

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

---

CASE NO. 2023070050

---

PARENTS ON BEHALF OF STUDENT,

V.

PALO ALTO UNIFIED SCHOOL DISTRICT.

---

EXPEDITED DECISION

August 09, 2023

On June 30, 2023, Parents on behalf of Student filed a due process hearing request with the Office of Administrative Hearings, called OAH, naming Palo Alto Unified School District. Administrative Law Judge Cynthia Fritz heard this matter by videoconference on July 25, 26, 27, and 28, 2023.

Attorneys Marc Buller and Emily Hart represented Student. Parents attended all hearing days on Student's behalf.

Attorney Jennifer Choi represented Palo Alto Unified School District. Palo Alto's Co-Director of Special Education Amanda Boyce attended all hearing days on Palo Alto's behalf.

On July 28, 2023, the evidentiary portion of the expedited record was closed, and the matter was submitted. The undersigned granted the parties' request to submit a closing brief during the submittal time. The parties timely submitted closing briefs on July 31, 2023.

## ISSUES

1. Did Student's conduct on May 18, 2023, constitute serious bodily injury?
2. Did Palo Alto inappropriately fail to hold a manifestation determination review before removal of Student to an interim alternative educational setting?
3. Is Palo Alto's placement, Creative Learning Center, an appropriate interim alternative educational setting?

## 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.) 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.

The parent of a child with a disability who disagrees with a decision regarding placement in an interim alternative educational setting, or manifestation determination,

may appeal the decision by requesting a hearing. (20 U.S.C. § 1415(k)(3)(A); 34 C.F.R. § 300.532(a) (2006).) The 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) (2006).)

The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents, and bears 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.Ed2d 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) Student filed the complaint and bore 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 nine years old and a rising fourth grader at the time of the hearing. Student resided with Parents within Palo Alto's geographic boundaries at all relevant times. Student is special education eligible under the categories of autism and speech or language impairment. The issue determinations below are reorganized for clarity.

#### ISSUE 1: DID STUDENT'S CONDUCT ON MAY 18, 2023, CONSTITUTE SERIOUS BODILY INJURY?

Student contends that his conduct on May 18, 2023 did not constitute serious bodily injury warranting a unilateral 45-day removal from his Palo Alto elementary school to an interim alternative educational setting. Palo Alto maintains that Student's conduct, biting his one-to-one aide, constituted a serious bodily injury warranting removal to an interim alternative educational setting.

The law 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 special circumstances. (20 U.S.C. § 1415(k)(1)(G); 34 C.F.R. § 300.530(g) (2006).)

The term "serious bodily injury" for the purpose of these disciplinary measures is bodily injury that involves a substantial risk of death; extreme physical pain; protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member, organ, or mental faculty. (18 U.S.C. § 1365(h)(3); 20 U.S.C. § 1415(k)(7)(D); 34 C.F.R. § 300.530(i)(3) (2006).)

"Serious bodily injury" is not simply a cut, abrasion, bruise, burn, or disfigurement; physical pain, illness, or impairment of the function of a bodily member, organ, or mental faculty. (See 18 U.S.C. § 1365(h)(4).) Whether there has been a serious bodily injury is a question of fact based upon the totality of the circumstances. (United States v. Johnson (9th Cir. 1980) 637 F.2d 1224, 1246.) Generally, testimony from medical providers, the injured party, or lay witnesses can be sufficient to establish a serious bodily injury, however, each case turns on the particular facts established. (See, United States v. Muret (S.D.N.Y. 1998) 994 F. Supp. 501, 519.)

At the time of the May 18, 2023 incident, Student attended third grade at a Palo Alto elementary school. Student was previously diagnosed with autism spectrum disorder. Student had needs in English language arts, math, receptive, expressive, and pragmatic language, articulation, fine and visual motor skills, social-emotional, and behavior. Student spent 60 percent of his school time in a general education setting with approximately 20 children and the other 40 percent of the school day in a special education moderate to severe classroom with approximately 10 children.

Student's last-agreed upon individualized education program, called IEP, provided 15 goals in the areas of math, reading, behavior, communication, and motor skills. Student received specialized academic instruction in a

- separate class and a general education classroom;
- individual speech and language services;
- individual occupational therapy;
- intensive individualized services; and
- consultative services in behavior, augmentative and alternative communication, and orientation and mobility.

