

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 PART TWO

PROCEDURAL STATUS

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

Administrative Law Judge Theresa Ravandi heard the first portion of this expedited matter over the course of eight days ending on August 9, 2017, and timely issued an expedited decision on August 23, 2017. The August 23, 2017 Expedited Decision determined that: (1) maintaining Student's current educational placement would result in a substantial risk of injury to Student and to others; and (2) Oakland's proposed placement in a counseling enriched special day class at either Sequoia Elementary School or Prescott Elementary School would not constitute an appropriate interim alternative educational setting for Student. The ALJ continued the expedited matter and ordered Oakland to identify an interim alternative setting for Student consistent with the findings and orders of the Expedited Decision. The record was re-opened for the limited purpose of determining whether Oakland's newly identified interim setting is appropriate in light of the Expedited Decision.

ALJ Ravandi convened the second part of this expedited matter on September 7, 2017, in Oakland, California, to hear further evidence as to an appropriate interim alternative educational setting for Student.

David Mishook, Attorney at Law, represented Oakland. Oakland's staff counsel, Andrea Epps, attended the hearing. Parent represented Student. Student did not attend.

On September 7, 2017, the evidentiary record was closed and the matter submitted.

ISSUE

Does Oakland's proposed placement at Highland Academy, in the Hayward Unified School District, constitute an appropriate interim alternative educational setting for

Student in accordance with the criteria set forth in OAH's August 23, 2017 Expedited Decision in this matter?

SUMMARY OF DECISION

Student requires immediate placement in an appropriate interim alternative setting. As determined in the August 23, 2017 Expedited Decision, an appropriate interim setting for Student must afford her the opportunity to participate in the general education curriculum and make progress on her goals. It must also 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; a safety plan, specific to the physical layout of the setting; and transportation arranged by Oakland.

This Decision finds that Highland Academy is an appropriate interim alternative educational setting for Student. Therefore, the appropriateness of Student's proposed alternate setting, Big Minds Unschool, was not a necessary issue to be determined herein. Even so, Big Minds is not an appropriate interim setting. Highland Academy is approximately a 30-minute drive from Student's home. Student's dangerous behaviors necessitating her removal to an interim setting also create a risk to her safety and that of others while in transit. In order for Oakland's proposed bus transportation to address the risk presented by Student's dangerous behaviors, Oakland will need to provide Student with a one-to-one aide during transit to her interim setting.

FACTUAL FINDINGS

1. This Decision specifically incorporates all prior Factual Findings from the August 23, 2017 Expedited Decision in this matter.

OAKLAND'S PROPOSED INTERIM SETTING OF HIGHLAND ACADEMY

2. In accordance with the August 2017 Expedited Decision, Oakland identified Highland Academy as an interim alternative educational setting for Student. Student is an eight and a half year old girl who is anticipated to attend third grade for the 2017-2018 school year. Highland is a public, therapeutic school that serves students in kindergarten through sixth grade, and is located in the city of Hayward, within the Hayward Unified School District.² Karen Mates is the administrator for Highland Academy and the compliance officer for Hayward. She has served as a director of special education for several districts for more than 14 years and is especially familiar with developing and operating therapeutic placements. Ms. Mates was well-qualified to describe Highland's program and provided detailed, consistent answers during her examination. She was a credible witness and her testimony is given substantial weight.

3. Hayward runs the academic program at Highland, and Point Quest, a certified non-public agency, operates and staffs the therapeutic and behavioral portions and provides training for all personnel. Highland has a full-time therapist and one part-time therapist on site to support the students and provide individual and group therapy sessions. Eight behavioral aides and a program supervisor are also on site. All staff are trained in Crisis Prevention Intervention which allows them to safely support a student by means of physical escorts and restraints if the student is a danger to herself or others.

4. Highland has three classrooms taught by credentialed special education teachers experienced in working with students with social or emotional needs, or who

² OAH does not have jurisdiction over Hayward, and Oakland remains the local educational agency responsible for Student. The evidence showed that Hayward has agreed to allow Student to attend Highland.

have otherwise struggled to remain in a general education setting. The teachers use the California Common Core State Standards curriculum and modify the work as needed for each student, whether above, at, or below grade level. Each class has no more than 10 students. In addition to the classroom teacher, there are two behavioral aides per class. A school-wide "floating" aide assists in all the classrooms, and an additional instructional aide is available to work individually with students in a separate setting when needed.

5. The classrooms are welcoming and decorated, but Student would not have access to push pins or tacks which she frequently removed from the bulletin boards at Sequoia Elementary and placed in her mouth. Each classroom has a computer station and a library corner with bean bag chairs. Based on photographs introduced into evidence, there are no evident climbing hazards in the rooms within the school. Highland has an outdoor sports field, basketball courts, a tarmac area for playing foursquare, and a side garden area. The campus is flat and completely fenced with a high chain link fence. Aside from the perimeter fence, there are no obvious climbing hazards such as railings with steep drop offs as are found on the hilly terrain at Sequoia. All students are closely supervised and never out of sight, allowing staff to intervene in any attempts to engage in unsafe behavior. Staff escort students to breakfast and lunch in the cafeteria, and to use the bathroom. No student has ever eloped from the campus. The school shares a parking lot with Spectrum Center School, which is located on a separate campus. Highland students are escorted to and from the parking lot to be picked up and dropped off.

