

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2023010468

FRANKLIN-MCKINLEY SCHOOL DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

EXPEDITED DECISION

March 1, 2023

On January 19, 2023, the Office of Administrative Hearings, called OAH, received an expedited due process hearing request from Franklin-McKinley School District, called Franklin-McKinley, naming Parents on behalf of Student. Administrative Law Judge Alexa Hohensee heard this expedited matter by videoconference on February 7, 8, and 9, 2023.

Attorney Carlos Gonzalez represented Franklin-McKinley. Mariam Galvarin, the Director of Special Services, attended all hearing days on Franklin-McKinley's behalf. Student's Mother represented Student on February 7, 2023. Student's Father appeared

for the morning session of hearing on all days and represented Student on February 8 and 9, 2023. Attorney Cathy Holmes, who stated that she was a court-appointed attorney for Student in a separate non-OAH matter, was not permitted to participate in the expedited due process hearing over Father's objection.

OAH granted the parties' request to file written closing briefs no later than February 16, 2023. OAH closed the record and submitted the matter on February 16, 2023.

EXPEDITED ISSUES

1. Is returning Student's placement to Robert F. Kennedy Elementary School, called Kennedy Elementary, substantially likely to result in injury to Student and others?
2. Is the interim alternative educational setting proposed by Franklin-McKinley on December 1, 2022, appropriate, and may Franklin-McKinley extend Student's placement in that interim alternative educational setting for not more than 45 school days?

At the time of the expedited hearing, Franklin-McKinley no longer sought a change of placement to an interim alternative educational setting because it had already changed Student's placement to an interim alternative educational setting on December 5, 2022. Instead, it sought a 45-day extension of the interim educational setting already in place. A party who requests a due process hearing may not raise issues at the hearing that were not raised in the request unless the opposing party agrees otherwise. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *County of San Diego v. California Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1465.) Here, Franklin-McKinley presented

evidence and testimony seeking to extend a current interim alternative educational setting. Mother did not object, and Father implicitly agreed to the issue change by addressing Student's current placement during testimony, warranting modification of the issues.

JURISDICTION

This hearing was held under the Individuals with Disabilities Education Act, called IDEA, its regulations, and California statutes and regulations. (20 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 to ensure:

- all children with disabilities have available to them a free appropriate public education, called a FAPE, that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living, and
- the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, assessment, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, and 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents, and has the burden of proof by a preponderance of the evidence. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 57-58, 62 [126 S.Ct. 528,

163 L.Ed.2d 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) Here, Franklin-McKinley requested the hearing and bears the burden of proof. The factual statements in this Decision constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

Student was eight years old and in third grade at the time of hearing. Student resided with Mother in Franklin-McKinley's geographic boundaries at all relevant times. Student was eligible for special education under the primary eligibility of other health impairment due to a diagnosis of disruptive mood dysregulation disorder and a secondary eligibility of speech or language impairment.

ISSUE 1: IS RETURNING STUDENT'S PLACEMENT TO KENNEDY ELEMENTARY SUBSTANTIALLY LIKELY TO RESULT IN INJURY TO STUDENT OR OTHERS?

Franklin-McKinley contends Student's aggressive and violent behaviors in violation of its code of student conduct increased in intensity and frequency in Fall 2022 to the point that it is substantially likely that Student, his peers, or staff will suffer an injury if Student is returned to Kennedy Elementary. Franklin-McKinley seeks to extend Student's current home placement on a virtual independent study program as an interim alternative educational setting for 45 additional school days.

Student contends his behaviors do not warrant placement in an interim alternative educational setting, and that Student should be returned to Kennedy Elementary with additional supports.

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. (20 U.S.C. §1412(a)(1)(A); Ed. Code, § 48915.5, subd. (a).) If a special education student violates a code of student conduct, school personnel may remove the student from his or her educational placement without providing services for a period not to exceed 10 days per school year, provided typical children are not provided services during disciplinary removal. (20 U.S.C. § 1415(k)(1)(B); 34 C.F.R. § 300.530(b)(1) & (d)(3).)

The law also provides that school personnel may unilaterally remove a student to an interim alternative educational setting for not more than 45 school days, regardless of whether the student's behavior is determined to be a manifestation of the student's disability, under three limited circumstances. (20 U.S.C. § 1415(k)(1)(G); 34 C.F.R. § 300.530(g).) Those circumstances include bringing a weapon to school, possessing or using illegal drugs at school, or inflicting serious bodily injury on another person at school. (*Ibid.*)

Otherwise, a school district may request a due process hearing to authorize a change of placement to an interim alternative educational setting for not more than 45 school days for disciplinary reasons 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).) This issue requires an expedited hearing that must be conducted within 20 school days of the date the 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).)

This Decision does not decide whether the December 5, 2022 change of Student's placement to virtual independent study as an interim alternative educational setting

complied with the IDEA, its implementing regulations or related California special education laws. Any reference to Student's placement in virtual independent study as an interim alternative educational setting is for contextual purposes only.

BACKGROUND

Student attended second grade during the 2021-2022 school year in Evergreen School District. Evergreen completed a comprehensive assessment of Student in November 2021. Student's cognitive abilities and academic achievement were average. Student's adaptive skills were generally average, with low scores in socialization. Student's teachers rated Student as having behavior problems, including

- hyperactivity,
- aggression,
- conduct problems,
- anxiety, and
- depression.

Only Student's teachers provided input on Student's social emotional functioning and behavior, as Parents did not return rating scales in those areas.

