

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

EL SEGUNDO UNIFIED SCHOOL
DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH Case No. 2017080191

EXPEDITED DECISION

El Segundo Unified School District filed an expedited due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on August 2, 2017, naming Parent on behalf of Student.

Administrative Law Judge June R. Lehrman heard this matter in El Segundo, California, on August 29, 30 and September 6, 2017.

Karen Gilyard and Ashley Turner, Attorneys at Law, represented District. Jack Plotkin, District's Director of Innovation and Student Support Services, attended on behalf of District.

Mother represented Student. Student attended the hearing during the morning of August 29, 2017 and the morning of August 30, 2017.

On September 6, 2017, the last day of hearing, the record was closed and the matter was submitted. The parties filed written closing arguments on September 13, 2017.

ISSUES¹

1. Is maintaining the current educational placement of Student at El Segundo High School substantially likely to result in injury to Student or others; and

2. If so, is the District's proposed placement at Sunrise nonpublic school operated by the HELP group and located in Culver City, California, as offered in Student's 2017 annual, triennial and transition individualized education placement, dated February 23, 2017, March 17, 2017, April 14, 2017 and May 4, 2017, an appropriate interim alternative educational setting for Student for not more than 45 days?

SUMMARY OF DECISION

District met its burden of persuasion that Student's continued placement at El Segundo High School is substantially likely to result in injury to herself or others, and that Sunrise nonpublic school operated by the HELP group and located in Culver City, California, is an appropriate interim alternative educational setting. Student's conduct during the 2016-17 school year was injurious to others and potentially injurious to herself, and District personnel were unable to manage it. District prevailed on all issues, and may place Student at Sunrise as an interim alternative educational setting for a period not exceeding 45 school days.

FACTUAL FINDINGS

1. Student is a 17-year-old girl with an eligibility category of intellectual

¹ The issues have been rephrased and reorganized for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

disability. She demonstrates significantly below average general cognitive functioning concurrently with deficits in adaptive behavior. Student sat quietly and patiently at the witness table during the time she was present at the hearing on the mornings of August 29 and 30, 2017. She played quietly with post-it notes and other items presented to her. Student appeared to the ALJ to stand approximately five feet tall and to weigh approximately 120 pounds.

2. Student entered El Segundo Unified School District in the 2015-16 school year from another school district and attended El Segundo High School.

3. Student's case carrier from the fall of 2015 until May 4, 2017 was special education teacher Maria St. Jacque, also known as Joy St. Jacque. Ms. St. Jacque teaches community-based instruction and functional skills. Student participated in these classes during the 2015-2016 and 2016-2017 school years.

4. El Segundo High School is an open campus located on a main street with numerous courtyards and entrance areas from outside, including onto streets and parking areas. The campus is not enclosed by fences. The campus contains multiple open areas, steps, stairways, elevators, and concrete platforms. Student has never eloped off campus. During the many incidents described below, staff has always prevented Student from exiting the campus grounds.

5. Student's most recently consented-to and implemented individualized education program at District was dated February 23, 2016. The February 23, 2016 IEP placement and services consisted of: a public high school with specialized academic instruction for three periods daily in a sheltered classroom setting (for life skills training in Ms. St. Jacque's classroom and for resource support); and three periods daily in general education; with one-to-one instructional aide support for "class periods" as well as "passing periods," and with behavior intervention of 2,025 minutes group and 825 minutes individual support services weekly. The evidence did not clarify the meaning of

"class periods" and "passing periods." Nor was it clear, if Student had one-to-one support for class and passing periods, what her 2,025 minutes of "group" behavior intervention would consist of; nor which proportions of the day were supported by one-to-one aide versus group aide services. For extended school year in the summer of 2016, Student received full-time daily one-to-one aide support.

6. Various persons at various times served as Student's aides. Aides Andrea Yob and Lisa Gladstone testified to behavioral incidents they were involved in. Ms. Gladstone was assigned to Student's classroom for the 2016-2017 school year, but it is unclear whether during the school year Ms. Gladstone served as a one-to-one or a "group" aide, nor how Student's needs were serviced by "group" aides. Instructional aides Julie Henneau, Heather Dargo and Ms. Falcone also were involved in behavioral incidents. No information clarified how these individuals serviced Student in what capacities or time frames, either as one-to-one or "group" aides. It is unclear which individuals were assigned to work with Student on which days or for which intervals, or why.

7. Prior to October 24, 2016, Student's services included behavior intervention plans and behavior support plans. These documents were not offered into evidence despite requests by the ALJ. Other documents indicate that there were apparently behavior plans dated February 20, 2015 and September 23, 2015. The February 20, 2015 plan appears to have been generated by Student's prior school district. It cannot be determined which, if any, of these behavioral support documents were implemented, nor what behaviors they targeted, goals they proposed or interventions they contained. Therefore for the period of time prior to October 24, 2016, it cannot be determined what District was obligated to provide in the way of a behavioral plan and services.