6. Highland runs a school-wide, positive behavior intervention program based on a token system. To encourage and reinforce positive behaviors, students earn tokens as they demonstrate desired behavior, and spend these tokens to purchase preferred items from the classroom reward box. Highland also recognizes students for displaying the core "PAWS" values of practicing respect, acting responsibly, working

together, and staying safe. They receive a "Paw" that can be entered into a drawing for a daily prize, a hot lunch, or a gift card. These core values are linked to a level system through which students advance to earn special privileges. The highest level is "purple," which allows access to the honors room on Fridays or a field trip. The honors room has games such as air hockey, ping pong, basketball hoops, and large building blocks. Students can opt to enter a drawing each day, week, or month to earn preferred items; the longer the wait, the more desirable the prize, such as a PlayStation video game console.

7. Ms. Mates persuasively described how the students at Highland watch out for each other, encourage desired behaviors, and help each other stay on track so that their class can earn special rewards. Students learn empathy and to help others who are having a difficult day. Point Quest's behavioral program calls for staff to reduce demands to regain student engagement and to provide praise and reinforcement for on-task and compliant behaviors. Highland implements contingency and multi-day contracts for students to earn a chosen reward for demonstrating or abstaining from a specific behavior. Students are also taught coping skills to self-regulate, and they learn to monitor their own behavior. They are encouraged to request breaks as needed. Many students also have individual behavior plans, which Highland staff are qualified to implement.

8. Highland has a sensory room designed by its occupational therapist. The sensory room is available to all students and has reduced lighting, music, large bean bags, massagers, fidgets, a tent, a trampoline, and a hammock swing. There are also tire swings which students can earn time to play on. Within the sensory room, there are dedicated de-escalation spaces that are small and calming, with large bean bag chairs and colored rugs. Students presenting a danger to themselves or others are brought to the de-escalation areas to calm with adult support. There are no doors and students are

not left alone in the de-escalation area. The spaces are designed to keep students safe until they are ready to return to class.

9. For those students who are anxious about attending a new school, the therapist prepares social stories with color photographs that introduce them to Highland and its staff. The therapist is available to meet students in the parking lot, and sit or walk with them, to ease them into their school schedule. If needed, students with transition difficulties can start school in a separate room in a one-to-one setting for a few days. Highland welcomes parent input and suggestions from outside mental health providers regarding strategies to best serve its students.

10. Ms. Mates was familiar with Student and her operative individualized education program. Her testimony established that Highland would be able to implement Student's IEP goals. She had no doubt that Highland would afford Student an opportunity to make progress on her academic and vocational goals, as well as her social-emotional goal of learning coping skills, a key focus for this school. Highland has an opening for Student and has agreed to accept her. Ms. Mates was confident that Highland has the ability to serve Student within its therapeutic program. Travel time from Student's home in Oakland to Highland Academy in Hayward is approximately 30 minutes or less. One other Highland student also travels from Oakland.

11. In response to Parent's questions, Ms. Mates persuasively testified that most students want to join in the classroom activities as they see what they can earn. It is her experience that students respond positively to the encouragement of their peers. Student would be afforded breaks as needed and be allowed to work in the garden or in another room to help with her transition. Ms. Mates was confident that Highland staff would quickly learn how to best interact with Student without escalating her behaviors. The therapists are well trained to work with Student to help her want to remain safe. Student will be expected to follow the rules, but Highland is flexible in its approach and

committed to help all of its students succeed and return to the general education setting.

Parent's Opposition to Highland

12. Parent's primary objection to placing Student at Highland was her concern that staff would treat Student as though she were intentionally engaging in maladaptive behavior, instead of addressing her underlying sensory needs. However, Oakland proved that the training, professionalism, and experience of the team at Highland do not support this assumption.

13. Parent expressed her belief that Student would climb the perimeter fence. Her concern was not that the fence presented a safety risk, but rather that Highland personnel would use physical escorts and restraints with Student, which Parent believed would cause Student to escalate her behaviors. Parent was also concerned that Student would not be willing to access and, therefore, could not benefit from Highland's sensory room because it served a dual purpose of providing de-escalation spaces. Parent opposed any attempts to block Student from exiting a room, such as a de-escalation space, as it was Parent's experience that this would also escalate Student's behaviors. Parent firmly believed that all Student required to remain safe and engaged in learning was kindness, soft tones, respect, and hand-holding or hugs for any physical re-direction. The evidence in this case showed that these responses did not keep Student safe and in the learning environment.

14. The August 2017 Expedited Decision already determined that to address the safety risks necessitating Student's removal from the general education setting at Sequoia, an appropriate interim setting for Student must include a dedicated de-escalation space, 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. Parent's concerns did not establish that Highland was not an appropriate interim

setting for Student in accordance with the previously determined criteria. Rather, Parent objected to the criteria themselves. This continued expedited hearing is not the forum for contesting the factual findings and legal conclusions previously made in this matter.

