

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2023040764

BERKELEY UNIFIED SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

EXPEDITED DECISION

May 30, 2023

On April 21, 2023, Berkeley Unified School District filed a due process hearing request with the Office of Administrative Hearings, called OAH, naming Parent on behalf of Student. The complaint included an expedited claim and OAH set the matter for an expedited hearing.

Administrative Law Judge Kara Hatfield heard this matter by videoconference on May 16, 17, and 18, 2023.

Attorneys Lenore Silverman and Ankita Thakkar represented Berkeley Unified School District, called Berkeley. Heather Lena Sweeny, Special Education Program Supervisor,

attended on behalf of Berkeley on the morning of May 16, 2023. Shawn Mansager, Director of Special Education, attended on behalf of Berkeley on the afternoon of May 16, 2023, and on May 17 and 18, 2023.

Parent represented Student, but on the first day of hearing stated she did not want to participate in the expedited hearing. OAH made multiple and repeated efforts to contact Parent after Parent left the videoconference, without success. OAH provided Parent written and verbal information daily regarding how to access the videoconference and participate in the expedited due process hearing. Parent did not respond to OAH's efforts to contact her and include her in the expedited due process hearing. Student did not attend the hearing.

The record was closed, and the matter was submitted on May 18, 2023.

ISSUE

Does Student's behavior pose significant risk of injury to himself or others such that Berkeley can remove Student to an interim alternative educational setting for not more than 45 school days?

JURISDICTION

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

subsequent citations to the Code of Federal Regulations are to the 2006 version, unless otherwise indicated. The main purposes of the Individuals with Disabilities Education Act, referred to as the IDEA, are to ensure:

- 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 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).)

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 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 certain circumstances. (20 U.S.C. § 1415(k)(1)(G); 34 C.F.R. § 300.530(g).)

A school district 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).) This issue requires an expedited hearing that 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).)

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, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) Here, Berkeley filed the complaint and has 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 13 years old and in seventh grade at the time of the hearing. Student resided with Parent within Berkeley’s geographic boundaries at all relevant times. Berkeley initially found Student eligible for special education in January 2017, under the eligibility category other health impairment, and created an individualized education program, called an IEP. In February 2020, after a three-year-review assessment, Student’s eligibility was changed to primary emotional disturbance, and secondary other health impairment. In spring 2021, Student’s placement was changed from a Berkeley public school to a nonpublic school.

A nonpublic school is a private, nonsectarian school certified by the California Department of Education, called CDE. (Ed. Code, §§ 56034, 56366.1.) A nonpublic

school must meet state standards to be certified by the CDE. (Ed. Code, § 56034.) Nonpublic schools typically serve only special education students who could not be appropriately educated in the public school environment.

Student began attending James Baldwin Academy, a nonpublic school, in April 2021. In fall 2022, Student's IEP placement was still nonpublic school, and Student was enrolled at James Baldwin Academy, but he did not attend school after August 2022. Parent no longer wanted Student to attend a nonpublic school.

Parent wanted Student to attend school from home through independent study. The IEP team did not agree to offer Student placement in an independent study program from home through his IEP because that placement would not appropriately address his needs for special education and related services.

At an IEP team meeting on November 17, 2022, Berkeley recommended and offered placement in a residential facility. A residential treatment center for children is a place where children with serious emotional, behavioral, or mental health problems live temporarily outside of their homes and communities to receive intensive and supervised care in a structured environment. Parent did not consent to placement in a residential facility.

At the end of November 2022, Parent exited Student from special education. Parent stated her intention was to enroll Student in Berkeley's independent study, home-based program. Parent did not do that. She enrolled Student at Longfellow Middle School on January 11, 2023, as a general education student. At the same time, Parent requested Berkeley assess Student for eligibility for special education and related services.

On January 17, 2023, Student's first day at school, Berkeley provided Parent with an assessment plan, Parent signed consent, and Berkeley began the assessment process. Berkeley assessed Student and convened an IEP team meeting on February 16, 2023. The IEP team determined Student was eligible for special education under the categories of emotional disturbance, related to Student's medical diagnosis of post-traumatic stress disorder, and other health impairment, based on Student's medical diagnosis of attention deficit hyperactivity disorder. Berkeley recommended and offered placement in a residential facility, and Parent did not consent. Student continued to attend Longfellow Middle School.