8. Crisis Prevention Intervention or "CPI" is a "program" or "model" of

responding to crisis. The CPI Institute is a national and international organization based in Wisconsin. The program presents a series of strategies for intervening when students or others are trying to injure themselves or others. CPI provides training and training materials. Hospitals, law enforcement, schools and other institutions may provide CPI training to their staff. CPI strategies involve noticing and observing behaviors that could escalate, and using techniques to de-escalate them. The environment must be assessed and a "decision-making matrix" used to assess the severity of the risk and the severity of the intervention. CPI techniques attempt to prevent crisis but, if necessary, provide guidance on how to lay hands on persons to protect them or others. CPI restraints or "holds" are used for safety and as a last resort when de-escalation and prevention techniques have failed. The CPI verbiage describes different types of holds and restraints. One such hold is a "child control position." There are also "team control positions" which are two-person holds with a third party monitor. There are also "seated control positions." CPI also utilizes methods to release grabs, by peeling hands away from the item that is being grabbed, isolating the weak spot of the grab, and distracting the person to release their hold.

9. CPI purports to provide education about the ethical and legal demands of responding to crisis in a variety of settings. No information was presented as to the CPI Institute's legal status, if any, as a purveyor of behavioral strategies, legal requirements, or ethical obligations to California schools.

10. School psychologist Jan Van Horn is a CPI "master trainer." She received CPI training through the Southwest Special Education Local Plan Area and through the Los Angeles County Office of Education. She was trained as a trainer during a weeklong program in 2008 or 2009. The weeklong training addressed the "philosophy" and the "ethical demands" of crisis intervention. It also trained her to build "crisis intervention teams" within District. Once a year, all District special education staff took a one-day CPI

refresher training from Ms. Van Horn. Certain staff members have taken more extensive two-day training in CPI provided by the Special Education Local Plan Area. Ms. Van Horn is also a behavior intervention case manager with extensive training and experience assessing behaviors, environmental factors, reinforcements, and preventive and reactive responsive strategies to address problem behaviors. As a BICM, Ms. Van Horn shares strategies with school personnel and assists IEP teams in identifying triggers, setting goals, and identifying replacement behaviors. As part of her duties, Ms. Van Horn attends IEP meetings, provides push in services in classrooms to model skills and provides guidance to aides, and might engage socially with students in classrooms.

11. Summer school 2016 is the start date for the evidence that was presented concerning numerous behavioral incidents involving Student.

12. During extended school year 2016 Ms. Gladstone was assigned to work with Student as Student's one-to-one aide. From June 28-30, 2016, Student was involved in three behavioral incidents in which she chased and threatened another girl. On one of these days, when the other girl was moved away by staff, Student grabbed a staff member's shirt and attempted to hit and kick. Staff was unable to redirect Student and they used a CPI hold to restrain her. On another one of these days, during physical education in the school quadrangle, Student approached the other girl aggressively, did not listen to redirection, and followed the other student while swinging her arms. When staff removed the other student and moved her away, Student started to run after them. The staff and the other student climbed two flights of stairs while Student chased them.

13. Several incidents occurred on August 23, 2016. This was at the beginning of the 2016-2017 school year. Over several school periods, Student grabbed a staff member's arm; Student grabbed the backpack of another student; Student was trying to hit others and was shouting "I kill you." Assistant Principal Dr. Logan Fox and Ms. St. Jacque intervened and tried verbal redirection. Dr. Fox tried to distract Student, asked

her what was wrong, directed her to use her iPad, and tried to re-focus Student to let go of the aide. When that failed, Dr. Fox removed, by peeling away, Student's hands from the aide's arms. Student then lunged at Dr. Fox with her fists swinging. Staff placed Student into a CPI hold. When released, Student attempted to strike Dr. Fox and Ms. St. Jacque. Special education teacher Andrew Kelley heard noise and a commotion during third period when he was alone in his classroom. He witnessed Student with Ms. St. Jacque and Dr. Fox. Student was hitting and kicking. Mr. Kelley went to assist. Student was in a CPI hold. Dr. Fox appeared tired and Mr. Kelley relieved her. The staff members moved with Student from the hallway into Mr. Kelley's classroom. Student then proceeded to hit and kick Ms. Van Horn, at which point Mr. Kelley put Student into another CPI hold. Student calmed down but then became re-agitated again, making further attempts to hit and kick. At another point during this incident, Student wandered around the classroom knocking items off shelves. Fourth period began, during which Mr. Kelley would normally have had students in his classroom, but he sent his students into a different classroom while Student remained in his room. At some point Mother was called and when she arrived she removed Student, bringing this incident to a close.

14. On August 24, 2016, after lunch period, Student lunged at and started chasing an aide with her fists. Dr. Fox and a school psychologist tried to redirect Student but then Student commenced to chasing the school psychologist and grabbed her shirt. A chase ensued with Student chasing the school psychologist up to the second floor. Dr. Fox sent a text message to others for assistance, including Mr. Kelley and Ms. Van Horn. Dr. Fox put Student into a CPI hold. Mother was called, bringing this incident to a close.