15. Ms. Mates established that as part of the therapeutic component of the Highland program, therapists would work directly with Student to understand why she placed herself in danger; learn how Student responds to interventions and how they could best assist her; and also teach Student skills she could use to keep herself safe. Carefully designed physical interventions would only be used by trained staff to prevent Student from injuring herself or others. At the same time, Highland's mental health component, behavioral supports including trained behavior aides, and its positive school-wide behavior program, complete with peer encouragement, would help lessen Student's dangerous behaviors that may require physical interventions.

16. Parent believed that Highland's token economy and level system which required Student to earn access to the honors room or time on the tire swings contravened the terms of her IEP. Student's IEP included accommodations such as a sensory schedule and access to sensory tools. However, there was no evidence that Highland could not or would not implement her IEP accommodations, or that there is any specific provision in the IEP that the token economy and level system would contradict.

17. Parent also opposed placement at Highland because she believed adult students attending the nearby Spectrum School would be able to freely interact with Student, which would place her at risk. This fear was unfounded. While Highland shared a parking lot with Spectrum, it is fenced; the two campuses stand alone and are not connected. Student would not be allowed unsupervised in the parking lot.

TRANSPORTATION TO HIGHLAND ACADEMY

18. Oakland has arranged to provide Student bus transportation to Highland. Oakland contracts primarily with a transportation company called First Student to bus its students to and from school, though it sometimes uses Michael's Transportation and J.I.R. Transportation, to meet its busing needs. Trained drivers operate the buses which are equipped with seatbelts. For students who refuse to stay buckled, there are additional safety restraints or harnesses available which keep students secure in their seats and are more difficult for the students to remove. If a student gets up from her seat during transit, bus drivers are trained to verbally direct the student to return to her seat and buckle up. If the student refuses, safety protocols require the bus driver to pull over as soon as it is safe to do so, and assist the student. Drivers do not use physical interventions with the students. If a student will not cooperate, the driver is trained to call dispatch, explain the situation, identify the location of the bus, and request support. Additional support is then sent to the driver. Depending on the location of the bus, an aide from the student's school may be sent to assist.

19. Parent testified that in her experience not all of Oakland's buses have seat belts and that two years ago Oakland lost a student, Parent's sister, for two hours when the bus driver failed to deliver her to school. Parent shared an additional fear that the bus driver would call law enforcement if Student's behaviors escalated on the bus. Parent was adamant in her belief that Oakland has treated, and will continue to treat Student as a criminal, by calling the police rather than addressing her disability-related needs. Oakland established that the safety protocol its bus drivers were trained to follow when a student exhibited unsafe behaviors did not include calling law enforcement.

Student's Need for a One-to-One Bus Aide

20. The August 2017 Expedited Decision determined that maintaining Student's current educational placement was substantially likely to result in injury to Student and to others. Many of the prior Factual Findings are of relevance to the determination of the current issue, whether Oakland's proposed bus transportation plan will address the safety risks underlying Student's need for removal to an appropriate interim educational setting.

21. In summary, during the 2016-2017 school year, Student refused to remain in class and was unable to attend to instruction or regularly participate in occupational therapy sessions even with full-time support from a one-to-one trained behavior aide. She eloped from her class daily and eloped from the campus approximately three times, once placing her life in danger by nearly running into a busy street. Student frequently placed herself in danger by climbing on fences, railings, and furniture. She attempted to escape and climb out of the principal's office window five times; often placed sharp tacks in her mouth, resulting in Oakland calling 911 twice; and displayed tantrum behavior such as throwing books and supplies, and making loud noises. Student engaged in physical aggression with increasing frequency and intensity which included hitting, kicking, biting, and throwing items at her aide. Her challenging behaviors presented a safety risk in terms of being able to leave the campus to participate in field trips, and Oakland refused to allow Student to attend field trips when it could not ensure her safety.

22. Following winter break in January 2017, Student voluntarily remained in the classroom for most of the day after her behavioral staff implemented a new strategy of removing all academic demands. However, she was still physically aggressive with her aide, climbed the classroom furniture in an unsafe manner, and threw objects, all of which caused disruption and required her to be removed from the class. Student's

dangerous behaviors dramatically increased towards the end of the school year and there was no consistent trigger; her behavior was unpredictable and explosive. Oakland and the non-public agency behavioral staff could not find a strategy that worked to keep Student or others safe in her general education setting by the end of the 2016-2017 school year. Her dangerous behaviors could not be safely ignored given the physical environment and risks. It was impossible to ensure a consistent response from all adults on campus, many of whom did not have training in the fields of behavior or mental health. Student required the implementation of a campus-wide behavior modification system to effectively address her undesirable behaviors.

23. Kristen Ojala is a board-certified behavior analyst and the senior clinical director of Juvo Autism and Behavioral Health Services, the non-public agency that provided Student's behavior services during the 2016-2017 school year at Sequoia in Oakland. Ms. Ojala is familiar with Student's behavioral challenges at school and the antecedents to her behaviors based on her direct supervision of Student's assigned behavior analyst and her own direct observations of Student at Sequoia. She has eight years of experience in the field of behavior analysis and has worked with students who require a one-to-one aide during bus transportation. At hearing, she testified to her opinion that Student would not require a bus aide.