At the time of the 2021 assessment, and at hearing, Parents were separated or divorced. Parents shared Student's educational rights, but had minimal contact with each other, and often disagreed on Student's educational needs.

Evergreen developed an individualized education program, called an IEP, based on the comprehensive assessment on November 17, 2021. That IEP placed Student in a general education classroom. Evergreen offered Student 30 minutes per day of

specialized academic instruction for four days per week in a separate classroom. There, a special education teacher taught Student organizational skills and helped him complete his schoolwork. Evergreen also offered speech services for 30 minutes twice per week in a small group outside of class, and 30 minutes per week in the classroom, to address articulation errors and teach Student critical thinking and social language. Evergreen further offered one hour per day of behavior intervention services to help Student develop problem solving skills. The IEP also included a behavior intervention plan for Student to complete classwork without prompting from an adult, and not leave the classroom without permission. Mother consented to the November 17, 2021 IEP, but Father did not.

Evergreen held an IEP team meeting on March 31, 2022, to add a behavior goal to the November 17, 2021 IEP. The goal was for Student to learn problem solving skills to address Student's behaviors when he was frustrated, including ripping up assignments, leaving the classroom or recess area, and kicking and throwing items in class. Both Mother and Father consented to the November 17, 2021 IEP, as amended on March 31, 2022.

Mother moved and enrolled Student in Franklin-McKinley for the 2022-2023 school year. Mother did not inform Franklin-McKinley that Student was eligible for special education and related services and had an IEP. Franklin-McKinley requested Student's comprehensive educational file from Evergreen, but did not receive the file until mid-September 2022, almost one month later.

Franklin-McKinley placed Student in Satwant Bath's third grade classroom at Kennedy Elementary. Teacher Bath had 24 years of elementary school teaching

experience, with the last five years teaching third grade. He had a calm and professional demeanor at hearing. He had good recall, answered all questions thoroughly, and was a very credible and persuasive witness.

Bath's expressions and tones at hearing showed concern and genuine distress at the events that occurred in his classroom. Soon after enrollment at Franklin-McKinley, Student began displaying anger and aggression in the classroom. Student's behaviors included:

- refusal to do classwork,
- suddenly becoming upset without apparent reason,
- pushing things off of his desk and other students' desks,
- throwing items around the classroom,
- ripping other students' work off their desks or the walls and destroying them,
- running out of his classroom and banging and kicking on doors and windows of other classrooms.

From the beginning of the 2022-2023 school year, Kennedy Elementary's school principal, Mariana Alvarez, had to respond to classroom and playground disruptions caused by Student's inappropriate behaviors almost daily.

Two weeks after the school year started, Franklin-McKinley staff was informed that Student had an IEP. They obtained an electronic copy of the November 17, 2021 IEP, as amended on March 31, 2022, from Evergreen and implemented it immediately. Staff saw that the behavior intervention plan addressed only work completion and elopement, and felt that Student needed more behavior supports because of Student's

conduct during the first couple weeks in Bath's class. Therefore, in addition to the IEP and behavior intervention plan from Evergreen, Franklin-McKinley implemented additional social emotional and behavior supports available to all general education students, called Tier 1 and Tier 2 supports. Tier 1 supports include on-demand access to counseling with a school site social worker or speaking with a trusted adult. Tier 2 supports include access to support groups, and extra adults in the classroom or on the playground to support the teacher and school staff.

Tier 3 supports were for special education students and required parental consent. In September and October 2022, Principal Alvarez referred Student to school-based counseling and social skills groups several times, but Parents declined each referral for those services.

Over the first semester as Student's behaviors escalated in the classroom and on the playground, Franklin-McKinley sent extra adults to Kennedy Elementary to manage the disruption caused by Student's behaviors. As Student's behaviors increased in intensity and frequency, all Kennedy Elementary staff were required to spend time in Bath's classroom or on the playground when they did not have other responsibilities, to maintain the safety of students.

STUDENT'S BEHAVIOR INCIDENTS RESULTING IN THE FIRST MANIFESTATION DETERMINATION REVIEW

The incidents reported in this Decision were violations of Franklin-McKinley's student code of conduct, and each resulted in a behavior report. Principal Alvarez or an administrative designee called both Parents about each reported incident. Principal Alvarez either spoke to Parents, left a voicemail message, sent an email message, or sent

a message on Parent Square about the incident. Parent Square is a confidential message website Franklin-McKinley used to communicate with students' parents. As the semester progressed, Principal Alvarez perceived that Father was becoming hostile during phone conversations and often accused school staff of being inadequately trained. Father would engage in monologues and not let Principal Alvarez speak. Principal Alvarez subsequently communicated with Father exclusively through Parent Square. Principal Alvarez called and asked Mother to take Student home when he could not be calmed down. As Student's behaviors increased, Kennedy Elementary suspended Student for his disruptive behaviors.

On August 26, 2022, Student was on the playground and jumped on a sixth grader's back. He then pushed a first grader to the ground and held her down. Student claimed he was saving the first grader from bullying by the sixth grader. Principal Alvarez counseled Student on the appropriate way to handle such a situation.

On August 29, 2022, while Student made a rude gesture to a student he disliked, Student tripped on a rock. Student dropped a tray he was carrying, blamed the other student, and punched him in the face. Principal Alvarez took restorative action by having Student apologize to the other student and having the two discuss what happened.