15. On August 25, 2016, Student was suspended for one day for the August 24 incident.

16. On August 31, 2016, Student lunged at and hit school nurse Louise Berg who was attending Student at the nurse's office. The attack came without warning. Staff

members arrived and separated Student from Ms. Berg. Thereafter Student grabbed Ms. Berg again, before Student was ultimately separated from her. Ms. Berg testified to this incident and appeared shaken and distressed by it.

17. From August 31 to September 6, 2016, Student was suspended for five days for the August 31 incident.

18. From August to October 2016, Mr. Kelley either witnessed or was involved in numerous other behavioral incidents involving Student, approximately one to two times weekly. Dr. Fox has been punched, slapped, kicked and pushed by Student and has been injured at least five times. Dr. Fox and/or Ms. St. Jacque corroborated incidents of aggression, elopement, grabbing, hitting, kicking, punching and the like, notated in the computer logs, occurring throughout the 2016-17 school year. Ms. Van Horn also confirmed her own involvement in more than 15-20 incidents during the 2016-2017 school year in which Student punched, kicked, grabbed, held, used threatening language, ran away, tried to bite, and had to be restrained using CPI holds.

19. The IEP team met on September 16, 2016. Ms. Van Horn discussed Student's grabbing and chasing behaviors, and the use of physical interventions and CPI strategies. She expressed the opinion that school might not be safe for Student since it was an open campus. There was discussion concerning the possible use of a nonpublic agency for aide support. It was agreed that Student should be assessed in the area of functional behavior.

20. Mother signed an assessment plan on September 19, 2016, consenting to a health, adaptive behavior, functional behavior assessment and a social emotional assessment.

21. On September 20, 2016, Dr. Fox was called to Student's classroom when Student was verbally threatening one of the aides, Julie Henneau. Student's hands were balled into fists and she was verbally threatening Ms. Henneau, saying she was going to

kill her. Dr. Fox attempted to redirect Student and asked her to use her iPad to say what was wrong. Student indicated that her stomach hurt. Dr. Fox offered Student a drink of water, and the situation de-escalated. Dr. Fox offered Student games and rewards. Mother had been called and when she arrived she told Student to be nice to Ms. Henneau and "no fists." At that point all seemed well, and the aide took Student to her next class which was Yearbook. However at Yearbook class, Student again threatened Ms. Henneau, saying "I kill you," and showed her fists again. Dr. Fox intervened and told Ms. Henneau to leave the area and blocked that door. However, Student then ran around the other way all around the building, looking for Ms. Henneau from the other side. Dr. Fox ran after Student. It was lunch hour. Many other students were milling about. Many staff members were running around the campus, looking for Student and trying to block her from exiting the campus onto the street. Ultimately, Student was apprehended and placed into a CPI hold; Mother arrived, bringing the incident to a close.

22. From September 21-26, 2016, Student was suspended for four days for the September 20 incident.

23. On September 26, 2016, a manifestation determination meeting was held to discuss the suspensions. The meeting team determined that Student's behavior was a manifestation of her disability, and that a functional behavior assessment should follow.

24. At the time of the manifestation determination meeting, Student had one-to-one instructional aide support for three general education periods of the day. The remainder of the day, Student had "group" instructional aide support.

25. The notes of the manifestation determination meeting evidence confusion concerning Student's behavioral support plan. As mentioned above, no evidence was presented as to what behavior intervention plan was then in effect. The meeting notes state that there was in existence a behavior plan, that was originally from Student's prior

school district, that had been “reviewed and revised 3 times since enrolling in District,” in October 2016 [sic], February 2016 and April 2016.” The notes state that the revisions “incorporate strategies to support [Student] in preparing for, processing and participating in transitions from different activities and settings within her school day. The team has incorporated visual supports, applications for her iPad and identified potentially powerful reinforcers and preferred activities to support ease of transition and behavioral momentum.” No testimony established that any District staff were familiar with the behavior plan or had ever implemented it.

26. The manifestation determination meeting members considered changing aide services. There was discussion of a non-public agency aide, and of increasing Student’s one-to-one services from three periods to six hours.

27. Ms. Van Horn and other team members recommended that the team consider alternate placements for Student for safety. Ms. Van Horn was concerned about Student potentially eloping off the open campus. Although a functional behavior assessment was soon to be conducted and revisions to the behavior plan were to ensue, District wished to consider an alternate placement during the process. Mother did not consent.

28. On or around September 26, 2016, the day of the manifestation determination meeting, Ms. Van Horn began drafting a Behavior Intervention Plan.

29. For the behavior assessment, Ms. Van Horn observed Student at school on nine days between September 16, 2016 and November 9, 2016.