ISSUE: IS STUDENT'S BEHAVIOR SUBSTANTIALLY LIKELY TO RESULT IN INJURY TO STUDENT OR OTHERS?

Berkeley contends Student engaged in a pattern of threats, intimidation, harassment, and elopement at his current school placement that placed himself, students, and school staff at substantial risk of injury. Berkeley seeks permission to change Student's placement from his current placement at Longfellow Middle School, a Berkeley public school, to an interim alternative educational setting for not more than 45 school days, without Parent's consent.

Student did not present a position. A preponderance of the evidence established Parent did not want to agree to send Student to another educational setting and wanted a judge to make the decision about what type of educational setting Student required.

When considering whether "maintaining the current placement of the child is substantially likely to result in injury to the child or to others," the Eighth Circuit rejected the proposition that a child must first inflict serious harm before that child

can be deemed substantially likely to cause injury. (*Light v. Parkway C-2 School Dist.* (8th Cir. 1994) 41 F.3d 1223,1230.) The Court held there is no requirement a child must be “truly dangerous” or “intend to cause injury,” reasoning, “[e]ven a child whose behaviors flow directly and demonstrably from [their] disability is subject to removal where that child poses a substantial risk of injury to [them]self or others.” (*Id.* at p. 1228.)

Conduct that has been found substantially likely to result in injury includes shoving and threatening people. (*Long Beach Unified School Dist. v. Student* (2008) OAH Case No. 2008030017; *Fort Bragg Unified School Dist. v. Parent on behalf of Student* (2008) OAH Case No. 2008100507; orders and decisions rendered in special education due process hearing proceedings may be cited as persuasive but not binding authority in subsequent proceedings. (Cal. Code Regs., tit. 5, § 3085).)

If the ALJ deciding the case determines that maintaining the current placement of the child is substantially likely to result in injury to the child or to others, the ALJ may order a change in placement 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).) The interim alternative educational setting must enable the child to continue to participate in the general education curriculum and to progress toward meeting the goals set out in the child’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, 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).)

These due process procedures may be repeated after the initial 45 school 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).)

Student began attending Longfellow Middle School on January 17, 2023, the middle of the 2022-2023 regular school year. Because Parent withdrew Student from special education, he was a general education student. He was 13 years old and, based on his age, in the middle of seventh grade, although Student had not attended school since August 2022. Longfellow was the smallest of the three middle school campuses in Berkeley, with 450 students. Based on Student’s prior history of eligibility for special education and related services and Berkeley’s familiarity with Student and his needs, Berkeley immediately implemented what it called Tier 2 interventions, for general education students who required additional supports to access their education. These included things like additional staff in his classrooms, access to breaks, and some modified assignments based on his level of presentation.

At the IEP team meeting on February 16, 2023, Student was found eligible for special education and related services based on the eligibility categories of emotional disturbance and other health impairment. Berkeley offered a program of special education and related services consisting of goals, placement, related services, and accommodations. Berkeley recommended placement at a residential facility to provide Student an intensive, behaviorally therapeutic setting to address Student’s pervasive and extreme impulsivity and emotional dysregulation, which included suicidal and homicidal statements along with high-risk behaviors. Parent consented to eligibility, goals, related services, and accommodations, but did not agree to the placement at a residential treatment center.

Berkeley adapted the February 16, 2023 IEP document to reflect maintaining Student at Longfellow Middle School, a comprehensive public school campus, with specialized academic instruction and related services of additional adult support at all times, educationally related mental health services, and parent counseling. Berkeley did not believe placement at a comprehensive public school was appropriate, but it had to allow Student to attend a public school campus while Berkeley staff worked with Parent regarding consent for the placement Berkeley contended was educationally necessary.