On August 31, 2022, Student got mad because he lost a toy, and in a rage took the phone of a nearby student and smashed it. He then slapped the materials in that student's hands upwards so the materials hit that student in the face. Student then ran around hitting other students. Principal Alvarez used de-escalation techniques that included calling Parents in real time to speak with Student. These techniques calmed Student, but later that same day, Student became frustrated while working with his

behavior interventionist and broke a class laptop computer. Student also went outside without permission and urinated on the side of a school building. Principal Alvarez referred Student for a social skills group and school-based counseling services provided by school staff or outside counselors, but Parents declined.

On September 6, 2022, Student used inappropriate language. When a classmate attempted to tell Teacher Bath, Student grabbed the classmate and held his hand over the student's mouth. Student's behavior upset and frightened the classmate. Principal Alvarez counseled Student after this incident.

On September 8, 2022, Student jumped on a sixth grader and caused him to fall. This was the same sixth grader Student jumped on two weeks earlier. Principal Alvarez restated and retaught playground expectations to Student.

On September 12, 2022, Student became upset in the school library and ripped up his book. He ran out of the library, threw rocks inside the library, and then ran into the library again and pushed everything off of the librarian's desk. Principal Alvarez asked Student to apologize to the librarian, which escalated Student's behavior. Principal Alvarez sent Student to calm down in the Wellness Room in the school social worker's office. The Wellness Room was where the social worker used mindfulness techniques to calm students when classroom techniques were ineffective.

On September 13, 2022, Student became upset when he was not allowed to visit non-school related websites on a classroom laptop computer. He threw the computer and a classmate's water bottle across the room. He then ran outside and threw a recycle bin into a classroom full of students. Principal Alvarez suspended Student for the remainder of the day. Although most students spent a same-day suspension in another

classroom doing their classwork, Student could not be placed in another classroom because he would hit the other students or staff members. Therefore, school staff asked Mother to pick him up.

On September 21, 2022, Student was jealous that a favorite classroom assistant was working in the pre-kindergarten classroom, and not Teacher Bath's classroom. Student ran from the playground into the pre-kindergarten classroom. When Teacher Bath responded and escorted Student out of the classroom, Student threw landscaping bark into the pre-kindergarten classroom, at the pre-kindergarten staff, and at Teacher Bath.

Teacher Bath had difficulty de-escalating Student and simultaneously keeping his other students calm. Principal Alvarez eventually de-escalated Student.

However, later on the playground, the pre-kindergarten teacher approached Student and asked him to help clean up the bark Student threw in front of her classroom. Student erupted and struck the teacher's hand with a pool noodle he held, and then ran over and hit another student on the back. When the other student protested, Student crumpled all of the other student's classwork and threw a ball at a school staff member.

Both Principal Alvarez and the school's behavior specialist spoke with Student. Principal Alvarez assigned additional adult support to Teacher Bath's classroom and the playground to keep students safe. Principal Alvarez made another referral for Student to receive Tier 3 services such as a social skills group and counseling services, which Parents declined. She suspended Student for one day.

On September 26, 2022, Student brought a raw chicken foot to school, and chased a classmate around the classroom with it, which upset and frightened the classmate and other students. Student then ran out of the classroom and pounded on windows and kicked doors of other classrooms. Principal Alvarez responded to teacher reports of the disruption. At lunch, Student hit his little brother to get the attention of the classroom assistant assigned to the brother's class. Principal Alvarez counseled Student on classroom expectations.

On September 27, 2022, Student threatened to stab a classmate with a sharpened pencil, but later claimed he was trying to play with her. Principal Alvarez suspended Student for three days.

On October 5, 2022, Student was denied access during class to a non-school-related online program for making music. In response, Student threw his laptop computer across the classroom and pushed over a desk. When informed that he would get a suspension, Student threw blocks, ran out of the classroom, and blocked the classroom door so nobody could leave. Principal Alvarez, the school social worker, and the behavior specialist all spoke with Student. Principal Alvarez suspended Student for one-day.

By October 2022, Principal Alvarez realized that restorative justice attempts could be additional triggers for Student's explosive behavior and caused additional incidents. Student had no demands placed on him in the Wellness Center, and he was generally calm there. Principal Alvarez began sending Student to the Wellness Center after most incidents for the safety of Kennedy Elementary's students and staff.

By this time, Principal Alvarez and Kennedy Elementary staff realized that implementing the November 2021 behavior intervention plan, using Kennedy

Elementary's restorative justice policies, putting Tier 1 and 2 supports in place, and assigning additional staff to the classroom and playground, were ineffective to manage or decrease Student's behavior and outbursts. On October 5, 2022, Franklin-McKinley contacted Parents to schedule an IEP team meeting on October 19, 2022, to review Student's IEP and address Student's behaviors.

On October 7, 2022, Student threw two pencil boxes at another student, and while Principal Alvarez was calling Mother, Student hit Alvarez's hand hard enough to knock her phone to the ground. Student ran along the classrooms and threw other students' lunch bags, water bottles, and milk cartons. He then ran into his classroom and threw a marker at Principal Alvarez when she followed. He shoved a student into the doorframe when running out of the classroom and threw other students' backpacks. Principal Alvarez spoke with Parents, made another referral to counseling services, added additional teacher support, and spoke to Student with the school social worker and behavior specialist. Student eventually calmed down.

On October 18, 2022, Student engaged in a series of aggressive actions. He pushed a first grader off of a climbing wall on the playground. When he ran from adults, he punched and pinched any students in his way. Student ran to the restroom and held the door shut, locking a kindergarten student in the restroom. He then ran to a line of first graders returning to their classroom and started shoving them. Principal Alvarez sent Student to the Wellness Room to calm down.

