15-foot drop to the ground below; climbing and standing on top of the 4-foot tall wheeled computer cart; riding the wheeled breakfast cart down the hall and threatening to maneuver it down the stairs; climbing the 10-foot tall perimeter fence, and the 10-foot tall chain link fence atop the 8-foot retaining wall; climbing and hanging down from the railings that border steep drop-offs; and standing atop the play structure, all placed her at substantial risk of injury. Further, Student's propensity to place sharp tacks in her mouth, while climbing, running, engaging in a tantrum, and making loud noises and snarling, created a substantial risk of injury from ingesting the tack. Whether or not the function of Student's behaviors is sensory in nature does not mitigate the risk presented.

13. Given the nature and extent of Student's elopement, climbing, and mouthing behaviors, especially in light of the increasing trend of these behaviors in terms of frequency, duration, and intensity since April 2017, in conjunction with Student's increasing emotional lability and presentation of being unable to control herself or appreciate the danger in which she was placing herself, it is clear that maintaining Student's educational placement would result in a substantial risk of injury to herself and to others.

Student's Affirmative Defense

14. Student asserts as an affirmative defense that Oakland failed to implement her operative IEP including her positive behavior intervention plan. Student maintains that these implementation failures predictably caused her behaviors. Oakland counters that it did implement Student's IEP at all relevant times, and to the extent certain services and accommodations were not provided, this was due to Student's inability to access the classroom and participate. Oakland argues that it implemented the core components of Student's behavior plan, and there were no strategies it could have implemented that would reduce the risk of injury presented by Student's behaviors within her current educational placement.

15. A statement of any new matter constituting a defense qualifies as an affirmative defense. (*Advantec Group, Inc. v. Edwin's Plumbing Co., Inc.* (2007) 153 Cal.App.4th 621, 627.) "Generally, a party must raise an issue as an affirmative defense where the matter is not responsive to essential allegations of the complaint." (*Bevill v. Zoura* (1994) 27 Cal.App.4th 694, 698; *State Farm Mutual Auto. Ins. Co. v. Superior Court* (1991) 228 Cal.App.3d 721, 725; Code Civ. Proc., § 431.30, subd. (b)(2); 5 Witkin, Cal. Procedure (3d ed. 1985) Pleading, § 1004, pp. 425–426.)) Because an affirmative defense requires an assertion of facts beyond those claimed by the petitioner, generally the party who offers an affirmative defense to the identified claims bears the burden of

proof on the defense. (*Seltzer v. Barnes* (2010) 182 Cal.App.4th 953, 969; *Hinerfeld-Ward, Inc. v. Lipian* (2010) 188 Cal.App.4th 86, 93; 1 Cal. Affirmative Defense, Burden of Proof (2nd Ed. 2017) § 1:6.) In this case, Student bears the burden of proving that Oakland failed to implement her IEP, including her behavior plan, and that but for this implementation failure, maintaining Student's educational placement would not result in a substantial risk of injury.

16. The IDEA and its 2006 implementing regulations are silent as to whether stay put applies to a child who transfers to a different public agency within the same state but between school years. (71 Fed. Reg. 46,682 (Aug. 2006); *R.F. v. Delano Union School District* (E.D.Cal. 2016) 224 F.Supp.3d 979, 985 (*R.F.*)). In *R.F.*, the student transferred between districts within California during the summer. When OAH denied his motion for stay put, student sought a temporary restraining order compelling the transferee district to implement his IEP from the transferor district. The federal district court, for the Eastern District of California, "decline[d] to read into the Department's silence an intention to limit the essential protections of stay-put." (*Id.* at 989 [though court found student likely to prevail on the merits and that the balance of equities and the public interest weighed in his favor, it denied the restraining order as the facts did not prove the likelihood of irreparable harm].) In the case of *N.E. v. Seattle School District* (9th Cir. 2016) 842 F.3d 1093, the Ninth Circuit, in acknowledging the artificiality of referring to a "then-current" educational placement during the summer break between school years, held that stage two of the transferor district's IEP was the student's stay put placement in the transferee district. (*Id.* at 1098.)