30. While the behavior assessment was in progress, staff notated more than a dozen behavioral incidents in District’s computer log entries, the accuracy of which were corroborated by Dr. Fox, Ms. St. Jacque and Mr. Kelley. Overall, the log entries comprise the time period from November 2015 to April 2017, documenting dozens of behavioral

incidents involving Student's verbal and physical aggression.²

31. The log entry for October 18, 2016, references a "new IA, Ms. Fran."

32. While the behavior assessment was still in process, the IEP team met on October 24, 2016, to review the behavior plan that Ms. Van Horn had been drafting. The team reviewed and tweaked Ms. Van Horn's draft plan at the October 24, 2016, meeting, despite the fact that the behavior assessment had not yet been completed. Mother consented to implement the new behavior plan.

33. The updated behavior plan, dated September 26, 2016, and consented to at the October 24, 2016 IEP team meeting, is the first such document presented in the evidence in this case. It states that Student's target behaviors are that she "lays down on the floor. Refusing to get up and/or move to a different location when directed. She has pulled and grabbed a peer's clothing and reached to grab a peer's face. [She] hit peer's head and grabbed another peer during lunch. [She] chased and threatened a peer during ESY. [She] has grabbed 2 IA's, chased, hit, punched, kicked, elbowed, and tried to bite other staff. [She] has grabbed glasses and thrown objects." These target behaviors were determined by Ms Van Horn pursuant to her own observations and the reports of teachers.

34. The behavior plan noted 13 reported incidents of lying down on chairs or on the floor in hallways aisles and doorways; three incidents of grabbing peers, with durations of these events between five and 40 minutes, before either moving or being moved to an alternate location.

35. The behavior plan stated that the triggers or antecedents were transitions to non-preferred activities or settings; peer interaction; and possible internal triggers

² Other entries for the time period late April 2017 through June 2017 also exist, but these are deemed unreliable as uncorroborated double hearsay.

such as tiredness, etc., among others. It also mentioned as possible triggers an “alternate lunch location” and an “alternate period 6 activity.”

36. The behavior plan proposed preventive strategies, including changes or strategies needed by staff to remove the likelihood of the behavior occurring: brief operational review of task demands of transition; prior notice of transition and review of task demands (up to five minutes notice); visual cues and scheduled using iPad for prompting to transition; additional (as appropriate) time to process and independently process and comply with transition demands and expectations; extra time to transition between classes, leaving before bell rings; awareness and control of proximity by less preferred peers, when possible; reminders by staff (verbal and visual) of safe, appropriate behavior prior to transition; use of reminders provided by Mother; use of “take 10 minutes” as a prompt to prepare for next transition; use of applesauce to lighten her mood; and prompting to call mother with her cell phone.

37. The behavior plan stated that the function of the behavior was to avoid less preferred activity or settings; to express dislike of peers; internal events; and to get a desired activity.

38. Positive replacement behaviors were noted as “by February 23, 2017, given prior review and notice (visual cue coupled with verbal prompt), [Student] will safely (remain standing/walking and /or sit in an appropriate place to rest) engage in ability-appropriate transition tasks such as going to and from classes and other relevant settings within an agreed upon amount of time, with no more than 3 verbal and visual prompts.”

39. The behavior plan proposed “instructional strategies to teach the replacement behaviors/skills to the student: provide a visual cuing schedule for daily transitions, coupled with brief operational verbal review of task demands. Elicit nonverbal as well as verbal indications of willingness to comply from Student as an

indication of understanding and/or need for clarification. Use reminders provided by mother.”

40. The behavior plan proposed the following reinforcement procedures to establish replacement behaviors: a checklist for compliance to be used for daily transition between all settings for at least three months, to develop and generalize behavioral momentum and pattern; positive social and verbal feedback regarding successful transition and acknowledgment of challenge the transition posed to Student; and the provision of rewards for behavior in the form of praise, high fives, chips, cookies, goldfish, and lemonade.

41. The behavior plan proposed the following reinforcement procedures to maintain the replacement behaviors: continued positive social and verbal feedback regarding successful transition and acknowledgement of the challenge that the transition posed to Student, coupled with daily review of transition behaviors with Student.

42. The behavior plan proposed the following reinforcement procedures to generalize the replacement behaviors: positive social and verbal feedback regarding successful transition and acknowledgement of challenge the transition posed to Student.

43. None of the staff members who testified, Dr. Fox, Ms. St Jacques, Mr. Kelley, the instructional aides, or Ms. Van Horn, were asked about the implementation of any preventive strategies, instructional strategies or reinforcement procedures according to the behavior plan.

44. The behavior plan proposed the following reactive strategies to use when the target behavior occurred: prompts with reminders recommended by Mother; redirect Student to her iPad to talk; prompt her to use her new cellphone to call Mother; prompt or redirect her attention to a visual schedule, and state the first step of the

transition demand; remind her of expectations for safe behavior in school and in the community, and use an "if-then" contingency, i.e. if Student could not follow safe directions at school then she would not be able to go to the next community/off campus outing; provide time and a location for Student to process task demands; allow her to remain in her current location if safety or disruption allowed, or remove her to the Health Office as an alternate location; provide a wheelchair for moving Student from one location to another following continued refusal to move independently, but without lifting or physically maneuvering her onto her feet or into the chair; if she persisted in remaining in a position that posed a danger to herself or others, provide a safe and approved physical intervention such as a team control hold and /or a transport intervention as directed by CPI trained and supervisory staff.