Principal Alvarez testified with good recall and was a very credible witness. She was a teacher for almost 10 years, and a school administrator for seven years, with five years as Kennedy Elementary's school principal. She testified convincingly that Student

punched very hard for a third grader. All of Franklin-McKinley's witnesses testified consistently and convincingly that Student's actions created a significant amount of fear among students and adults on campus.

Student's IEP team convened on October 19, 2022. Parents attended. Mother expressed concern about Student's outbursts at school and requested a one-to-one aide to accompany Student throughout the school day. Father also requested a one-to-one aide because he questioned the training of school staff to handle Student's outbursts.

The behavior specialist requested a functional behavior assessment of Student, to take data and determine the triggers and functions of Student's behaviors. She explained to the team that information from the functional behavior assessment would help the IEP team develop appropriate behavior intervention strategies and offer appropriate services and supports to address Student's behaviors.

Neither Mother nor Father consented to the functional behavior assessment. Mother wanted a comprehensive assessment, which Franklin-McKinley's IEP team members explained was not offered because Student had been comprehensively assessed less than a year earlier by Evergreen. Father informed the IEP team that Student was being assessed by court order in another matter. Father would only consent to a functional behavior assessment if the court-appointed assessor conducted both the home and school assessments.

The Franklin-McKinley IEP team members asked Father to have the court-appointed assessor contact the school. The court-appointed assessor did not contact the school, and a court-ordered assessment had not been completed by the time of the expedited due process hearing.

The October 19, 2022 IEP offered Student essentially the same placement and services as the November 17, 2021 IEP, as amended on March 31, 2022, with a written note that new behavior goals and services would be determined after the functional behavior assessment. Franklin-McKinley gave Parents an assessment plan for a functional behavior assessment with a copy of the IEP. Neither Parent consented to the IEP, or to the assessment plan.

On October 20, 2022, Student broke a ruler and Teacher Bath sent him to the Wellness Room, where Student threw items around and tried to spit on another child. The school social worker successfully calmed Student with mindfulness activities. However, half an hour later, Student pushed another student so hard that she sprained her arm. Principal Alvarez sent Student to the Wellness Center again to calm down.

On October 21, 2022, Student left the classroom and when Teacher Bath asked Student to return, he picked up a handful of wet dirt from the ground and threw it at Teacher Bath, barely missing him. Student returned to the classroom and destroyed another student's papers and desk. During lunch, he punched another student in the head, and later pushed a different student and hurt her shoulder. Principal Alvarez suspended Student for three days. As of October 12, 2022, Student had been suspended for a total of nine days during the 2022-2023 school year.

On Student's return to school on October 25, 2022, Kennedy Elementary staff told Student that he could not join his brother's pre-kindergarten classroom. Student proceeded to flip over tables set outside for a pre-kindergarten activity. Several adults intervened and calmed Student. Then Student ran to a group of first graders, picked one up from behind and swung the first grader back and forth in anger, terrifying the first grader and other children. Adults intervened and calmed Student again. However, later during lunch, Student chased two students and when another student went to report the incident, Student slammed him against a wall and punched him in the face. The other student broke free, but Student grabbed him and punched him again.

Principal Alvarez responded, and Student called her a rude name. Principal Alvarez called Mother to take Student home for the day. However, while waiting near the parking lot, Student walked up to Principal Alvarez and hit her in the back. When she did not respond immediately, he hit her in the back again. When Mother arrived, Student threw an unidentified item at Principal Alvarez. Principal Alvarez suspended Student for five days. Because Student's suspensions exceeded 10 school days, Franklin-McKinley contacted Parents over the next few days to schedule a manifestation determination meeting within 10 days of the October 25, 2022 suspension.

On November 3, 2022, Student kicked the door of a fourth grade classroom and hit the students as they returned to the class. At lunchtime, he rummaged through third grade backpacks, and threw a classmate's water bottle and broke it. Later in the day, Student went to the pre-kindergarten class and hit his brother. After each of these incidents on November 3, 2022, Principal Alvarez sent Student to the Wellness Center to calm down.

FIRST MANIFESTATION DETERMINATION MEETING

A manifestation determination review is a process by which members of Student's IEP team determine if a student's actions are a manifestation of his or her disability or due to the school district's failure to implement the student's IEP. The appropriateness of the manifestation determination review is not an issue in this expedited matter and is included in this Decision for context only.

On November 4, 2022, Teacher Bath, Principal Alvarez, Director of Special Services Galvarin, the school psychologist, and the behavior specialist met for the manifestation determination review and a subsequent IEP team meeting. The manifestation determination review was conducted without Parents, who indicated they could not arrange to participate on 10 days' notice. Student's court-appointed attorney attended the manifestation determination review and the IEP team meeting. The manifestation determination team reviewed Student's disciplinary incidents and determined Student's behaviors were a manifestation of his disability, and not due to Franklin-McKinley's failure to implement Student's IEP.

Franklin-McKinley staff members were frustrated that Parents would not consent to a functional behavior assessment so that the triggers and functions of Student's behavior could be tracked and identified, and a new behavior plan with supports could be developed. The manifestation determination team recommend a functional behavior assessment of Student.

Franklin-McKinley conducted an IEP team meeting after the manifestation determination review. The IEP team reviewed Student's academic progress and determined Student was no longer keeping up with grade-level standards because

his behavior interfered with access to the curriculum. Director Galvarin recommended that Student be placed in a non-public school with a therapeutic program to help Student build coping skills. The Franklin-McKinley IEP team members documented this offer in a November 4, 2022 IEP amendment to the October 19, 2022 IEP. The details of the proposed non-public school program were not included in the November 4, 2022 IEP amendment. Franklin-McKinley sent Parents copies of the manifestation determination review documents and the November 4, 2022 IEP amendment that recommended a non-public school placement. Parents did not consent to the November 4, 2022 IEP amendment to the October 19, 2022 IEP.