Student exhibited maladaptive behaviors from his first day on campus. By the time the school psychologist completed the psychoeducational assessment only two weeks after Student started school at Longfellow, he had already been suspended a total of six days for events that occurred on three different dates, among many other dates on which Student's behavior was highly disruptive. Student was suspended for slapping, pushing, punching, and kicking other students, and for saying sexually charged and insulting things to another student. Student often provoked fights, used profanity, used offensive words based on race, disability, appearance, and sexual orientation. He created disruptions in his own classes and other classes he barged into when he eloped from his assigned classes.

After Student was found eligible for and Parent consented to special education and related services, Berkeley provided Student a one-to-one aide, who was a registered behavior technician, from a contracted nonpublic agency, with supervision services by a board certified behavior analyst from the nonpublic agency. Berkeley also supported Student through a behavior intervention plan, developed by Berkeley staff including Anthony Catanzaro, who was a board certified behavior analyst and credentialed special education teacher.

Longfellow teachers, administrators, and school resource officers received information and training about Student to implement the behavior intervention plan and a simplified version of it called "reactive strategies plan for school staff," created by Catanzaro. The reactive strategies plan detailed steps for staff to take in response to minor disruptions Student created such as:

- calling out or arguing in class;
- general profanity not directed at anyone;
- consensual playfighting with peers;
- wandering in class; and
- elopement, such as leaving his assigned class, wandering campus, and entering and remaining in the wrong class.

But very soon after the behavior intervention plan and reactive strategies chart were created, Student rarely engaged in those low-level, less disruptive behaviors and far more frequently exhibited majorly disruptive behaviors. These included:

- profanity directed to and about others;
- throwing, slamming, and breaking items;
- taking items from peers and staff;
- threats to students and staff;
- sexual harassment of peers and staff;
- physical aggression toward peers and staff, that was brief and stopped;
- physical aggression toward peers and staff that was repeated; and
- screaming, yelling, and running away.

Most concerning to Berkeley staff was Student's elopement from campus, exiting onto three residential streets that fronted the school, as well as one very busy, major

street that had a lot of vehicular traffic, including public buses. Longfellow was an open campus, with many entrances and exits, including the specific opening students used to access the cafeteria, which was across the street. When Student eloped from campus, he sometimes ran into the street at full speed, and told others he hoped that would lead to him dying. Sometimes he stood in the cross walk, taunting cars to hit him. Three times Student eloped from campus, he laid down in the street, screaming in protest for people not to get near him, and stated he wanted to be hit by a car and wanted someone to kill him. Berkeley staff feared for Student's life. Student sometimes engaged in other risky behaviors such as walking off campus through a street-level gate, and then re-entering campus by climbing over a 12-foot-high fence from which he could have fallen and been severely injured or died.

Student said and did provocative things to other students. If words or small gestures did not incite a reaction from someone, Student used physical violence to stimulate an interaction. Student enjoyed teasing, bullying, and attacking students he did not know. Other students used their cellphones to videorecord the encounter and post the recording to social media, tagging the person who was the target of Student's aggression. Those targeted students were then further criticized, teased, and tormented online with cruel comments by those who viewed the videos of Student insulting, pushing, and fighting with them.

Berkeley staff had to increase the counseling services they provided other students who were victimized by Student's aggression. School psychologist Emily Timm provided counseling to many students who shared in their sessions feeling fear of and frustration with Student's behavior on campus. Other students requested to be transferred out of classes in which Student was assigned because Student was so disruptive to their learning. Some students' parents requested their children be removed from the classes to which

Student was assigned because he significantly distressed their children and impeded their learning. Parents told Timm they were afraid for their children's safety since Student enrolled. Students and staff expressed to Timm feeling fear in the hallways since Student began attending at Longfellow Middle School.

Shortly after starting at Longfellow, Student began to leave classes immediately after checking into them, or he did not go to his classes at all. Instead, Student wandered around campus and entered and disrupted other classes in which he was not enrolled. He once threw a basketball into a classroom, creating havoc as it ricocheted around the room during instruction. He entered other classes and sat down, then engaged in disruptive comments and conduct.