45. For behaviors requiring a crisis intervention response such as a restraint, the behavior plan directed staff to follow California Education Code procedure related to managing unpredictable, spontaneous behavior that poses a clear and present danger of serious physical harm to Student or others, that cannot be immediately prevented by a response less restrictive than the temporary application of a technique used to contain the behavior.

46. In addition to finalizing the behavior plan, the IEP team offered non-public agency aide services, and Mother consented, at the October 24, 2016 IEP meeting. There was to be a period of overlap of District aides before the non-public agency replaced them. The non-public agency was named STAR. The STAR aide would provide services for a maximum of 385 minutes per day, which was the entire school day, however a District aide would cover the STAR aide's lunch break.

47. The STAR aide assigned to Student was named Jocasta (also called Cassy). After a period of transition, she was assigned to Student by November 1, 2016.

48. The October 24, 2016 IEP amendment to Student's last agreed upon

February 23, 2016 IEP, with the institution of this behavior plan and non-public agency aide services, constituted Student's program for the duration of the time period at issue in this case. No further proposed changes to Student's program were consented to by Mother.

49. On October 25, 2016, another incident occurred in Ms. St. Jacques's classroom involving Cassy. Student had grabbed Cassy. Dr. Fox was called and peeled Student's hands off Cassy. Student then proceeded to hit and kick Dr. Fox.

50. On November 17, 2016, Ms. Van Horn generated a report summarizing her functional behavior assessment of Student. The behavior addressed in the behavior assessment was chasing, grabbing, hitting, kicking, and biting. The behavior assessment indicated that Student had been redirected and offered alternative preferred items of interest but that this strategy did not work—Student would, despite the redirection and alternatives, persist in following, grabbing and holding onto the clothing and bodies of others. When blocked from pursuit, and/or when her targets were moved away from her, Student would continue to pursue the person. When grabbing, if Student's hands were disengaged from the grab, Student would hit, kick and persist in grabbing. When a "child control" or "team hold" position was used as a CPI intervention, Student would persist in grabbing, kicking, biting and hitting. After a CPI hold was released, Student would continue to follow and try to hit or kick the staff who had released the hold. The behavior was noted to occur two to three times per day. The behavior assessment documented more than 40 incidents since August 23, 2016.

51. The behavior assessment recommended one-to-one aide support and supervision in all school settings by an aide from a non-public agency with data collection and monitoring. These were recommended to occur in the school setting or in an "alternative school setting with specified environmental supports." The behavior assessment incorporated a document entitled "Environmental Analysis Summary of

Observations.” Ms. Van Horn generated this document from the same observations she made for the behavior assessment. The Environmental Analysis Summary of Observations made “suggested changes in environment” to add physical boundaries. Ms. Van Horn recommended removing Student to a closed environment with physical boundaries to remove access to hazards such as stairways, streets, driveways, hallways and the like.

52. The IEP team reviewed the behavior assessment and the Environmental Analysis Summary of Observations at an IEP meeting on November 16, 2016. STAR personnel attended the IEP team meeting and shared information concerning their attempts to implement the October behavior plan. There had been a decrease in Student’s aggressive behaviors but an increase in eloping behaviors. Behaviors were occurring two to 12 times per day. The STAR personnel described that the antecedents to the behaviors were people leaving or entering the environment, difficulty communicating wants and needs, reprimands, transition to less preferred activities, and possible health or internal triggers. The STAR personnel described the challenges of managing Student’s behaviors and ensuring her safety and the safety of staff. Student’s environment and transitions had been modified for her safety and were more restrictive, but if safety could not be secured then the last resort was the use of CPI holds. The STAR personnel were concerned about elopement from every doorway, and thus Student was being placed into a sheltered classroom during periods five and six. District team members raised concerns about the level of restrictions that were being placed on Student to ensure safety, such as restricting her placement to a sheltered classroom for more of the day.

53. According to former school Principal Jaime Mancilla, in the fall and winter of 2016 District tried to address behavior during transitions by starting Student’s school day without transitions, such that Student’s first period was cancelled and she remained

in Ms. St. Jacques's classroom. District also did not send Student to sixth period art class when it appeared she could not transition to art class without incident. Dale Lofgren, Executive Director of Pupil Services, was concerned about how restrictive Student's placement and services were becoming in order to ensure her safety and the safety of others. He recalled that the STAR personnel wanted to restrict Student to one room. It was recommended that physical education period was a danger and that Student should remain in Ms. St. Jacques room during sixth and seventh periods although no classes were occurring there during those periods, so that Student would be working in isolation.

54. Various members of the team recommended looking at alternative school settings, given the level of restrictions already being placed onto Student at the High School. These were restricting her access to socialization, and were still failing to ensure her safety. Mother did not agree with the District team members' assessment of the situation.