24. Student's behaviors at school would escalate when she was presented with a demand or otherwise asked to transition. Consistent with her testimony during the first portion of the expedited hearing, Ms. Ojala opined that the functions of Student's dangerous behaviors of elopement and climbing, tantrums, and mouthing inedible items, were to escape a demand and to seek adult attention. Ms. Ojala testified that if there was not a triggering stimulus on the bus (i.e. a demand), Student would not engage in the unsafe behaviors that she engaged in at school. During cross-examination by Parent, she acknowledged that there would be demands placed on Student during

the bus ride. However, Student was able to stay seated and attend to a preferred task for up to 30 minutes. Ms. Ojala opined that using the antecedent strategy of allowing Student to participate in what she termed a “very highly preferred activity” such as a new application on a tablet, or a new video game, would enable her to remain safely in her seat for the duration of the bus ride. There was no evidence that Ms. Ojala knew how long the bus ride from Oakland to Highland would take.

25. It was Ms. Ojala’s opinion that only a student who exhibits self-injurious behaviors, or severe physical aggression towards a bus driver, requires a bus aide, whereas a student who simply needs to be distracted with a preferred activity does not require an aide on the bus. Ms. Ojala’s testimony that there was no evidence Student would be unsafe on the bus disregarded the fact that Student engaged in dangerous behaviors to obtain adult attention. Ms. Ojala hypothesized that the presence of a one-to-one bus aide for Student could encourage Student to engage in unsafe behaviors to gain adult attention. However, her testimony failed to account for the prospect that Student would act out to get the attention of the bus driver. Ms. Ojala’s opinion that Student would be able to attend to a preferred activity on the bus if the only adult on board was the driver, but that Student may be more likely to engage in risky behaviors if she had an aide on the bus, was somewhat inconsistent and not convincing. Having an adult, who was not tasked with being the driver, present on the bus, would reasonably ensure the safety of all involved in the event Student engaged in dangerous behaviors.

26. Ms. Ojala acknowledged that Student was unable to remain seated in her classroom during the 2016-2017 school year. However, she testified that school did not engage Student and the school environment is different from that of the bus without explaining why the bus environment would not stimulate Student’s non-compliant behavior. Ms. Ojala opined that a preferred activity “may be enough” to keep Student safely seated on a bus that would be taking Student to school. Ms. Ojala was not aware

that Parent struggled to keep Student seated, buckled, and engaged while in the car, such that Parent made sure another adult was present to assist. These facts did not change Ms. Ojala's opinion as it was her position that students exhibit different behaviors with their family members.

27. During the 2016-2017 school year, Student's car ride to school, which included dropping her cousin off at another location, was more than 30 minutes long. Parent usually had Student's aunt in the car as a support. Initially, the aunt drove because Parent had to sit in the back seat with Student to support her to remain seated with her seat belt on. Restraints of any kind, including seat belts, escalate Student. Student is now able to sit in the back seat with her cousin, but Parent sings with her, makes up stories, draws pictures, helps her focus on workbooks, and pretends to make You Tube videos with her on the cell phone with the self-facing camera. Student still unbuckles her seat belt but responds to Parent's verbal directions to buckle up. It is Parent's experience that Student would be unable to remain safe and seated in a moving vehicle with her seat belt on for 30 minutes without adult support.

28. Parent's testimony that Student's challenging behaviors increase with changes in her routine, especially if she is not supported, was convincing and consistent with the August 2017 Factual Findings. Student has grown accustomed to Parent bringing her to school and picking her up. Introducing her to a bus that will be transporting her to a new school is a transition that will likely cause anxiety and behavioral challenges such that Student will require adult support to travel safely. Parent presented compelling testimony that since Student requires an individual behavior support aide throughout her school day to address her safety needs, she will need similar assistance on the school bus.

29. Ms. Ojala testified that the behavior data collected by Juvo during the 2016-2017 school year did not support the claim that Student's behaviors were sensory

seeking in nature. As previously found in the August 2017 Expedited Decision: Student frequently engaged in animal walking on her hands and feet, often as part of an elopement; and the testimony of Juvo and Oakland witnesses that Student's animal walks were not sensory seeking was not persuasive. As previously determined, Student's expert established 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 she felt; this made her feel good which resulted in a repetitive behavior. Given the anxiety producing stimuli of a new transportation plan and new school, Student will likely continue to engage in animal walks even while on the moving bus. Ms. Ojala believed that if Student stood up and walked around on the bus, this would not be a big enough safety risk to require an aide. Even so, she acknowledged that there were many variables to consider when determining risk, including the bus itself and whether it had seatbelts, the driver, the number of student passengers, and whether there was an additional adult on the bus. Ms. Ojala's opinion that Student would not require a bus aide was not convincing as she did not have any information about these variables and apparently did not know that the bus driver would be required to pull over and seek help if Student would not remain seated.