CONTINUED BEHAVIORS AND SUSPENSIONS

On November 4, 2022, the same day as the manifestation determination review and IEP team meeting, Student was very upset. He took several students' backpacks. When one child tried to take his backpack back, Student tugged on the bag hard enough to throw the student to the ground. Then, Student ran around the campus and when a classmate went into the classroom to hide, Student followed her and hit her with a pool noodle. He then pushed everything off a table in the classroom and took another student's jacket and put it in a bathroom toilet. Principal Alvarez suspended Student for three days.

On November 8, 2022, Student returned to school from his suspension. All students were in the cafeteria for lunch and watching a movie because it was raining. Student sat calmly at first, then suddenly stood up and threw a piece of pizza. He walked on stage to the movie screen, punched it, and threw a milk carton. He then walked past Principal Alvarez and slammed into her. Alvarez suspended Student for two days.

On Student's return from suspension on November 10, 2022, he ran out of the classroom and blocked the door of a girls' restroom with nine third and fourth graders inside. The girls were very upset, cried, and pushed against the door together to escape. Once the girls got out, Student chased them. He pushed one of the girls so hard into a water fountain that she hurt her ribs. Principal Alvarez suspended Student for five days. Franklin-McKinley contacted Parents to schedule another manifestation determination review.

On his return from suspension on November 16, 2022, Student punched another student. Principal Alvarez sent Student to the Wellness Center to calm down.

Even with the Tier 1 and Tier 2 supports, including up to eight additional adults present on campus with the school social worker, psychologist, and behavior specialist, Principal Alvarez could not keep the students at Kennedy Elementary safe from Student. Kennedy Elementary's staff needed help to understand and manage Student's disruptive and unmanageable behaviors. However, Parents would not consent to a functional behavior assessment, counseling services, or placing Student in a social skills group. Parents did not sign the October 19, 2022 IEP or the November 4, 2022 IEP amendment that offered placement in a therapeutic non-public school.

There was fear throughout the entire Kennedy Elementary community, including students, their parents, and staff, that Student would continue to terrorize and harm others. All general education interventions had failed. School staff regularly sent Student to the Wellness Center after behavioral incidents to keep the other students safe.

On November 29, 2022, Student ran into his brother's pre-kindergarten classroom and took away his toys. Student refused to leave the pre-kindergarten classroom, and after he was escorted out by Principal Alvarez, he kicked and banged on the classroom door. Principal Alvarez sent Student to the Wellness Center.

On November 30, 2022, Student was quietly working and suddenly threw another student's water bottle. Student then pulled all of the bins of science kits down from the shelves and ran around the classroom. Principal Alvarez sent Student to the Wellness Center.

On December 1, 2022, Student kicked and pounded on the doors and windows of a fourth grade classroom. Later, he left his classroom and rummaged through other students' backpacks until he found some chips and took them. Principal Alvarez sent Student to the Wellness Center.

At hearing, Franklin-McKinley submitted contemporaneous disciplinary reports and suspension notices, substantiated by the testimony of Principal Alvarez, in support of Franklin-McKinley's request to prevent Student's return to Kennedy Elementary. The testimony of Teacher Bath, Principal Alvarez, Director Galvarin, the school program specialist, and school psychologist were consistent in describing Student's behavior and the fear and trauma to students and staff at Kennedy Elementary. Each witness was familiar with Student, had personal knowledge of Student and his conduct, and was experienced in their area of vocation. Each witness was deliberate and careful in their testimony and expressed an authentic belief that Student was a danger to students and adults at Kennedy Elementary.

Witness testimony persuasively showed that Student had threatened, intimidated, and physically harmed school staff and students. Extra adults on campus had minimized the harm to other students, but injuries still occurred. School staff and students were afraid of Student and concerned that he would cause greater harm to others if he remained at Kennedy Elementary. Student's presence at Kennedy Elementary posed a substantial risk of injury to others.

Father conceded at hearing that Student was out of control but believed that additional adult support in the form of a one-on-one aide with Student at all times would prevent the type of behaviors that had resulted in disciplinary suspensions. In Father's opinion, Kennedy Elementary's staff were not sufficiently trained to help his child. Father explained that he was waiting for a court-appointed assessment of Student and would not consent to the school's proposed functional behavior assessment. Father and Franklin-McKinley were at an impasse, during which time Student's behaviors became more intense and frequently involved targeted aggression and violence towards peers and adults. Mother did not testify.

Franklin-McKinley met its burden of proving that Student's behavior, including punching, hitting, confining, and intimidating other students, coupled with his assaults on staff, injured others and posed a substantial risk of future injury to others.

ISSUE 2: IS THE INTERIM ALTERNATIVE EDUCATIONAL SETTING PROPOSED BY FRANKLIN-MCKINLEY ON DECEMBER 1, 2022, APPROPRIATE, AND MAY FRANKLIN-MCKINLEY MAINTAIN STUDENT IN THAT INTERIM ALTERNATIVE EDUCATIONAL SETTING FOR NOT MORE THAN 45 SCHOOL DAYS?

Franklin-McKinley contends that its proposed extension of Student's current placement in virtual independent study is appropriate and should be ordered for an additional 45 school days, rather than returning Student to Kennedy Elementary. Student contends that virtual independent study is not appropriate, and that he should be returned to the public school setting.