55. Another IEP team meeting convened on December 9, 2016, to review progress since the institution of STAR aide services. Ms. St. Jacques shared that Student had climbed cement platforms, lifted a desk and pulled on people's clothing. Her classroom had been evacuated 16 times so far during the 2016-17 school year because of Student's behaviors in the classroom. Mr. Mancilla described the staff's attempts to prevent elopement. Mr. Mancilla felt that the High School was exhausting its resources and could not ensure Student's safety or provide for her to access her education. At this IEP, District offered a nonpublic school placement. Mother did not agree.

56. Dr. Fox, Ms. St. Jacques, and/or Mr. Mancilla corroborated other incidents of aggression, elopement, grabbing, hitting, kicking, punching and the like, notated in the computer logs, occurring on January 3, 6, 9, 12, 17, 18, 19, 31, February 2, 7, 8, 14, 15, 16, 17, 21, 22, 24, 27, 28, March 1, 7, 13, 14, 21, 22, 23, 28, 29, 31, April 13, 17, 18, 20,

21, 24 and 15, 2017.

57. In February 2017, Student's triennial IEP was opened and then continued until March 17, 2017. In the spring of 2017, assessments were conducted for Student's triennial IEP. Ms. St. Jacque administered academic assessments and generated an assessment report dated March 15, 2017. School Psychologist Ms. Van Horn generated a psychoeducational assessment report dated March 15, 2017. The team reviewed the psychoeducational and academic assessments at a continued triennial IEP team meeting on March 17, 2017.

58. On March 28, 2017, four entries in the school computer log, corroborated by Ms. St. Jacque, reflected Student's noncompliance toward Cassy, her STAR aide, followed by verbal threats "I kill you" during fourth period beginning around 11 a.m. Student approached Ms. St. Jacque aggressively. Ms. St. Jacque blocked Student with a chair while Student struck at her. A struggle ensued and Student punched Ms. St. Jacque. Cassy returned to separate Student from Ms. St. Jacque but Student punched Ms. St. Jacque four more times. Student then slapped Cassy repeatedly in her face, stomach, shoulder, and back. Other staff members arrived to intervene. The incident lasted until around 12:24 p.m.

59. On April 21, 2017, Student reached toward Ms. St. Jacque and was blocked by Cassy. The class was evacuated to the next room. Cassy blocked Student at the door. Cassy and Student struggled, with Student kicking and hitting Cassy. Dr. Fox arrived and Student yelled "I kill you." The incident lasted approximately one hour. Other behavioral incidents through April 25, 2017, are notated in District's computer log showing attempts to elope with Cassy trying to redirect and then blocking Student.³

³ Computer entries of later incidents on April 26, 25, May 1, 2, 3, 8, 9, 10, 15, 16, 22, 23, 25 and June 21, 2017 are deemed uncorroborated double hearsay and unreliable.

60. On or around May 4, 2017, Ms. St. Jacque was removed as Student's case carrier on medical advice of Ms. St. Jacque's doctor. She was suffering dread and anxiety as a result of Student's behaviors.

61. Student's triennial IEP was completed on May 5, 2017. District offered Student placement in a nonpublic school. Mother did not consent.

62. The completed triennial IEP offered Student placement at Sunrise nonpublic school operated by the Help Group. District offered a draft behavior intervention plan targeting the target behaviors of noncompliance, verbal aggression, eloping, and physical aggression. Ms. Van Horn generated two draft goals for the draft behavior plan. The first stated: "by February 23, 2018, given prior review and notice (visual cue coupled with verbal prompt) Student will safely remain standing/walking and or sit in an appropriate place to rest, engage in ability-appropriate transition tasks such as going to and from the restroom or helper tasks, and other relevant settings with an agreed upon amount of time, with no more than 3 verbal and visual prompts." The second draft goal stated: "by February 23, 2018, Student would demonstrate increased tolerance to environmental exposure, such as going to the hallway or different classrooms and buildings, 100% of the time without tantrums eloping grabbing etc., across two consecutive weeks."

63. Ms. Van Horn was familiar with the Sunrise nonpublic school operated by the Help Group through her duties as a school psychologist with responsibilities for students who were placed there. She has observed District students in Sunrise placements, and has been there to observe and consult, attend IEP team meetings, and perform assessments. Sunrise is a program designed to provide supports to persons with adaptive and developmental delays. It provides functional programs in personal care and management, community-based instruction, functional math and functional reading. Sunrise has a behavior management system that uses positive behavioral

interventions, including redirection, setting limits and using reinforcers based on a student's preferences. It uses a schedule with visual prompts. It utilizes a reward system. It has a "cool down" room. The environment is designed to maximize opportunity to participate, in a developmentally appropriate way appropriate to a student's chronological age. Sunrise is located in a complex that is closed with gates; people are let in by using an intercom from the parking lot. Sunrise has a separate building and classrooms on the complex, which opens out onto a courtyard that is fenced and walled off from streets. CPI strategies are also used by Sunrise, but because of the closed campus the environmental factors differ from an open campus. Students can more safely be allowed to run away without physical intervention and be monitored by staff from a distance because of the low risk of elopement onto streets and injury.