17. While this case is not about stay put, the above cases support the finding herein that the December 2015 Aspire IEP was Student's operative IEP at the start of the 2016-2017 school year. The parties did not dispute this. Based on this same legal analysis, the March 5, 2015 positive behavior intervention plan developed by STE

Consultants, as modified in March 2016, was Student's last consented to and operative behavior plan. Oakland failed to implement this plan from at least September 12, 2016, through the end of the school year. Even so, Student did not prove that this implementation failure caused her behaviors.

18. At hearing, Student presented evidence that when Aspire implemented her operative behavior plan in first grade, it was effective in curtailing her dangerous behaviors such as elopement, and that she did not exhibit climbing and mouthing behaviors at that time.

However, this does not establish that if Oakland implemented this same plan, Student would not have engaged in the dangerous behaviors detailed herein. This premise fails to account for the fact that Student had difficulty with transitions and the effect of her transfer to Sequoia, including the impact of new staff, new peers, new routines, a new classroom, and a new school located on a campus that presented various physical hazards. Further, Student had advanced to a new and more challenging grade level. Due to her behavioral challenges which resulted in class removals, she had missed a good deal of academic instruction time prior to her transition to second grade at Sequoia. Each year the curriculum builds on the prior year and advances in rigor. Further, Student's emotional and behavioral presentation varied over time, and was impacted by many factors including home circumstances.

19. Implementation failures would, in general, be relevant to the expedited removal issue if such failures directly caused the behaviors that created the substantial risk of injury. For example, in a Michigan case involving the denial of a temporary restraining order, the district court found that the student would not have engaged in dangerous behavior if he had been accompanied by his "safe person" as required by his IEP. (*Troy School District v. K.M.*, (E.D.Mich., Jan. 16, 2015, No.12-CV-15413) 2015 WL 233215, at p.2.)

20. A district should not be allowed to abdicate its responsibility to provide required IEP services, and then seek to remove the child as a means of addressing the substantial risk. Rather, in such a situation, it could be found that the district failed to maintain the placement and that this failure caused the risk; the logical remedy being that the child remains and the district is tasked with implementing the IEP. For example, a hearing officer in Minnesota declined to remove a student based on two incidents that could have resulted in injury as these events were attributable to the behavior plan not being followed. (*Independent School Dist. No 270, Hopkins Public Schools* (SEA Minn. May 16, 2014; OAH 5-1300-31399; MDE 14-019-H) 114 LRP 34891.) Of note, the hearing officer in that case required the district to demonstrate that it had done all it reasonably could to reduce the risk that the student would cause injury.

21. Student established that she did not receive all of the services and accommodations in her December 2015 Aspire IEP, and her consented to September 12, 2016 IEP, and that Oakland failed to implement her operative behavior plan.²⁷ However, Student did not establish, that but for Oakland's implementation failures, she would not have exhibited dangerous behaviors, such that maintaining her educational placement would not create a current substantial risk of injury. Therefore, this Decision need not address the intricacies of Student's IEP services and accommodations, or the extent to which Oakland did, or did not, implement her IEP or maintain her educational placement.

22. This case is more complicated than the two scenarios detailed above. Even if Student had establish that Oakland's implementation failures caused her dangerous

²⁷ No findings are made as to whether there were any material failures to implement Student's IEP. (See *Van Duyn v. Baker School Dist. 5J* (9th Cir. 2007) 502 F.3d 811, 820-822.)

behaviors, in the circumstances presented here, a failure to implement is not dispositive to the adjudication of the issues in this expedited hearing. By the end of the school year, Student's social-emotional, psychological, and behavioral condition, for which there were many contributing factors, coupled with the dangers inherent in the physical layout of the Sequoia campus, created a situation, such that maintaining her educational placement would result in a substantial risk of injury to herself and to others, even if Oakland implemented her IEP in its entirety, along with her behavior plan. This was established by the testimony of Student's own expert.