If the administrative law judge 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 administrative law judge may order a change in placement of a child with a disability 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) (2006).) Once a child is placed in an interim alternative educational setting, the school district can seek an extension of that placement for up to 45 school days through a due process hearing if it believes that returning the student to the original placement is substantially likely to result in injury to the student or others. (34 C.F.R. § 300.532(b)(3).)

The IEP team is responsible for determining a student's interim alternative educational setting, including the location and the services the student will receive. (34 C.F.R. § 300.531.) In the alternative setting, the student must be able to participate in the general education curriculum and progress towards meeting the student's IEP goals. (20 U.S.C. § 1415(k)(D)(i); 34 C.F.R. § 300.530(d)(1).)

The school district is not required to provide exactly the same services in exactly the same setting as the student was receiving prior to removal, but must include services necessary to enable the student to continue to participate in the curriculum and progress towards goals. (*Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities*, 71 Fed.Reg. 46716 (Aug. 14, 2006) [rules and regs. for 34 C.F.R. § 300.530(d)].) The decision on the degree to which the student's program must be replicated in an interim alternative educational setting is a decision that must be based on the individual needs of the child. (*Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA's Disciplinary Provisions* (U.S. Dept. of Educ, Office of Special Education Programs, Jul. 19, 2022).)

Students placed in an interim alternative educational setting are entitled to receive, as appropriate, a functional behavior 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).)

SECOND MANIFESTATION DETERMINATION REVIEW

On December 1, 2022, Franklin-McKinley held another manifestation determination review and subsequent IEP team meeting. The same persons from the November 4, 2022 manifestation review and IEP team meeting were present. Parents did not respond to staff's attempt to reach them to schedule the meetings and did not attend. Student's court-appointed attorney attended. The appropriateness of the manifestation determination review is not an issue in this expedited matter and is referenced in this Decision for context only.

The school psychologist presented a report of Student's disciplinary incidents for the 2022-2023 school year to the manifestation determination team and opined that Student's conduct had a substantial relationship to his disruptive mood dysregulation disorder. The manifestation determination team determined Student's behaviors were a manifestation of his disability, and not due to Franklin-McKinley's failure to implement Student's IEP. The team again recommended a functional behavior assessment to determine the function of Student's behaviors. That information would enable the IEP team to develop updated behavior goals, update Student's behavior intervention plan, and offer appropriate behavioral supports so that the behavior violations did not recur.

After the December 1, 2022 manifestation determination review, Franklin-McKinley held an IEP team meeting and changed Student's offer of FAPE. The placement offer was characterized as an interim alternative educational setting, and consisted of virtual independent study for 45 days. Franklin-McKinley offered Student access to a general education teacher daily, with virtual specialized instruction for 30 minutes, four days per week. They also offered 30 minutes of virtual speech services per week, and 30 minutes per week of behavior consultation. The proposed IEP amendment did not include a rationale for the placement change, or the reduction in speech and behavior services.

On December 1, 2022, Franklin-McKinley sent Parents a notice of action, stating that as of December 5, 2022, it was implementing a disciplinary removal to virtual instruction as an interim alternative educational setting. Franklin-McKinley gave Student's pattern of physical aggression towards students and adults as the reason for the change of placement. Franklin-McKinley implemented the disciplinary change of

placement without parental consent or a Decision from OAH. Franklin-McKinley did not permit Student to return to the Kennedy Elementary campus on or after December 5, 2022.

Director Galvarin was the sole witness to testify concerning the appropriateness of virtual independent study for Student. She held a doctorate in educational leadership, and had general education, special education, and administrative credentials. Director Galvarin had been in her current position for over five years, overseeing Franklin-McKinley's special education programs.

Director Galvarin expressed frustration that Parents would not allow the school to provide counseling services and would not consent to a functional behavior assessment to evaluate and revise Student's behavioral needs and supports. She stated that she could not contact any non-public schools to find an appropriate therapeutic program for Student unless both parents signed releases of information for those schools.

Director Galvarin opined that virtual independent study was appropriate for Student because the only time he had done well in school was with virtual instruction during the COVID-19 pandemic school closures in the 2019-2020, and 2020-2021 school years. No records of Student's academic performance during virtual instruction, either during the pandemic school closures or from Student's placement on virtual independent study, were offered into evidence to corroborate Galvarin's opinion. Student was in kindergarten in March 2020, when schools closed for the COVID-19 pandemic, and Director Galvarin's unsupported opinion that a program for a kindergartener would work for a third grader in crisis was not persuasive.

Student's placement in virtual independent study is not an appropriate interim alternative educational setting for several reasons.

First, the program components are unclear. The proposed December 1, 2022 IEP amendment offering virtual independent study did not include details as to what constituted virtual access to a general education teacher or specialized academic instruction, or how Student would participate in the general education curriculum. Franklin-McKinley did not establish how virtual independent study would enable Student to make progress on his IEP goals. Franklin-McKinley did not offer any evidence by anyone with personal knowledge of Student's virtual program at hearing.

Second, Franklin-McKinley dramatically reduced Student's services from those in his November 17, 2021 IEP, as amended on March 31, 2022, and in Franklin-McKinley's October 19, 2022 IEP offer. The October 19, 2022 IEP team noted that Student was falling behind in the general education curriculum and his behaviors were interfering with learning. In October 2022, Student's behaviors had escalated in intensity and frequency. Yet, Student's speech services to work on the social language important to interacting with his peers and adults were inexplicably reduced from 90 minutes per week to 30 minutes per week.