64. Ms. Van Horn's opinion is that Sunrise nonpublic school operated by the Help Group is an appropriate temporary placement for Student. Student could be kept safe with less physical intervention or restraint.

65. Student attended extended school year during the summer of 2017. No reports of bad behavior were established by the evidence presented. Student began her 12th grade year at El Segundo High School on or around August 29, 2017. No reports of bad behavior were made during the first week of school.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK FOR STUDENT DISCIPLINE UNDER THE IDEA⁴

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20

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

U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006) et seq.; Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

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

3. A special education student's educational placement is that unique combination of facilities, personnel, location or equipment necessary to provide instructional services to the student. (Cal. Code Regs., tit. 5, § 3042, subd. (a).) A "change

of placement” is a fundamental change in, or elimination of, a basic element of a student’s educational program. A change of placement is defined as (a) a removal for more than 10 consecutive school days, or (b) a series of removals that cumulate to more than 10 school days and constitute a pattern based on listed factors. (34 C.F.R. § 300.536(a).)

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

5. 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).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C); 34 C.F.R. § 300.511(e); Ed. Code, 56505(l).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) Here, District is the filing party and has the burden of persuasion on all issues.

ISSUES 1 AND 2: INTERIM ALTERNATIVE EDUCATIONAL SETTING - LIKELY TO INJURE SELF OR OTHERS

6. District contends that maintaining the current educational placement of

Student at El Segundo High School is substantially likely to result in injury to Student or others. District seeks an order that Student may be placed in an appropriate interim alternative educational setting for not more than 45 school days. Mother contends that District has not established that Student is substantially likely to injure herself or injure others.

7. A local educational agency may request a due process hearing to authorize a change of placement if the district "believes that maintaining the current placement of the child is substantially likely to result in injury to the child or to others...." (20 U.S.C. § 1415(k)(3)(A); 34 C.F.R. § 300.532(a).) If it is determined following a hearing that a special education student's behavior in his or her current placement is substantially likely to result in injury to the student or to others, the student may be placed in an appropriate interim alternative educational setting for not more than 45 school days. (20 U.S.C. § 1415(k)(3)(B)(ii)(II); 34 C.F.R. § 300.532(b)(2)(ii).) 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* (2013) Cal.Offc.Admin.Hrngs. Case No. 2013100168.) Behaviors that resulted in, or were substantially likely to result in, injury to children and district personnel include kicking and 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* (2013) Cal.Offc.Admin.Hrngs. Case No. 2013090966.) Eloping into a parking lot, bolting from the classroom, climbing onto the top of 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 student. (*Id.*)

8. The United States Department of Education has refused to further define the term "substantially likely to result in injury to the child or others, saying that "[a]ccording to the IDEA, hearing officers have the authority under 34 CFR 300.532 to exercise their judgments after considering all factors and the body of evidence presented in an individual case when determining whether a child's behavior is substantially likely to result in injury to the child or others." 71 Fed. Reg. 46,722 (2006).⁵

9. The Office of Special Education Programs has stated: "The hearing officer may move the child to an alternative educational setting if the public agency demonstrates by evidence that it is more than a preponderance of the evidence that maintaining the child in the child's current placement is substantially likely to result in injury to the child or others. The hearing officer must consider the appropriateness of the child's placement, whether the school district has made reasonable efforts to minimize the risk of harm in the child's current placement, including the use of supplementary aids and services, and determine that the interim alternative educational setting meets the requirements of [the IDEA]." (OSEP Memorandum 97-7, 26 IDELR 981, (OSEP 1997).)

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

⁵ The Department distinguished the specifically-defined phrase "serious bodily injury," as used in 34 CFR 300.530 (g), which, it said "has a definitive meaning." It concluded that the meaning of "substantially likely to result in injury to the child or others" is left to the judgment of the hearing officer, and no further clarification is needed.

procedures may be repeated after the initial 45 days if the district “believes that returning the child to the original placement is substantially likely to result in injury to the child or to others.” (34 C.F.R. § 300.532(b)(3).)

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

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

ANALYSIS AND CONCLUSIONS

13. District established that Student is substantially likely to injure herself or others. District also established that Sunrise nonpublic school operated by the Help Group is an appropriate interim alternative educational setting for 45 days from the date of this Decision.

14. This Decision does not address, and should not be interpreted to find, that District’s offer of Sunrise for the rest of the 2017-18 school year constitutes a free appropriate public education. The Decision is solely to ensure Student’s safety and the safety of other students and staff, for 45 school days. Because El Segundo High School is an open campus, and Student showed a tendency to attempt to elope during the 2016-17 school year, and District interventions failed, her safety cannot be assured there.