30. Ms. Ojala opined that Student should be allowed to attempt to travel in the least restrictive manner and, only if she could not remain safe on the bus, then other options should be considered. Her opinion was not persuasive as it failed to account for many of the facts established in the August 2017 Expedited Decision, including: Student's psychological and developmental profile made transitions difficult for her and environmental changes and new routines would create behavioral challenges for Student; mental health needs drove Student's behaviors which were therefore unlikely to respond to a behavior plan alone; Student would quickly re-escalate without a known trigger and her responses to reinforcers and behavior interventions was variable; and

Student's psychological presentation and emotional lability during her dangerous behaviors, and her inability to appreciate the seriousness of her behaviors, increased the risk.

31. Just as Student's behaviors could not be safely ignored on campus, they cannot be safely ignored on a bus. The evidence established that an aide will need to be available on the bus to keep Student from engaging in unsafe behaviors, and to address any behaviors that place all of the occupants on the bus, and ultimately other drivers and pedestrians, at risk.

STUDENT'S PROPOSED SETTING OF BIG MINDS UNSCHOOL

32. Parent wants Student to attend Big Minds Unschool, a school for twice exceptional students who have a disability such as autism or attention deficit hyperactivity disorder, but who are also gifted. Parent believes this school will allow Student to be herself, and she has full confidence the staff can keep Student safe without using physical interventions. The director, Dr. Melanie Johnson Hayes, has a doctorate in education and leadership and holds a multiple subject California teaching credential. She testified at hearing that there is an opening for Student, and she is welcome to remain for longer than 45 school days. Big Minds operated for five years as a laboratory school to explore practical applications of research on twice-exceptional children while Dr. Hayes completed her doctorate. It opened to the general public in January 2015, and has operated at its current site for the past two years. It is not certified by the state of California as a non-public school.

33. Big Minds operates four days per week, Monday through Thursday, and provides approximately three hours of instruction per day. It has a "soft start" to the school day, meaning students arrive between 8:30 a.m. and 10:00 a.m. Big Minds uses an individualized curriculum which varies for each student. At times it may incorporate, but it does not adhere to, the common core standards. The students choose what subject

and project they wish to participate in each day, though they must meet with a math coach and a literacy coach twice a week. Big Minds has 10 instructional staff or coaches; only two are credentialed teachers, one of whom holds a special education teaching credential. Dr. Hayes testified her school is able to implement Student's IEP. Her testimony was not persuasive as she had not reviewed Student's IEP, or behavior intervention plan, or any of her education records prior to accepting Student into the program. Dr. Hayes briefly reviewed Student's IEP during her testimony at hearing.

34. Big Minds has four therapeutic supervisors on staff with experience in family therapy and four therapy interns. The school program is premised on an attachment model wherein the staff develop a relationship with the students, refrain from any restrictive or punitive measures, and are trained to de-escalate students without physical contact. Dr. Hayes expressed some hesitation about implementing Student's behavior plan, not because she had not seen it, but rather because it was her experience that twice exceptional students do not respond to applied behavior analysis measures.³ Big Minds does not have a dedicated de-escalation space or a school-wide behavior modification program.

35. Big Minds is in the city of Pinole, approximately a 30-45 minute drive from Oakland. The school is located within a 2,500 square foot building, set back 50 feet from a busy street. Inside the school, there are separate class rooms for computers, science, art, and projects; a social-emotional coaching room; a Zen room for one-to-one math and literacy coaching; a library; a Lego room; a kitchen; and bathrooms. There is no fence around the school and no outdoor play area. Rather, the students walk three blocks along a busy street to a park for lunch recess, or can remain at the school indoors. One teacher is available to supervise every four students.

³ There was no credible evidence that Student is twice exceptional.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK FOR DETERMINING AN APPROPRIATE INTERIM ALTERNATIVE EDUCATIONAL SETTING⁴

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)⁵ et seq.; Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) 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).) 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).)

2. 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.)

3. 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

⁴ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

⁵ All references to the Code of Federal Regulations are to the 2006 edition.

administrative hearing decision is preponderance of the evidence].) Here, Oakland is the filing party and has the burden of persuasion as to whether its proposed interim setting is appropriate.

4. All prior Legal Conclusions from the August 2017 Expedited Decision are incorporated herein.

IS HIGHLAND ACADEMY AN APPROPRIATE INTERIM ALTERNATIVE EDUCATIONAL SETTING FOR STUDENT?

5. Oakland contends that Highland is an appropriate interim alternative setting for Student as it has a high staff-to-student ratio on a small campus with embedded therapeutic supports, dedicated de-escalation spaces, and a campus-wide positive behavior modification system. Oakland asserts that these supports will allow Student to participate in the general education curriculum, afford her the opportunity to make progress on her goals, and address the behaviors leading to Student's removal.

6. Student contends that she will be harmed if placed at Highland because the staff will use hands-on techniques that cause her to escalate, and that adult students at the adjacent Spectrum School pose a risk to her safety. Student argues that Highland's behavior program, wherein students must earn certain privileges, conflicts with her IEP accommodations of sensory breaks and access to sensory tools. Student also asserts the school is too far away, and Oakland's transportation plan is not appropriate as the buses are not safe and Student requires a one-to-one bus aide.