Student qualified for extended school for the 2023 summer. Student's behavior intervention plan focused on aggression, noncompliance, and elopement behaviors.

### MAY 18, 2023 INCIDENT

There is no dispute that Student bit his paraprofessional, Adrianna Barbosa, on May 18, 2023. The debate between the parties lies in Palo Alto's determination that the conduct caused a serious bodily injury to Barbosa.

On May 18, 2023, Barbosa sustained a serious bodily injury. While accompanying Student on a walking field trip to a nearby park around 12:30 PM, Student bit Barbosa. At the time, Student had two aides holding each one of his hands while walking to the park about 30 feet behind the other students who were accompanied by other Palo Alto staff. Barbosa was one of the staff members holding Student's hand when he bit her on her left forearm. Student bit over Barbosa's jean jacket and shirt causing the injury. This occurred a few blocks away from the school on the way to the park.

At the time of the bite, the other Palo Alto staff member with Student, Maria Farhani, a behavior instructional coach, heard Barbosa scream. When she turned toward Barbosa, Student's head was above Barbosa's forearm with his mouth open in a biting motion. Student then tried to bite Farhani who released her hand and shuffled back away from Student with her hands up. Student then turned to Barbosa to kick and hit her but Barbosa was able to shuffle back while holding her injured arm. Student then tried to kick Farhani and ran toward the street. Farhani was able to instruct Student back to the sidewalk. Farhani described Student at the highest aggression and pacing the sidewalk.

Barbosa described the bite to Farhani as hard and that her forearm was "hurting so much." Barbosa requested Farhani to call the school office. Barbosa was crying and felt blood coming through her jacket. Barbosa also said it was an emergency and she needed help.

Barbosa attempted to get help from nearby workers across the street and knocked on two separate residences trying to get ice while Farhani stayed with Student. When she could not find immediate help, Farhani and Barbosa decided to go back to the school with Student. Barbosa complained on the return to school that her injury hurt and Farhani believed that Barbosa was in a lot of pain and that the injury was serious. They arrived back to the school around 12:50 PM, approximately seven minutes after Student bit Barbosa.

Once they reached the school, Barbosa went to the main school office and was escorted to the nurse area, while Farhani took the Student back to his classroom.

Shortly after, principal Mary Bussman and administrative assistant Laurie Shea arrived in the nurse area and assisted Barbosa in taking off her bloody jacket and shirt to expose the injury.

#### BARBOSA SUFFERED EXTREME PHYSICAL PAIN FROM STUDENT'S BITE

In the nurse area, Bussman observed Barbosa with a terrified look on her face, crying, and having trouble talking, breathing, and possibly in shock. Barbosa further observed Barbosa wincing in pain and tightening up. Bussman believed Barbosa was in extreme pain and was holding her hand and trying to soothe her. Bussman placed gauze on her wound.

Bussman described the wound as approximately 3.5 inches by 2.5 inches in length and width, oblong, and bleeding mixed with plasma and clear liquid coming out of the wound. It was cut on all sides of the wound and had broken through several layers of skin. Bussman stated she had never seen such a severe wound in her time, 24 years, as an educator.

The photographs submitted in evidence corroborated Barbosa and Bussman's testimony. The pictures include both the elbow and wrist, so scale was evident. The bite was accurately described in size and depth. A bite frequently includes an outline of the mouth dotted by teeth marks. Not in this case. The flesh was removed from the entire area, including the center, as individual teeth marks were not visible.

At that time, Bussman did not believe Barbosa was coherent, thought she would pass out, and was not in a condition to make decisions for herself. Although Barbosa

did not want paramedics called because she was concerned to be around sick people in an emergency room due to her medical issues, Bussman believed it was necessary.

Shea established that the wound was approximately 3.5 inches by 2.5 inches on Barbosa's forearm with bleeding that continued despite efforts to stop it. This corroborated Bussman's testimony. She observed that Barbosa's skin had gathered in the center of the wound and all around the wound was bloody. She believed 911 emergency services should be called.

Shea described Barbosa as very upset, frightened, crying, breathing erratically, unable to talk, and squeezing her hand tight, and telling her that the injury really hurt. Shea called 911.

Paramedics arrived and rendered medical services and cleaned the wound. Barbosa declined to be transported to the emergency room due to her own medical issues, but paramedics expressed the need for Barbosa to get medical attention.