15. The risk of harm was abundantly clear during 2016-17. It is less clear that

Student is *currently* substantially likely to injure herself or others. The reliable log entries of behavioral incidents ceased on April 25, 2017. Thereafter, Student attended extended school year during the summer of 2017, and no reports of bad behavior were established by the evidence presented. Recently, during the hearing on the mornings of August 29-30, 2017, Student sat quietly and patiently, exhibiting no agitation. Student began her 12th grade year at El Segundo High School on or around August 29, 2017. No reports of bad behavior were made during the first week of school.

16. Nevertheless, it is safer for Student's own well-being and the well-being of other students and staff, to infer that Student's very frequent unmanageable behavioral incidents, that were well-documented throughout the previous school year, have not materially improved and cannot be expected to materially improve without a change to the interventions she has been receiving.

17. After October 2016, a behavior plan was put into place and consented to by Mother. It appears that District attempted to implement the October 2016 behavior plan's reactive strategies (prompts, redirection, reminders, and CPI holds), but that its efforts to thereby manage Student's behaviors were not successful.

18. On November 17, 2016, Ms. Van Horn generated her functional behavior assessment summary. She had observed Student on September 16 and 27, on October 4, 7, 12, 18, 19, and on November 7 and 9, 2016. The behavior assessment indicated that Student was redirected and offered alternative preferred items of interest but that this strategy did not work—Student would, despite the redirection and alternatives, persist in following, grabbing and holding onto the clothing and bodies of others. When blocked from pursuit and or her targets were moved away from her, Student would continue to pursue the target person. When grabbing, if Student's hands were disengaged from the grab, Student would hit, kick and persist in grabbing. When a "child control" or "team hold" position was used as a CPI intervention, Student would

persist in grabbing, kicking, biting, and hitting. After a CPI hold was released, Student would continue to follow and try to hit or kick the staff who had released the hold. The behavior was noted to occur two to three times per day. More than 40 incidents since August 23, 2016, were documented in the functional behavior assessment. Thus, District attempted to implement at least the reactive strategies set forth in the October 2016 BIP, but was not successful.

19. STAR personnel shared information at the IEP meeting on November 16, 2016. STAR informed the IEP team concerning their attempts to manage Student's behaviors and that there had been a decrease in aggressive behaviors, but an increase in eloping behaviors. Behaviors were occurring two to 12 times per day. STAR personnel described the challenges of managing Student's behaviors and ensuring her safety and the safety of staff. Student's environment and transitions had been modified for her safety and were more restrictive, but if safety could not be secured then the last resort was the use of CPI holds. STAR personnel were concerned about elopement from every doorway, and thus Student was being placed into a sheltered classroom for more of the day. Thus, STAR attempted to implement at least some of the strategies set forth in the October 2016 behavior plan, but was not successful.

20. Thus, it was abundantly clear that during the 2016-17 school year, District was unable to address Student's behavioral needs. She bit, kicked, grabbed, eloped, chased and threatened. There was ample proof that she was, during the 2016-17 school year, substantially likely to injure herself or others.

21. It is also clear that Sunrise nonpublic school operated by the Help Group is an appropriate alternative interim educational placement for not more than 45 days. As expertly testified to by Ms. Van Horn, the Sunrise program provides supports to persons with adaptive and developmental delays. It provides functional programs in personal care and management, community-based instruction, functional math and functional

reading. Sunrise's behavior management system (positive behavioral interventions, redirection, limits, reinforcers, schedule with visual prompts, reward system, and "cool down" room) are all appropriate interventions for Student for this interim 45 day period. Unlike El Segundo High School, the Sunrise closed physical environment can maximize Student's opportunities to participate in the curriculum with less risk of harm to herself or others.

22. In conclusion, District has established that maintaining the current educational placement of Student at El Segundo High School is substantially likely to result in injury to Student or others; and that District's proposed placement at Sunrise nonpublic school operated by the HELP group and located in Culver City, California, as offered in Student's 2017 annual, triennial and transition individualized education placement, dated February 23, 2017, March 17, 2017, April 14, 2017 and May 4, 2017, is an appropriate interim alternative educational setting for Student for not more than 45 days.

REMEDIES

23. An ALJ may order a change in placement to an appropriate interim alternative educational setting for not more than 45 school days if the ALJ determines that student's current placement is substantially likely to result in injury to student or to others. (20 U.S.C. § 1415(k)(3)(B)(ii)(II); 34 C.F.R. § 300.532(b)(2)(ii)). When a student is removed from student's current placement, the student shall 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).) The interim alternative educational setting must also enable the child to receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications that are designed to address the behavior violation so that it does not recur. (34 C.F.R. § 300.530(d)(1)(ii).)

24. District may change Student's placement to an appropriate interim alternative educational setting at Sunrise nonpublic school operated by the Help Group and located in Culver City, California for not more than 45 school days, starting from the first day of attendance.

ORDER

District may place Student at Sunrise nonpublic school operated by the HELP group and located in Culver City, California for not more than 45 school days, starting from the first day of attendance at Sunrise School.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. District is the prevailing party on all issues.

RIGHT TO APPEAL

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

DATED: September 20, 2017

/s/

JUNE R. LEHRMAN

Administrative Law Judge
Office of Administrative Hearings