Similarly, Student's 300 minutes per week of behavior intervention were reduced to 30 minutes per week of behavior consultation. Franklin-McKinley did not present evidence concerning Student's transition to a virtual program. It could reasonably be anticipated that Student would require behavior support to cope with a change in educational setting. Franklin-McKinley did not present evidence that Student did not need continued behavior support for at least one hour per day while accessing the

general education curriculum virtually, or that such support could be eliminated or replaced with 30 minutes per week of consultation, and still allow Student to receive educational benefit.

Franklin-McKinley's proposed interim alternative educational setting does not need to exactly replicate Student's placement prior to disciplinary placement, but it does need to meet the minimum standard of enabling Student to participate in the general education curriculum and progress towards meeting his IEP goals. Here, Director Galvarin's reference to Student's unestablished success in online kindergarten classes of unknown composition falls far short of proving Franklin-McKinley's proposed program meets the standard for an interim alternative educational setting.

In addition, at hearing Teacher Bath, Principal Alvarez, the school psychologist, the school behaviorist, and Director Galvarin, all opined that Student required a therapeutic non-public school to appropriately address his behaviors. No evidence was produced that the proposed placement in virtual independent study provides the therapeutic setting Student needs to learn the skills to ensure that Student's aggressive and violent behavior does not recur. Franklin-McKinley did not demonstrate how virtual independent study, with reduced services and behavioral support of 30 consultation minutes, addressed any of Student's educational needs, let alone enabled Student to progress on his IEP goals.

Franklin-McKinley asserted that because Parents refused to sign releases to share information with non-public schools, it could not go forward with the process of finding a specific non-public school for Student. That is incorrect. Federal law allows educational agencies to send redacted copies of a student's educational records without parental consent after removal of all personally identifiable information.

(34 C.F.R. § 99.31(b)(1)(2012).) The November 4, 2022 IEP team determined that Student required a therapeutic non-public school setting. Director Galvarin opined that there were at least five non-public schools in Santa Clara County with therapeutic settings that could meet Student's needs. Therefore, it is difficult to discern why Franklin-McKinley seeks an interim alternative educational setting that does not meet Student's educational needs.

More disturbingly, Franklin-McKinley proposes an interim alternative educational setting that places the entire burden of overseeing Student's educational program on Mother, without her consent.

A FAPE means special education and related services that are available to an eligible child that meets state educational standards at no charge to the parent or guardian. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17 (2006).) A FAPE requires school districts to provide appropriate educational services at no cost to parents. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17 (2006).) For that reason, FAPE cannot be conditioned on parental participation as a component of an IEP or to meet the local educational agency's responsibility to provide a student with a FAPE.

A student who is suspended or expelled is entitled to a FAPE, which for an interim alternative educational setting requires special education and related services to enable the student to participate in the general education curriculum and progress toward meeting the goals in the student's IEP. (34 C.F.R. §§ 300.101(a) and 300.530(d)(i).)

Here, Franklin-McKinley proposes to make Mother responsible for Student throughout the school day. Mother must assist Student, a young third-grader with a disability, to participate in virtual education throughout the day. This is a tremendous burden, and it is inappropriate for Franklin-McKinley to shift the duty of educating

Student to Mother. The interim alternative educational setting proposed by Franklin-McKinley, imposed on December 5, 2022, violates the IDEA requirement that a FAPE be provided at no cost to the parent.

In addition, the in-home interim alternative educational setting Franklin-McKinley proposed does not comply with California law.

At the start of the COVID-19 pandemic in March 2020, California issued shelter-in-place mandates. School districts used virtual in-home educational programs to instruct students, both in general education and special education. Those mandates expired in 2021. California compulsory education laws require children between the ages of six and 18 years to attend school, with limited exceptions that do not apply here. (Ed. Code, § 48200.)

Franklin-McKinley characterizes its interim alternative educational setting as virtual independent study, but it is not an independent study program. California has many requirements for an independent study program, such as an independent study agreement specifying in detail the available materials, resources, and supports. (Ed. Code, § 51747, subd. (g).) Most importantly, parental consent is required for a student under the age of 18 to participate in independent study, as the parent must sign the independent study agreement before the commencement of independent study. (Ed. Code, § 51747(g)(9)(A).) Here, there was no evidence that either parent signed an independent study agreement with Franklin-McKinley.

Education in the home must typically be requested by the parent and requires parental consent. Student instruction in the home or hospital during illness or recovery requires the parent to provide medical information and documentation. (Ed. Code, §§ 48206.3, et seq; 48208, subd. (a).) Homeschooling has extensive

documentary requirements, including the parent's consent to be the primary teacher. (See Ed. Code, § 33190; *Schooling at Home*, California Dept. of Educ., <https://www.cde.ca.gov/sp/ps/homeschool.asp>.) Franklin-McKinley made no showing that either Parent requested, or consented to, Student's current interim alternative educational setting, regardless of whether it was appropriate or not.

Franklin-McKinley did not meet its burden of proving that the proposed interim alternative educational setting is appropriate. The proposed program of virtual independent study does not enable Student to participate in the general education curriculum or progress towards meeting his IEP goals. Therefore, Franklin-McKinley may not extend Student's current placement in virtual independent study as an interim alternative educational setting. Student must be returned to his previous placement at Kennedy Elementary.

As discussed under the Remedies section below, Franklin-McKinley will have five school days from the issuance of this Decision to put additional supports in place on the Kennedy Elementary campus to ensure the safety of its students and adults.