7. 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 offers 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; and *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1313-1314 [to determine whether a school district substantively offered a student a FAPE, the focus must be on the adequacy of the district's proposed program, not parent's preferred program].)

8. 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).)

9. Highland Academy constitutes an appropriate interim alternative setting for Student as it meets all of the criteria established in the August 2017 Expedited Decision. Student will be able to participate in the general education curriculum. A credentialed special education teacher will modify Student's work as needed and teach her the common core standards. Student will be in a class of no more than nine other students, on a campus that serves students from kindergarten to sixth grade. She will receive individual as well as small group instruction and have the assistance of two

behaviorally trained aides, one floating aide, and another instructional aide. Highland is familiar with and able to implement Student's IEP, and will afford her the opportunity to make progress on all of her goals. Highland's reward system, which requires Student to earn access to the honors room or time on the tire swings, is not inconsistent with her IEP nor renders it inappropriate as an interim alternative setting.

10. In terms of addressing the safety risks associated with Student's behaviors, Point Quest operates the therapeutic component of the Highland program and provides a full-time therapist and one part-time therapist, both of whom are available to provide individual and group therapy sessions, assist with Student's transition to her new school, and help Student stay safe. Point Quest also provides eight behaviorally-trained aides and implements a school-wide positive behavior intervention program. All staff are trained to safely use physical interventions when needed to prevent injury, and the school has dedicated de-escalation spaces. The campus is completely fenced with a high fence, and students are never left alone. Highland has a high staff to student ratio with three credentialed teachers, nine behavior aides, two therapists, and one program supervisor, and no more than 30 students on campus. While Spectrum School shares a parking lot with Highland, the two school campuses are separate.

11. Parent does not agree with the use of physical interventions or blocking Student from moving freely as she believes these strategies will cause Student's behaviors to escalate. However, the August 2017 Expedited Decision found, in light of Student's dangerous behaviors, she requires a safety plan that may include the use of blocking exits and physical interventions as determined necessary to prevent injury. The evidence established that Highland's practice of closely monitoring the students, and training its staff in Crisis Prevention Intervention, meets the criteria of having a safety plan in place specific to Student and the campus.

12. Parent wants Student to be placed in a school near her home. There is no requirement that Oakland offer a setting preferred by the Parent or that the interim setting constitutes the least restrictive environment. In weighing the approximate 30 minute commute to a public school in the city of Hayward with the positive factors of the placement, the commute does not render Highland inappropriate. Travel time to Student's preferred alternative setting of Big Minds is at least as long and likely longer. What constitutes an appropriate transportation arrangement for Student, in light of the unique facts of this case, is addressed in a separate section below. Oakland met its burden of proof that Highland is an appropriate interim alternative educational setting for Student.

Student's Preferred Alternate Setting

13. Pursuant to the August 2017 Expedited Decision, Student was afforded the opportunity to present evidence as to an alternate interim setting, if she disagreed with Oakland's proposed setting. Student seeks an order that Big Minds is an appropriate interim setting such that she may be placed there as opposed to Highland. Oakland argues that Big Minds is not an appropriate interim setting as it is not a certified non-public school and does not have the essential components determined necessary by the prior Expedited Decision.

14. A hearing officer may not render a decision which results in the placement of an individual with exceptional needs in a non-public, nonsectarian school if the school has not been certified pursuant to Education Code section 56366.1. (Ed. Code, § 56505.2, subd. (a); But cf. *Ravenswood City School Dist. v. J.S.*, (N.D. Cal. 2012) 870 F.Supp.2d 780, 788 [upholding an ALJ's authority to order district to reimburse a student's placement at a noncertified school as compensatory education].)

15. The purpose of this portion of the continued expedited hearing is not to weigh the appropriateness of the interim settings proposed by each party and

determine the best setting, but rather to determine whether the setting proposed by Oakland is appropriate. Having determined that Oakland's proposed setting of Highland is appropriate for Student, whether Student's preferred placement is appropriate is not a necessary issue to be determined. Even so, this Decision finds that Big Minds is not an appropriate interim alternative educational setting for Student as there was no credible evidence that it would afford Student the opportunity to make progress on her IEP goals and participate in the general education curriculum. Further, it does not have a campus-wide behavior modification program, a dedicated de-escalation space, or any safety plan to address the risk presented by Student's dangerous behaviors in light of its unfenced campus located on a busy street, and practice of walking students down this street to a nearby park for lunch recess. In addition, Oakland is correct that it cannot be ordered to place Student at Big Minds as it is not a certified non-public school.