Melissa Dabel, Student's special education teacher, also saw Barbosa in the nurse area toward the end of the school day and described Barbosa as extremely pale, shaking, crying, and in shock. She observed that Barbosa's jacket and shirt had teeth indentations with blood. She described Barbosa's injury as significant.

Barbosa described her pain that day on a pain scale of one to 10, with 10 being the highest amount of pain. Although she did not use the word extreme to describe her pain, a reasonable inference from describing the pain as the highest on the pain scale is that it was extreme physical pain. However, Bussman described Barbosa in extreme pain and others described Barbosa's pain as serious and significant. Barbosa's opinion



regarding the highest pain that she suffered from Student's bite was given great weight because other witnesses corroborated Barbosa's opinion regarding the severity of her pain and the injury, and Barbosa's behavior at the time.

After seeing the paramedics, Shea drove Barbosa to a medical clinic because Barbosa could not lift her arm. Barbosa continued to cry and be in pain during the drive. Upon arrival, Barbosa was seen five minutes later in the clinic. The physician, Doctor Sackett, cleaned the wound and gave Barbosa Tylenol as Barbosa could not take other pain medication due to her medical condition. Doctor Sackett signed her out of work until May 23, 2023, and provided her a sling for her arm. The next day Barbosa could not move her arm. On May 20, 2023, Barbosa visited urgent care because of the pain associated with changing her dressing. On May 22, 2023, Barbosa visited Dr. Sackett again and she received a doctor's note for modified activity and restricting the use of her arm or engaging in repetitive motions until June 5, 2023.

On May 23, 2023, Barbosa returned to work with her arm in a sling and drove herself to work using her right hand only to drive. Shea helped her change her dressing that day and Barbosa was in considerable pain and crying. Shea observed that the wound was still bleeding and a large bruise covering approximately half the length of her forearm formed. Barbosa did not work with any students directly and mostly participated in administrative work or monitoring students. When assigned to Students, she did not work with any students who had behavior needs.

Shea saw Barbosa every day through June 7, 2023, and described Barbosa's wound as tender and painful. Bussman described Barbosa's wound upon her return to school on May 23, 2023, as having extensive bruising from the injury to the wrist and elbow several inches in all directions that was purple and yellow in color. Barbosa

established the wound was throbbing for one week. She continued to have pain and still cannot shower with the injury exposed due to continued tingling and pain. Barbosa regained her range of motion of her arm after three weeks.

In total, Barbosa went to 16 follow up medical visits, with some virtual visits, and four mental health related visits through the time of hearing. Barbosa continues to be under the care of a physician for the bite.

Student failed to present any evidence contrary to the personal accounts of the victim and witnesses who had firsthand knowledge of the injury or an expert witness in opposition to Barbosa's opinion and other Palo Alto staff that Barbosa was in extreme pain at the time of the bite. While Parents disputed the seriousness of the injury at a subsequent meeting with Palo Alto and did not believe it constituted a serious bodily injury, neither Parent had any personal knowledge of the injury. Thus, their opinions were less persuasive.

Student cited an OAH decision in support of its contention that Barbosa's injuries were not a serious bodily injury. (*Student v Westminster School District* (2010), OAH Case Number 2010110730. However, OAH decisions are not binding authority. (Cal. Code Regs., tit. 5 § 3085.) Further, the facts here can be distinguished from that case.

In that matter, a student bit a staff member on each of her forearms causing bleeding and bruising. One bite caused a scar of about a quarter inch in size. The administrative law judge found no serious bodily injury because the staff member's injury did not cause her extreme physical pain. She did not scream during the bite but did have pain. She was not prescribed any pain medication at first, and she returned to work on the second day after the incident. She managed to perform many of her daily

routines after her initial visit to Prompt Care, and the single prescription medication she took resolved her pain. The staff member's forearms were bruised, but the bruising resolved rather quickly and left her with only a minor scar.

Conversely, and based on the totality of the circumstances and facts here, Barbosa suffered extreme physical pain. It was reasonable for Barbosa to describe her pain as a 10, the most severe and extreme pain after the bite, as her symptoms reflected extreme pain and the personal accounts of other Palo Alto staff that had personal knowledge of the bite support the conclusion that Student's conduct on May 18, 2023, constituted extreme physical pain. Her injury caused her to be on modified work through the end of the school year. Accordingly, sufficient evidence established that Student's conduct on May 18, 2023, caused Barbosa extreme pain, rendered her temporarily unable to perform her work duties completely, and she was unable to change her own wound dressing for days. Further, Barbosa's scarring and disfigurement are much more significant than a quarter inch scar as discussed below. Thus, Student's comparison to one victim in OAH case number 2010110730 was unconvincing.