Sometimes Student's conduct was so threatening or out-of-control that Berkeley staff could not resolve the crisis on their own, and they called for additional support and resources from public services. Berkeley requested responses from a community-based mobile crisis intervention program with skilled staff for medical intervention, and the Berkeley Police Department. In the month before the expedited hearing, Berkeley called the crisis intervention program six times, and would have called more often but the program is closed on Tuesdays, and some high-risk incidents with Student occurred on Tuesdays.

Student's assaults included, among other incidents, the following:

- On March 6, 2023, Student punched another student. The two then grabbed each other by their shirts and started grappling. Next, Student swung the other student up against the lockers.

- On March 8, 2023, Student did not have permission to go on a field trip. Student left campus and Berkeley staff followed him off campus and persuaded him to return. He left campus again, then returned by climbing over a fence. Student called Parent, then became escalated and threw chairs in the conference room. A school resource officer tried to enter the room, then suggested Berkeley staff call the Berkeley Police Department. Student became enraged and grabbed a metal rod that was in a windowsill to prop the blinds up. Student used abusive language and repeatedly threatened to hurt the school resource officer with the metal bar. Student spit at the vice principal. The school psychologist entered the room and used techniques approved by the Crisis Prevention Institute to take the metal bar away from Student. Student ran into the hallway and took a fire extinguisher out of its emergency box, then placed the fire extinguisher in his backpack. As the school psychologist approached Student, Student took the fire extinguisher out of his backpack and began to unravel the top of it to prepare to spray the school psychologist. The school psychologist wrested control of the fire extinguisher from Student, and Student ran off campus and did not return.
- On March 24, 2023, Student pulled a peer's hood down and slapped him on the back of the neck, which angered the peer. A fight broke out. Student eloped from campus, saying he was going to get some other people to "jump" the peer, meaning to physically harm him.
- On April 10, 2023, Student was standing on classroom furniture and disrupting class. The teacher called for security personnel. The vice

principal went to support and remove Student from class. Student directed profanity at the vice principal and threatened to “chin check” him, meaning to physically harm him.

- On April 11, 2023, Student went to a morning class and threw materials around the room, made fun of a student’s appearance, accused another student of having acquired immunodeficiency syndrome, called AIDS, and a physical altercation resulted, which a teacher labeled as a fight. An administrator talked to Student and used restorative practices. Student participated in a planned fight at lunch, then refused to go to the office to discuss what happened. He went into math class and took paper out from under what the teacher was writing on. Principal Salita Mitchell came and chased Student to a physical education class. There, Student got into an argument with a different student and spit in his face.
- In early May, Student arrived at school already agitated, was interrupting class, had a lot of energy, was playfighting with other students, and quickly showed he would not be safe. Vice Principal Valentin Del Rio went to talk to Student. Student was very close to Del Rio and threw a football into Del Rio’s face, hitting him with it.
- The one-to-one aide, who accompanied Student at all times, engaged in de-escalation strategies, prompted Student to make a different choice, and distracted or redirected Student. If Student continued to ignore the requests, the aide contacted the school safety officers to support her in removing Student from the situation. If Student continued to escalate, the aide called the school psychologist, the community-based crisis

intervention program, or administrators to discuss discipline measures. However, when Student perceived he was "in trouble," he tended to escalate his behavior even further.

- Student told Timm he heard things and reacted to what he believed he heard. Student explained that he spat at a peer because the peer said Student's mother was a prostitute, but the peer denied ever actually talking to Student. Other adults reported similar situations where Student explained his conduct was in reaction to some comment from a peer, but the adults present at the altercation confirmed the peer never said anything to Student. Student sometimes talked to himself. Student reported Timm said things to him, and Timm was certain she had not said what Student alleged, or had not said anything. Student exhibited paranoia about what people were saying about him, and others observed no one was saying anything.

At the April 25, 2023 manifestation determination and IEP team meeting, Parent stated she wanted Student placed in a residential treatment program, and signed release of information authorization forms for two facilities. However, at a manifestation determination and IEP team meeting on May 10, 2023, Parent refused to consent to Berkeley's offer of placement at a residential facility. Parent stated she was concerned about the impact it would have on her relationship with Student if she consented to placing him outside her home. Parent wanted and hoped a judge would decide to place Student at a residential facility.