TRANSPORTATION

16. At hearing, Oakland argued that Student had raised, and bore the burden of proving, an affirmative defense that Highland was not an appropriate interim setting because Student could not be safely transported by bus without the provision of a one-to-one aide. Oakland's argument is not persuasive. Oakland identified a setting beyond its jurisdictional boundaries. Therefore, suitable transportation is an essential part of the appropriateness of the identified setting. (See *Bevill v. Zoura* (1994) 27 Cal.App.4th 694, 698 [a party must raise an issue as an affirmative defense only when "the matter is not responsive to essential allegations of the complaint."]; *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.) Oakland proposed Highland Academy in the city of Hayward as an interim setting; Parent did not request this setting. Further, the August 2017 Expedited Decision determined that Oakland would be required to provide Student with transportation to effectuate her

removal to an appropriate interim alternative setting. It was incumbent on Oakland to prove that it had an appropriate transportation plan in place for its proposed interim setting, or risk having its setting rejected or being ordered to provide alternate, appropriate transportation.

17. Oakland contends that it can safely transport Student to Highland on its buses, which are equipped with seat belts and safety restraints as needed, as Student has the ability to participate in a highly preferred activity for 30 minutes. Oakland argues that there is no evidence that Student would assault the bus driver, or engage in self-injurious behaviors in transit, or that she cannot safely travel on the bus without an aide. Student asserts changes in routine and restraints of any kind, including seat belts, cause her to escalate; she is unable to remain seated for long periods of time; and she frequently takes her seat belt off in the car and requires adult support to safely travel. Student contends she will require a one-to-one aide to support her during a bus ride to Highland.

18. The term “related services” includes transportation and such developmental, corrective, and other supportive services as may be required to assist a child to benefit from special education. (20 U.S.C. § 1401(26); Ed. Code, § 56363, subd. (a) [In California, related services may be referred to as designated instruction and services]; *Irving Independent School Dist. v. Tatro* (1984) 468 U.S. 883, 891 [104 S.Ct. 3371, 82 L.Ed.2d. 664], superseded by statute on other grounds.) The IDEA regulations define transportation as: (i) travel to and from school and between schools; (ii) travel in and around school buildings; and (iii) specialized equipment (such as special or adapted buses, lifts, and ramps), if required to provide transportation for a child with a disability. (34 C.F.R. § 300.34(c)(16).)

19. The IDEA does not explicitly define transportation as door-to-door services or include in the definition of transportation an aide to escort the child to and from the

bus. Generally, the IEP team makes the decision about whether a student with a disability requires transportation as a related service in order to receive a free appropriate public education. (Ed. Code, § 56342, subd. (a); *Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children With Disabilities*, 71 Fed. Reg. 46576 (Aug. 14, 2006).) It is assumed that most children with disabilities will receive the same transportation provided to nondisabled children, consistent with the least restrictive environment requirements, unless the IEP team determines otherwise. (*Ibid.*) The IEP team bases its decision on the unique needs of the student as related to her disability. (*McNair v. Oak Hills Local School District* (8th Cir. 1989) 872 F.2d 153, 156.)

20. This case is not about the provision of FAPE in the least restrictive environment or whether Student requires transportation as a related service to access her education. Even so, the August 2017 Expedited Decision determined that transportation would be an essential component of an appropriate interim educational setting for Student in light of Student's dangerous behaviors, and the fact that Oakland's two proposed local settings were deemed inappropriate because they did not address the safety risk presented by her behaviors.

21. A school district that transports a student has a duty to exercise reasonable care under the circumstances. (Ed. Code, § 44808; *Farley v. El Tejon Unified School Dist.* (1990) 225 Cal.App.3d 371, 376.) The transportation must be reasonably safe. (*Eric M. v. Cajon Valley Union School Dist.* (2009) 174 Cal.App.4th 285, 293.) However, the IDEA requires transportation of a disabled child only to address his educational needs, not to accommodate a parent's convenience or preference. (*Fick v. Sioux Falls School Dist.* 49-5 (8th Cir. 2003) 337 F.3d 968, 970.) The school bus is an extension of the school campus. (See *Questions and Answers on Serving Children with Disabilities Eligible for Transportation* (Office of Special Education and Rehabilitative

Services, Nov. 1, 2009) 531 IDELR 268 [any safeguards applicable to a school disciplinary removal apply to a removal from the school bus].)

22. Oakland's buses are operated by trained drivers and equipped with seat belts. An alternate safety restraint, which is more difficult for Student to remove, can also be provided. As a result, its buses are reasonably safe. Even so, use of a restraint, including a seat belt, can cause Student's behaviors to escalate. Student does not like to stay seated in the car with her seatbelt fastened, so Parent often has another adult present to assist her with the task of driving or engaging Student. Parent has developed numerous strategies to keep Student engaged and safely seated with her seat belt fastened during her drives to school. These facts support Student's need for an aide on the bus.

23. Because Student is able to participate in a preferred activity for 30 minutes, Oakland's plan is to motivate Student to stay safe in her seat with her seatbelt fastened by providing her with a highly preferred activity during the bus ride. However, it is important to consider the context in which Student will be asked to remain seated and engaged in a preferred activity, namely, during a bus ride to a new school. Student is accustomed to her routine of Parent driving her to and from school and has never taken a bus to school. She struggles with transitions and changes in routine and these cause her to engage in challenging behaviors. Student's behaviors include physical aggression; making loud noises and throwing items during tantrums; elopements which include running, animal walks, and climbing; and mouthing dangerous items. A bus ride to Highland involves many challenging transitions such as getting used to the bus and getting to know the driver; becoming familiar with the new route and any other passengers; going to a new school at a new location, with new staff, new classmates and new routines; and coping with possible undesirable behavior by peers. Student's demonstrated ability to participate in a preferred activity for up to 30 minutes does not

mean she can generalize this ability to the school bus and remain safely seated with her seat belt fastened, while being transported to a new school.