Accordingly, Student's bite of Barbosa's forearm on May 18, 2023, caused her extreme physical pain and amounted to a serious bodily injury.

### **BARBAOSA SUFFERED PROTRACTED AND OBVIOUS DISFIGUREMENT**

Barbosa now describes her injury, over two months later, as the skin being extremely rough, difficult to touch, painful, scarred, wrinkled, and with a large skin tag through it. The scar is approximately 1.5 inches by 1.5 inches on the outside of her forearm in a prominent, obvious, and readily visible area. Barbosa believes plastic surgery will not help and the scar is hard for her to look at. Barbosa expressed that

her arm did not look like this before the May 18, 2023 bite. Bussman saw the wound later and described Barbosa's forearm as disfigured and the healing as horrendous because the skin had healed wrinkled and folded over.

The evidence presented not only established permanent scarring on Barbosa's forearm, an obvious location on a person's body, but also significant cosmetic deformity with the wrinkling, rough skin, and large skin tag through the scar. Further, the photographic evidence corroborated Barbosa and Bussman's testimony of the scarring and cosmetic deformity. Thus, a visible and prominent scar with wrinkling, folds, and a rough texture on the outside of the forearm, at this size, after two months, is obvious and protracted disfigurement.

Student argued that the injury is not a serious bodily injury under any category because of Palo Alto's failure to implement Student's IEP. This argument fails because it is irrelevant to the determination of serious bodily injury. (20 U.S.C. § 1415(k)(7)(D).)

Student failed to meet his burden of proof as to this issue. Student had the burden of establishing that Palo Alto erred when it determined Student had inflicted serious bodily injury upon Barbosa on May 18, 2023. Student failed to offer any contrary testimony regarding Barbosa's obvious scar and disfigurement other than the opinion that it was not severe enough to constitute a serious bodily injury. Accordingly, Student's bite of Barbosa on May 18, 2023, also constituted serious bodily injury due to obvious and protracted disfigurement.

### ISSUE 3: IS PALO ALTO'S PLACEMENT, CREATIVE LEARNING CENTER, AN APPROPRIATE INTERIM ALTERNATIVE EDUCATIONAL SETTING?

Student contends that Creative Learning Center is an inappropriate interim educational setting for Student because he will not be able to participate in a general education setting. Further, Student has not been accepted to Creative Learning Center and Parents were told it will take two to three months for him to get accepted and enrolled at the school. Thus, Student argues, Creative Learning Center is an unsuitable placement for Student.

Palo Alto argues that Creative Learning Center, a nonpublic school, is an appropriate interim alternative educational setting for Student because of its intensive therapeutic supports, ability to participate in general education curriculum and implement Student's IEP. Further, Creative Learning Center can conduct a functional behavior assessment while Student attends the program. Thus, it maintains, Creative Learning Center is an appropriate setting for Student.

If a special education student violates a code of student conduct, school personnel may remove the student from their current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 school days, to the extent those alternatives are applied to children without disabilities. (20 U.S.C. § 1415(k)(1)(B); 34 C.F.R. § 300.530(b)(1) & (d)(3) (2006).) For disciplinary charges in placement greater than 10 consecutive school days, the disciplinary measures applicable to students without disabilities may be applied to students with disabilities if the conduct resulting in discipline is determined not to have been a manifestation of the special education student's disability. (20 U.S.C. § 1415(k)(C); 34 C.F.R. § 300.530(c) (2006) & 300.536(a)(1) (2006).)

Under special circumstances, school personnel may remove a student to an interim alternative 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, including if Student's conduct constituted serious bodily injury. (20 U.S.C. § 1415(k)(1)(G); 34 C.F.R. § 300.530(g) (2006). The IEP team determines the interim alternative educational setting. (20 U.S.C. § 1415(k)(2); 34 C.F.R. § 300.531 (2006).)

The interim alternative educational setting must enable the child to receive:

- educational services, to enable the child to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP; and,
- 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. (20 U.S.C. § 1415(k)(1)(D)(i) and (ii); 34 C.F.R. § 300.530(d)(1)(i) and (ii) (2006).)