23. Dr. Frugé established that Student's educational setting now required, at a minimum, two key components to keep her safe: a dedicated de-escalation space and an integrated, campus-wide behavior modification program. These are missing from Student's current educational placement. Accordingly, maintaining Student's current placement would not curtail her elopement, climbing, mouthing, and aggression, all of which create a substantial and present risk of injury. As such, this Decision need not determine whether Oakland's implementation failures directly caused, reinforced, or escalated Student's dangerous behaviors. This ALJ declines to expand the reach of this expedited Decision into a wide-ranging analysis of the extent to which Oakland implemented Student's operative IEP.

ARE OAKLAND'S PROPOSED INTERIM ALTERNATIVE EDUCATIONAL SETTINGS APPROPRIATE?

24. Oakland asserts that its intensive counseling enriched special day class program is an appropriate interim setting for Student as it will address the behaviors leading to her removal through the provision of a high staff-to-student ratio, embedded therapeutic and behavioral supports, and a dedicated de-escalation room. Oakland asserts that these supports will allow Student to participate in the general education curriculum and afford her the opportunity to make progress on her goals. Student

contends that she will be harmed in the proposed interim settings as the students in these program exhibit disruptive behaviors which she will mimic, including elopement, and the mental health and behavioral supports are not targeted to address her sensory needs and underlying developmental and mood disorders.

25. 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)(i).) There is no requirement that the interim setting offer Student a FAPE or the least restrictive environment. Additionally, the IDEA requires that a student with a disability who has been removed to an interim alternative educational setting receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications so that the behavior for which the student has been placed in the interim alternative educational setting does not recur. (20 U.S.C. § 1415(k)(1)(D)(ii); 34 C.F.R. § 300.530(d)(1)(ii).) 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 a parent prefers. (See *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)

26. The proposed counseling enriched special day class program at Sequoia is located on the Sequoia campus. Therefore, it presents the same physical dangers Oakland highlighted as one of the reasons for needing to remove Student from her current placement. Oakland did not introduce any evidence as to the physical campus that houses the Prescott program. As such, Oakland did not establish that the Prescott campus would provide a safe setting in light of Student's behaviors necessitating removal. In addition, neither of the programs has a campus-wide integrated behavior program that Student requires to address the safety concern driving her removal. In conclusion, neither of Oakland's proposed alternative educational settings is

appropriate. However, Student requires an immediate interim setting for not more than 45 school days.

27. As described by Student's expert, the non-public school run by Edgewood has the core components that would address the safety issues presented by Student's behavior and assist her to self-regulate. However, no one from Edgewood was called as a witness. Student did not present any evidence as to the physical layout of the Edgewood campus or how Student's immediate safety needs would be addressed in that setting during her transition to the campus, and pending the integrated behavior modification program taking hold. The ALJ has the authority to order placement in an appropriate interim alternative educational setting upon making the finding that Student was substantially likely to injure herself or others in her general education placement at Sequoia. However, neither of Oakland's proposed settings is appropriate, and the parties have failed to provide sufficient evidence of another appropriate setting.

28. The IEP team is responsible for determining a student's interim alternative educational setting only when a student's disciplinary conduct is determined to not be a manifestation of the student's disability or where there are special circumstances involving weapons, illegal drugs or the infliction of serious bodily injury. (20 U.S.C. § 1415(k)(2); 34 C.F.R. § 300.531.) When a school district proves that maintaining the current placement of the child is substantially likely to result in injury to the child or to others, it is the responsibility of the ALJ to order a change in placement to 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).)

29. Student's interim alternative educational setting, in addition to allowing her to participate in the general education curriculum and to make progress on her goals, must address the safety risks driving her removal. As such, it shall additionally include: a therapeutic component; a high staff-to-student ratio; a campus-wide,

integrated behavior modification system; a dedicated de-escalation space; a setting with physical features conducive to keeping Student safe in light of her behaviors; and a safety plan, specific to the physical layout of the setting; and transportation. The ALJ is unable to order a change in placement at this time because Oakland has failed to propose an appropriate interim setting.