Berkeley submitted various behavior logs and reports, manifestation determination analyses, and IEP team meeting notes for manifestation determinations in support of its

request to remove Student from his current educational placement. Berkeley also called Principal Mitchell, school psychologist Timm, board certified behavior analyst Catanzaro, and Special Education Program Manager Heather Lena Sweeny in support of its case. Each witness was familiar with Student, had personal knowledge of Student and his conduct, and was experienced in their area of vocation. Some, like Timm and Catanzaro, had directly assessed or served Student. Others, like Mitchell and Sweeny, frequently met with and observed Student. Each witness was deliberate and careful in their testimony and expressed an authentic belief that Student was a danger to himself and others at his current placement.

Witness testimony from Timm, Catanzaro, Mitchell, and Sweeny persuasively showed that school staff and students had been threatened, intimidated, and physically harmed by Student. School staff and students were afraid of Student and concerned that he would cause greater harm to others if he remained at Longfellow Middle School. Each witness credibly testified that Student's current placement at Longfellow Middle School posed a substantial risk of injury to Student and others.

THE INTERIM ALTERNATIVE EDUCATIONAL SETTING

During hearing, program specialist Sweeney credibly opined Student required placement at a small, therapeutic, residential facility with an integrated nonpublic school. Sweeney had over 20 years' experience as an educator and five years' experience as a special education program specialist. Based on Parent's authorization for release of information between Berkeley and prospective residential facility placements, Berkeley identified one appropriate program only 60 to 90 minutes away from Berkeley, which provisionally accepted Student and had space available for him as of the time of the expedited hearing. The residential facility, Victor Treatment Center, had an integrated

nonpublic school called North Valley School. Sweeney was thoughtful and persuasive in her testimony in support of placing Student at Victor Treatment Center, or a similar residential facility with integrated nonpublic school, as an interim alternative educational setting.

Victor Treatment Center offered a short-term residential therapeutic treatment program, and North Valley School offered a small, structured, educational placement that would allow Student to participate in the general education curriculum and to receive his IEP services. Victor and North Valley had a lower student-to-adult ratio than a comprehensive, public-school campus like Longfellow Middle School, and had staff trained to address social-emotional and behavior problems like those demonstrated by Student. Victor and North Valley had mental health, behavioral, and educational services available to help stabilize Student's mental health and support him accessing his education.

Berkeley had fully implemented Student's IEP for several months, except the placement the Berkeley members of the IEP team believed was necessary to afford Student a free appropriate public education. Berkeley determined Student required a placement that would address, 24 hours a day, Student's extreme deficits in self-regulation skills, which prevented him from accessing the curriculum and put his life and safety in danger, as well as created significant safety risks for those around him. Timm, Catanzaro, Mitchell, and Sweeney all credibly opined that Berkeley had accessed and used all the resources available to it and could not adequately protect Student, his peers, and staff at Longfellow. Student's behavior created, many times each day, substantial risk of injury to himself and others.

For these reasons, Berkeley showed by a preponderance of the evidence that maintaining Student's current placement at Longfellow Middle School posed a substantial risk of injury to himself or others. Berkeley met its burden of proof in this matter and may remove Student to an interim alternative educational setting.

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:

Berkeley Unified School District proved that Student's behavior posed significant risk of injury to himself or others such that Berkeley can remove Student to an interim alternative educational setting for not more than 45 school days.

Berkeley Unified School District prevailed on this issue.

ORDER

1. Berkeley Unified School District may immediately remove Student from his current placement at Longfellow Middle School and place Student at Victor Treatment Center or similar residential facility with an integrated nonpublic school, as an interim alternative educational setting.

2. The interim alternative educational setting shall last a maximum of 45 school days, at which point Berkeley Unified School District shall return Student to his placement at Longfellow Middle School, unless otherwise ordered or agreed to by the parties.

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.

Kara Hatfield

Administrative Law Judge

Office of Administrative Hearings