On the morning of May 22, 2023, Boyce met with Palo Alto staff members to discuss the incident so she could investigate and gain more information about it and determine if the right staff were present, and if the behavior intervention plan was followed. Boyce determined that the injury sustained was a serious bodily injury. Boyce then discussed the option of an interim alternative education setting for Student as placement at the morning meeting with staff.

Later that day, an emergency IEP team meeting commenced and Boyce discussed the May 18, 2023 incident with the IEP team including the Parents. The IEP team consisted

of some but not all the same people that were at the May 22, 2023 staff meeting. A photograph of the injury was shown. Boyce informed the IEP team that she determined the injury was serious bodily injury and proposed a nonpublic school as an appropriate interim alternative education setting.

A nonpublic school is a private, nonsectarian school that is 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.) The IEP team, except Parents, agreed that the injury constituted a serious bodily injury and that a nonpublic school was the appropriate interim alternative educational placement. The IEP team meeting lasted approximately one hour.

The May 22, 2023 IEP team started the 45-day interim alternative educational placement for Student as home instruction on May 22, 2023, through the end of the school year, June 1, 2023. It was anticipated that Student would then be placed in an appropriate nonpublic school for extended school year. A second IEP team meeting would commence on May 30, 2023, to discuss an appropriate nonpublic school once it was found.

Sometime after the May 22, 2023 IEP team meeting, Cynthia Loleng-Perez, Palo Alto's special education co-director was notified to look for an appropriate interim alternative educational placement for Student and to attend the upcoming May 30, 2023 IEP. Loleng-Perez worked and collaborated with Boyce; oversaw the day-to-day special education operations, including the budget; and oversaw the nonpublic schools and residential treatment placements, including compliance. Loleng-Perez has previous

experience as the director of a nonpublic school, and extensive knowledge of nonpublic schools, extensive experience placing students in alternative placements, and knowledge of local nonpublic schools, including Creative Learning Center.

Before attending the May 30, 2023 IEP team meeting, Loleng-Perez familiarized herself with Student's IEP, including his present levels, services, goals, behavior intervention plan, and his multidisciplinary report. She began searching for an appropriate nonpublic school for Student. After considering a few schools she deemed appropriate alternative placements, she found that only one had a current opening, Creative Learning Center.

On May 24, 2023, Boyce sent out a written prior notice stating that Student's interim alternative educational setting would be the nonpublic school, Creative Learning Center. On May 30, 2023, Loleng-Perez attended the May 30, 2023 IEP team meeting to discuss Creative Learning Center as the interim alternative educational setting for Student. Parents and their counsel attended. The IEP team, except Parents, agreed that Creative Learning Center was an appropriate interim alternative educational setting for Student.

Loleng-Perez was informed that Creative Learning Center serves student with autism, speech or language impairment, and extreme behaviors. Boyce believed Creative Learning Center successfully worked with students with autism. Loleng-Perez is familiar with Creative Learning Center as Palo Alto has other students attending the school. Loleng-Perez credibly opined that Creative Learning Center can provide general education curriculum to Student and implement his IEP to make progress on his goals. It also offered the related services that Student needed as stated in his IEP. And it offered therapeutic support such as counseling, behavior staff, an on-site board certified



behavior analyst, and three to four different levels of behavior support to help address Student's behaviors. Additionally, Creative Learning Center could conduct a functional behavior analysis by either or both Palo Alto and Creative Learning Center staff. Further, as a nonpublic school, all staff and service providers are required to be properly credentialed.

Loleng-Perez demonstrated that Creative Learning Center was an appropriate interim alternative educational setting for Student. Creative Learning Center offered a structured educational placement that would allow Student to participate in the general education curriculum, implement his IEP, assist in progressing toward meeting his IEP goals, and implement his related services. Loleng-Perez was thoughtful and persuasive in support of placing Student at Creative Learning Center as an interim alternative educational setting, and her testimony was given great weight.

Student argued that that his IEP called for significant mainstreaming time in a general education setting and Creative Learning Center cannot abide by this IEP condition because it does not have any general education classes where Student will be exposed to typical peers. Even if this is correct, Student's argument is unconvincing.

The law for placement at a 45-day interim alternative educational setting requires that Student participate in the general education curriculum, not a general education setting. (20 U.S.C. § 1415(k)(1)(D)(i); 34 C.F.R. § 300.530(d)(1)(i) (2006).) Student conflates participation in general education curriculum to a requirement that Student needs to be in a general education setting. Loleng-Perez' uncontroverted testimony was that Student would participate in general education curriculum at Creative Learning Center. Thus, Student's argument fails.