30. This decision has determined: (1) that Student requires immediate placement in an appropriate interim alternative educational setting for not more than 45 school days; (2) Oakland's proposed alternative settings are not appropriate; and (3) the essential components of an appropriate interim setting for Student. Oakland must immediately identify an appropriate interim alternative educational setting, consistent with the findings and conclusions herein, and disclose this to Student within three business days. OAH will maintain jurisdiction to ensure Student is placed in an appropriate alternative setting. OAH will re-open the record for the limited purpose of deciding this issue, and re-convene the expedited hearing.

Student's Requested Remedy for Staff Training

31. In her closing brief, Student requests an order that Oakland staff and its agents participate in training on the four functions of behavior, and that Oakland staff be trained on implementation of IEP's and behavior plans. Student did not prove that any of the alleged implementation failures caused her behaviors necessitating her removal to an interim setting. Further, Student provides no legal authority in support of her affirmative requests for relief in the context of this District-filed expedited hearing. Nothing in this Decision prevents Student from filing or pursuing her own request for a due process hearing and related claims for relief.

ORDER

1. Maintaining Student's current educational placement will result in a substantial risk of injury to Student and to others.
2. Oakland's proposed intensive counseling enriched special day classes at Sequoia and Prescott are not appropriate interim alternative educational settings for Student.
3. Student immediately requires an appropriate interim alternative educational setting for not more than 45 school days from the first date of attendance. Student's interim alternative setting, in addition to affording her the opportunity to participate in the general education curriculum and make progress on her goals, shall include a therapeutic component; high staff-to-student ratio; a campus-wide, integrated behavior modification system; a dedicated de-escalation space; a campus with physical features conducive to keeping Student safe in light of her behaviors; and a safety plan, specific to the physical layout of the setting. Oakland shall be responsible for arranging transportation to Student's interim alternative educational setting.
4. Oakland shall immediately identify an appropriate interim alternative educational setting, consistent with the findings, conclusions and order herein, and disclose this to Student within three business days of this Decision, on or before August 28, 2017.
5. OAH shall maintain jurisdiction over this expedited matter until resolution of the appropriate setting. OAH hereby continues the expedited matter and the record shall be re-opened for the limited purpose of determining whether Oakland's newly identified interim setting is appropriate in light of this Decision. The parties will be allowed to present limited evidence and witnesses regarding the newly proposed interim alternative setting. Student will be afforded the opportunity to present limited evidence as to an appropriate alternate placement.

6. The parties shall participate in a prehearing conference specially set for Thursday, August 31, 2017, at 9:00 a.m. PHC statements shall be exchanged and filed by August 30, 2017, at 5:00 p.m. The scope of evidence allowed and the number and identity of witnesses will be determined at the PHC.

7. A one-day hearing shall be held on September 7, 2017, beginning at 9:00 a.m., at the OAH Oakland Office located at 1515 Clay Street, Suite 206, Oakland, California, 94612. The parties are required to exchange their evidence binders relevant to the newly proposed interim setting, and a list of proposed witnesses not later than August 31, 2017, unless the parties agree otherwise. There will be no continuances absent a showing of extraordinary good cause. This continued expedited hearing scheduled shall take priority over other OAH matters. The parties may request a mediation date to occur prior to the scheduled hearing.

8. Nothing in this Decision prevents the parties from determining on their own, and agreeing to, an appropriate interim alternative educational setting. The parties shall immediately inform OAH in writing if they have agreed to an interim educational setting and move OAH to vacate the remaining portion of this expedited matter without a further hearing.

9. Student's requests for relief are denied.

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. Oakland prevailed as to Issue 1. Student prevailed as to Issue 2 as to the appropriateness of the Sequoia and Prescott proposed interim alternative educational settings. Student's specific interim setting shall be determined following the continued expedited hearing.

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).)

DATE: August 23, 2017

/s/

THERESA RAVANDI

Administrative Law Judge

Office of Administrative Hearings