24. Further, pursuant to her IEP, Student has a one-to-one behavior support aide to assist her throughout her school day and is supported by a behavior plan that is designed to reinforce desired behaviors and provide her tools to tolerate non-preferred activities. For all intents and purposes, the school day begins at the bus stop. That Student needs personalized services to address her behaviors and keep her safe at school supports her need for the same assistance while in transit. Student's dangerous behaviors are triggered by demands and serve the dual functions of allowing her to escape the demand and to gain adult attention. Numerous demands will be made of Student in relation to her new mode of transportation. For instance, she will be expected to get on the bus, be seated, put her seat belt on, stay buckled up, and follow the bus driver's instructions and the rules of the bus. These demands are likely to trigger her desire to escape.

25. Student often escapes by engaging in animal walks which would not be conducive to her safety or that of others while riding on the bus. Student has been physically aggressive with her aide when presented with a demand, so it is likely that she would be physically aggressive to the driver upon being instructed to do something. Her behaviors also include trying to escape out a window, attempting to run out into a busy street with cars, climbing furniture, and throwing items. Just as these behaviors could not be ignored in a general education setting because of the risk presented, these behaviors could not be safely ignored on the bus. Student engaged in dangerous behaviors to obtain adult attention. In the environment of a moving bus with the only adult being the bus driver, Student's behaviors could conceivably be life-threatening, and also provocative to other students on the bus. Oakland and Ms. Ojala narrowly view the role of a one-to-one bus aide as simply serving to engage, distract, or otherwise

babysit Student. In fact, this person is needed to address Student's known propensity to engage in dangerous behaviors that cause substantial risk of injury to Student and to others, to equip her with the tools and confidence she requires to travel safely to school on the bus, and to prevent a tragedy.

26. Student requires a campus-wide behavior intervention program to keep her safe in a school setting because she requires consistent and predictable responses from trained adults. It is contradictory to expect Student to safely ride the bus to Highland without implementing a behavior plan on the bus. There was no evidence that the bus drivers for Oakland are trained in behavior de-escalation or to implement a behavior reinforcement system. Additionally, while a preferred activity may work, it also may not. It may work one day but not the next. Student's responses to behavior interventions have been variable, and her behaviors explosive and unpredictable. Her inability to appreciate risk has increased the danger. Because of this, Oakland restricted Student from participating in field trips as it could not ensure her safety during off-campus outings.

27. In the event her highly preferred activity was ineffective, or some technology malfunctioned, or the activity was otherwise inaccessible to her, Oakland did not have a backup plan. This is especially concerning in light of the fact that Oakland was unable, even with the assistance of trained behavioral staff, to devise a strategy that would keep Student safe at Sequoia by the end of the 2016-2017 school year. Even when a full-time trained behavior aide supported Student at Sequoia, removed all academic demands, and identified and provided highly preferred rewards, Student's behaviors increased, creating a substantial risk of injury to herself and others such that she needed to be removed from her general education setting. Under these circumstances, it is unpersuasive to argue that Student is safe to travel on a bus to a new school without any behavioral support.

28. The August 2017 Expedited Decision determined that known risks, inherent to the Sequoia campus, or in combination with Student's propensities, must be addressed to provide an appropriate interim setting. Similarly, risks inherent to bus travel, in light of Student's known behaviors, must be addressed in transporting Student to her interim setting. Oakland did not prove that Student would be able to safely ride the bus to her new school without adult assistance, and failed to show how its transportation plan would address the physical safety risk driving Student's need for removal to an interim alternative setting. Simply hoping that the identified highly preferred activity will be enough to get Student safely to and from school is not acceptable as it is not a reasonably safe plan.

29. While the proposed setting of Highland accounts for the safety risks necessitating Student's removal, Oakland's proposed transportation plan does not. Even if Student were deemed to bear the burden of proof as to her need for a bus aide, based on the entirety of the evidentiary record, including the Factual Findings and Legal Conclusions of the August 2017 Expedited Hearing, Student has more than met this burden. Oakland will be required to provide Student a one-to-one aide during bus transportation as part of an interim alternative educational setting at Highland, for no more than 45 school days.

ORDER

1. Oakland's proposed placement of Highland Academy is an appropriate interim alternative educational setting for Student as long as Oakland complies with paragraph 3, below.

2. Oakland may change Student's placement to Highland Academy for not more than 45 school days, starting from Student's first day of attendance, so long as Highland remains willing to accept Student.

3. Oakland shall provide appropriate bus transportation that includes a seatbelt or similar safety restraint, and a one-to-one aide during transit to and from Student's interim alternative setting.

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 the sole issue decided.

RIGHT TO APPEAL

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

DATE: September 21, 2017

/s/

THERESA RAVANDI

Administrative Law Judge

Office of Administrative Hearings