Parents further maintained that they believe it will take over two months for Student to get accepted into the school and therefore, it is an inappropriate placement. Student cites an OAH decision in support of this proposition claiming that it purports to state that a school district's general proposal of a type of placement without specifically naming a school that would accept the student was not an appropriate IAES. (*Escondido Union School District v. Parents on Behalf of Student* (2022) OAH Case Number 2022090699.) Student misstates that decision.

In that matter, Escondido proposed a residential treatment center as an appropriate interim alternative educational center but did not name any specific residential treatment facility as an appropriate placement. Instead, it set forth some criteria that a residential treatment facility should provide Student to be an appropriate interim alternative educational setting. No witness opined to any specific residential treatment facility that had the criteria that it believed was appropriate for Student. Additionally, Escondido failed to establish a day treatment center was not the least restrictive environment for Student. Further the undersigned found that more information was needed to make that determination. However, the decision did not find that acceptance into interim alternative educational setting as a factor for appropriateness. Student misconstrued that decision.

Here, Palo Alto named a nonpublic school, Creative Learning Center, as an appropriate interim alternative educational setting for Student and Loleng-Perez credibly testified to its legal appropriateness. Student failed to present any convincing evidence contrary to Loleng-Perez' opinion about Creative Learning Center's appropriateness that impugned her testimony. The fact that Student had not been accepted does not make the placement inappropriate for Student. However, if Palo Alto wanted to implement the 45-day interim alternative education placement, Student should be able to attend the school.

Further, Parents inconsistently testified that one of them had toured Creative Learning Center and thought it was inappropriate but then later corrected that statement and believed that neither toured the placement. Thus, Parents had no personal knowledge of Creative Learning Center and only had anecdotal information from people they knew who had kids attending the school or heard things about the school. Thus, their concerns and testimony regarding Creative Learning Center were less persuasive.

For all these reasons, Student failed to meet his burden of proving that Creative Learning Center is an inappropriate 45-day interim alternative education setting for Student.

## ISSUE 2: DID PALO ALTO INAPPROPRIATELY FAIL TO HOLD A MANIFESTATION DETERMINATION REVIEW BEFORE REMOVAL OF STUDENT TO AN INTERIM ALTERNATIVE EDUCATIONAL SETTING?

Student contends that regardless of whether Student's conduct on May 18, 2023, constituted serious bodily injury, Palo Alto needed to hold a manifestation determination meeting before removing Student to an alternate interim educational setting. Student maintains the failure to hold a manifestation determination review violated Parents' and Student's rights.

Palo Alto argues that it is not required to hold a manifestation determination meeting before removing a student to a 45-day interim alternative educational setting when a student's conduct constitutes serious bodily injury. Further, Palo Alto agrees that Student's conduct that day was a manifestation of his disability. Palo Alto had two separate IEP team meetings discussing Student's May 18, 2023 conduct which should

constitute a manifestation determination review. And if these meetings fail to constitute a manifestation determination meeting, it was harmless error. Thus, it did not interfere with Parents' or Student's rights.

When a school district seeks to discipline a child with a disability for violating a code of student conduct, it must convene a meeting to determine whether the child's conduct was a manifestation of the child's disability. (20 U.S.C. § 1415(k); 34 C.F.R. § 300.530 (2006).) This is known as a manifestation determination. (20 U.S.C. § 1415(k)(1)(E).) It must be accomplished within 10 school days of the decision to change the student's placement. (*Ibid.*)

A manifestation determination must be made by the school district, the parent, and relevant members of the IEP team as determined by the parent and the school district. (20 U.S.C. § 1415(k)(1)(E)(i); 34 C.F.R. § 300.530(e)(1) & (h) (2006); *Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities*, 71 Fed. Reg. 46540, 46720 (Aug. 14, 2006) (*Comments on 2006 Regulations*)).) The manifestation determination team analyzes the child's behavior as demonstrated across settings and across times. (*Comments to 2006 Regulations, supra*, 71 Fed. Reg. 46720.) All relevant information in the student's file, including the IEP, observations of teachers, and any relevant information from the parents, must be reviewed as part of the manifestation determination process. (20 U.S.C. § 1415(k)(1)(E); 34 C.F.R. § 300.530(e)(1) (2006); *Comments to 2006 Regulations, supra*, 71 Fed. Reg. 46720.)