CONCLUSIONS AND PREVAILING PARTY

As required by 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.

ISSUE 1:

Returning Student's placement to Kennedy Elementary is substantially likely to result in injury to Student and others.

Franklin-McKinley prevailed on Issue 1.

ISSUE 2:

The interim alternative educational setting proposed by Franklin-McKinley on December 1, 2022, is not appropriate. Franklin-McKinley may not place or extend Student's placement in the interim alternative educational setting of virtual independent study.

Student prevailed on Issue 2.

REMEDIES

Under federal and state law, courts have broad equitable powers to award such relief as determined to be appropriate. (20 U.S.C. § 1415(i)(1)(C)(iii); Ed. Code, § 56505, subd. (g); see *School Committee of the Town of Burlington, Massachusetts v. Dept. of Education* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385].) This broad equitable authority extends to an ALJ who hears and decides a special education administrative due process matter. (*Forest Grove School Dist. v. T.A.* (2009) 557 U.S. 230, 244, n. 11 [129 S.Ct. 2484, 174 L.Ed.2d 168].) It also extends to due process matters involving disciplinary placements. (20 U.S.C. §§ 1415(i)(1)(C)(iii) and (i)(1)(A).) Specific to disciplinary change of placements, a hearing officer is expressly authorized to return a child with a disability to the placement from which the child was removed. (20 U.S.C. § 1415(k)(B)(I).)

Here, although Franklin-McKinley proved that Student's presence at Kennedy Elementary was substantially likely to result in injury to Student or others, the current placement in virtual independent study is not an appropriate interim alternative educational setting. Student must be returned to Kennedy Elementary. However, this Decision allows Franklin-McKinley to implement additional school safeguards to maintain the safety of Student and other students and adults.

Parents have requested a one-to-one behavior aide to support Student, and Franklin-McKinley has declined to offer such a support without a functional behavior assessment to guide effective behavior intervention. This Decision directs Franklin-McKinley to provide Student with a one-to-one behavior aide throughout the entire school day, in the classroom, on the playground, and anywhere on campus. Franklin-McKinley must also provide behavioral supervision by a Board Certified Behavior Analyst to direct and support the one-to-one behavior aide for at least one hour per week until such time as there is consent to an offer of FAPE by Franklin-McKinley, or OAH or another court of competent jurisdiction orders otherwise. Franklin-McKinley may provide more than one hour per week of behavior supervision if recommended by the Board Certified Behavior Analyst.

A full-day one-to-one behavior aide with behavioral supervision is a Tier 3 support that Franklin-McKinley has not previously offered or provided to Student. Although these services cannot meet all Student's behavioral needs until those needs are identified by a functional behavior assessment and a behavior intervention plan is developed from the assessment results, these services may prove sufficient to keep the

Kennedy Elementary community safe pending the assessment and consented-to or court-ordered offer of FAPE. This Decision does not in any way limit the other measures that Franklin-McKinley may take to keep its Kennedy Elementary students and adults safe.

At hearing, Franklin-McKinley's witnesses testified compellingly and convincingly that without a functional behavior assessment, Franklin-McKinley's behavior interventions are unlikely to be effective in addressing the underlying function of Student's behavior, or in teaching him appropriate coping skills. In fact, the behavior intervention services and behavior intervention plan in the November 17, 2021 IEP, proved insufficient to decrease Student's maladaptive behaviors, or to teach him the skills necessary to act appropriately when upset. Father unreasonably sought to have someone who may not have had the necessary qualifications and knowledge of school-based interventions conduct the functional behavior assessment. Student offered no proof that the court-appointed assessor Father preferred was qualified to conduct a functional behavior assessment. Accordingly, Franklin-McKinley is ordered to have a qualified behaviorist conduct a school-based functional behavior assessment of Student after his return to Kennedy Elementary. Parents' consent is not required.

Franklin-McKinley is also ordered to hold an IEP team meeting to review the functional behavior assessment results and offer Student an IEP developed with consideration to those results. This order does not in any way limit the need for parental consent to implement the IEP, or Parents' right to bring procedural or substantive due process claims in disagreement with the functional behavior assessment or the resulting IEP.

ORDER

1. Franklin-McKinley must return Student to his pre-disciplinary placement at Kennedy Elementary within five school days of issuance of this Decision.
2. Upon Student's return to Kennedy Elementary, Franklin-McKinney must provide Student with a one-to-one behavior aide throughout the entire school day, in the classroom, on the playground, and anywhere on campus. Franklin-McKinley must also provide supervision of Student's behavior aide for no less than one hour per week by a Board Certified Behavior Analyst. Franklin-McKinley must provide this aide and supervision until such time as there is a consented-to offer of FAPE by Franklin-McKinley, or until OAH or another court of competent jurisdiction orders otherwise.
3. Franklin-McKinley must conduct a functional behavior assessment of Student upon his return to Kennedy Elementary, which may be without the consent of Mother or Father, and hold an IEP team meeting to review that assessment within 60 calendar days of issuance of this Decision.
4. Franklin-McKinley must contact Parents within 24 hours of the date this Decision is served on Franklin-McKinley to inform Parents of Student's return to Kennedy Elementary. Franklin-McKinley staff must, at the least, inform each Parent of the date of Student's return to Kennedy Elementary by telephone call or voicemail message, email, U.S. mail, certified mail with proof of signature of receipt, and Parent Square message.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56505, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within 90 days of receipt.

/s/

Alexa J. Hohensee

Administrative Law Judge

Office of Administrative Hearings