If the local educational agency, the parent, and relevant members of the IEP team make the determination that the conduct was a manifestation of the child's disability, the IEP team will conduct a functional behavior assessment, and in a situation where a

behavioral intervention plan has been developed, review the behavioral intervention plan if the child already has such a behavioral intervention plan, and modify it, as necessary, to address the behavior. (20 U.S.C. § 1415(k)(1)(f)(i)(ii).) The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child; and the provision of a free appropriate public education to the child. (34 C.F.R. § 300.501(a) (2006); Ed. Code, § 56500.4.)

Here, Palo Alto needed to hold a manifestation determination meeting review after Student's May 18, 2023 conduct as this resulted in a disciplinary change of placement of more than 10 days. (20 U.S.C. § 1415(k); 34 C.F.R. § 300.530 (2006).) Although Palo Alto erroneously believed it was relieved of its obligation to conduct a manifestation determination review and remove Student to an interim placement without a manifestation review because it conceded the conduct was a manifestation of his disabilities, it failed to proffer any legal authority supporting this proposition.

The plain reading of section 1415(k) and the accompanying regulation shows that a manifestation determination review is required whenever a disciplinary change of placement exceeds 10 school days. (20 U.S.C. § 1415(k); 34 C.F.R. § 300.530 (2006) As to special circumstance disciplinary removals, the language states that school personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability. (20 U.S.C. § 1415(k)(1)(G).) It would be unnecessary to have this language in this specific section regarding the determination of the behavior as a manifestation of student's disability if the manifestation determination review was not required in the first place.

Additionally, the federal register intimated that a school district must conduct a manifestation determination review after removal regardless of whether the conduct amounts to a special circumstance. (Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, 71 Fed. Reg. 46714, 46720 (Aug. 14, 2006) (Comments on 2006 Regulations).) The Office of Special Education and Rehabilitative Services, called OSERS, in the United State Department of Education Questions and Answers on Discipline Procedures, issued January 2007, also maintained that a school district is required to hold a manifestation determination review each time that a student is removed for more than 10 school days, even in cases where the removal is made for violations of 34 C.F.R. § 300.530(g) (2006), which includes conduct constituting serious bodily injury. Thus, Palo Alto's argument fails.

Palo Alto also contends that the two IEP team meeting on May 22 and May 30, 2023, constituted a manifestation determination meeting. This argument is unconvincing. First, Palo Alto conceded that it failed to hold a manifestation determination meeting. Although it held two May 2023 IEP team meetings to discuss Student's May 18, 2023 conduct and placement at an interim alternative setting, they did not fulfill some of the manifestation determination meeting requirements. Parents were not given proper notice that a manifestation determination review would be held. Parents were given a one-day notice of an emergency meeting for May 22, 2023.

Further, Parents were denied participation in a process that would involve a review of all relevant information in Student's file, and information provided by Parents and teachers and a determination through the manifestation determination review regarding whether the conduct was a manifestation of Student's disability. Thus, Palo Alto failed to hold a manifestation determination review. This significantly impeded

Parents their right and opportunity to participate in a manifestation determination review process. Accordingly, Palo Alto inappropriately failed to hold the required manifestation determination review.

## 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:

Student failed to prove that Student's conduct on May 18, 2023, did not constitute serious bodily injury.

Palo Alto prevailed on Issue 1.

### ISSUE 2:

Student proved that Palo Alto inappropriately failed to hold a manifestation determination review.

Student prevailed on Issue 2.

### ISSUE 3:

Student failed to prove that Palo Alto's placement, Creative Learning Center, was an inappropriate interim alternative educational setting for Student.

Palo Alto prevailed on Issue 3.

## ORDER

1. Within 15 calendar days of this Decision, Palo Alto must conduct a manifestation determination meeting to determine whether Student's conduct on May 18, 2023, was a manifestation of his disability or caused by Palo Alto's failure to implement his IEP.
2. If it is determined that Student conduct was a manifestation of his disability, the IEP team must review Student's behavioral intervention plan and modify it, if necessary, to address the behavior.
3. Palo Alto must return Student to his last agreed upon and implemented placement upon expiration of the 45-day interim alternative educational placement unless Parents and Palo Alto agree otherwise.

## RIGHT TO APPEAL THIS DECISION

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

Cynthia Fritz  
Administrative Law Judge  
Office of Administrative Hearings