

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

PALO ALTO UNIFIED SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

CASE NO. 2023070764

EXPEDITED DECISION

SEPTEMBER 5, 2023

On July 20, 2023, the Office of Administrative Hearings, called OAH, received a due process hearing request from Palo Alto Unified School District, naming Student. Administrative Law Judge Tiffany Gilmartin heard this matter on August 15, 16, 17, and 22, 2023.

Attorney Matt Tamel represented Palo Alto. Cynthia Loleng-Perez, Director of Special Education, attended all hearing days on Palo Alto's behalf. Attorney Marc Buller represented Student. Parents attended all days of the hearing.

Student's motion for oral closing arguments was granted. At the conclusion of testimony and closing arguments on August 22, 2023, the record was closed, and the matter submitted for decision.

ISSUE

Is maintaining Student's present placement at El Carmelo Elementary School substantially likely to result in injury to Student or someone else such that Palo Alto may place Student in an appropriate interim alternative educational setting at Creative Learning Center, without Parents' consent, for up to 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.) 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).)

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) (2006).) This interim alternative educational setting request 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) (2006).)

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).) Palo Alto 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 fourth grader at the time of the hearing. Student resided with Parents within the geographic boundaries of Palo Alto at all relevant times. Student was eligible for special education in the category of autism with a secondary category of speech and language impairment.

On August 9, 2023, OAH issued a decision in *Student v. Palo Alto Unified School District*, (2023) OAH case number 2023070050. OAH case number 2023070050 involved the same parties and similar issues. OAH granted Palo Alto's motion to take official notice of the decision in OAH case number 2023070050.

The prior Decision held Student's conduct constituted serious bodily injury and that Palo Alto failed to hold a manifestation determination review prior to removing Student to an interim alternative educational setting. The Decision further held that Student did not meet his burden to demonstrate Creative Learning Center was an inappropriate interim alternative educational setting.

Palo Alto now requests an additional 45-day interim alternative educational setting placement at Creative Learning Center. The 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) (2006).) It is determined in this Decision that Palo Alto demonstrated Student’s return is substantially likely to result in injury to others and that Creative Learning Center is an appropriate placement for up to 45 school days.

IS MAINTAINING STUDENT’S PRESENT PLACEMENT AT EL CARMELO ELEMENTARY SCHOOL SUBSTANTIALLY LIKELY TO RESULT IN INJURY TO STUDENT OR SOMEONE ELSE SUCH THAT PALO ALTO MAY PLACE STUDENT IN AN APPROPRIATE INTERIM ALTERNATIVE EDUCATIONAL SETTING AT CREATIVE LEARNING CENTER, WITHOUT PARENTS’ CONSENT, FOR UP TO 45 SCHOOL DAYS?

Palo Alto contends Student continues to present a risk due to the intensity of his aggressive behaviors and the lack of any noticeable antecedent behavior puts Student and others at risk. Palo Alto seeks permission to change Student’s placement from his current placement at El Carmelo Elementary School, a Palo Alto public school, to Creative Learning Center, an interim alternative educational setting, for not more than 45 school days without Parents’ consent.

Student contends his behaviors are known and have been consistent since kindergarten. Student further contends Palo Alto failed to adjust Student’s behavior intervention plan to appropriately address Student’s targeted behaviors.

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) (2006).) For disciplinary changes in placement greater than 10 consecutive school days (or that are a pattern that amounts to a change in placement), the disciplinary measures applicable to students without disabilities may be applied to special education students 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)(2) (2006).)

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 special circumstances. (20 U.S.C. § 1415(k)(1)(G); 34 C.F.R. § 300.530(g) (2006).) The individualized education program, called IEP, team, determines the interim alternative educational setting. (20 U.S.C. § 1415(k)(2); 34 C.F.R. § 300.531 (2006).)

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) (2006).) This Decision finds that maintaining Student's placement at El Carmelo Elementary is substantially likely to result in injury to others.

Student's most recent, consented to, and implemented IEP is dated September 29, 2022. The September 29, 2022, IEP placement and services consisted of

- a comprehensive elementary school with specialized academic instruction for 1,200 minutes per week;
- Intensive individual services for 1,200 minutes per week;
- Individual speech and language and occupational therapy support for 30 minutes per week.

Student was to spend 40 percent of his time in a general education classroom and 60 percent of his day outside the general education classroom. Student's program included a behavior intervention plan addressing three behaviors, specifically, aggression, elopement, and non-compliance. Student's program also included

- supplemental supports such as behavior consultation for 240 minutes per month,
- visually adaptive and augmentative communication support for 600 minutes per year,
- consultation with a teacher of the visually impaired for 450 minutes per year,
- consultation with a mobility specialist for 30 minutes per month, and
- occupational therapy consultation for 200 minutes per year.

Parent consented to Student's September 29, 2022, IEP on December 2, 2022, allowing Palo Alto staff to implement Student's behavior intervention plan. Prior to parental consent of Student's IEP, he had numerous behaviors that caused injury to other students, aides, and teachers. For the purposes of this decision, those incidents were not considered as Palo Alto was not afforded the opportunity to implement

Student's behavior intervention plan until December 2, 2022. After December 2, 2022, Student continued to have numerous behavior incidents including biting other students, spitting at his aides and teachers, scratching, pulling hair, and hitting.

Student's special education classroom teacher, Melissa Dabel, arranged her classroom for his safety. Dabel, a credentialed moderate-to-severe special education teacher with seven years of experience, also served as Student's case manager. Student's special education class at the end of the 2022-2023 school year had nine students and seven staff. The special education classroom served a moderate to severe student population and had a maximum of 10 students. Dabel established that she can clear Student's area quickly should his behavior deteriorate. Student's space in Dabel's classroom is geared toward helping Student's behavior stay regulated. When Student's behavior is dysregulated, Student

- has loud vocalizations,
- pounds on his legs and arms,
- jumps up and down,
- throws things at staff and students,
- spits,
- kicks, and
- bites others.

The classroom is also equipped with screens that can quickly be pulled to provide a protective space between Student and others. Student has bitten Dabel four-to-five times, spit on and scratched her, and pulled her scarf. Student becomes behaviorally dysregulated daily; however, with the help of staff and his behavior plan, can regulate and rejoin his peers in learning. Dabel's testimony was credible and given great weight.

MAY 18, 2023, INCIDENT

On May 18, 2023, Student participated in an off-campus field trip with his third-grade classmates. Student experienced behavior dysregulation earlier in the day. Student's aide Adriana Barbosa, and the campus Behavior Intervention Coach, Maria Farhani, each held Student's hand as the class walked to Gamble Gardens. Shortly after the class left the school site, Student bit Barbosa on the arm. He then turned to bite Farhani. Farhani was able to deflect his bite. Student kicked her. Student then tried to run into the street. Farhani was able to contain Student. Barbosa and Farhani were able to get Student back to the school campus. Student bit through Barbosa's jean jacket and shirt, resulting in a large, bleeding wound on her forearm.

Administrative Law Judge Cynthia Fritz determined in OAH case number 2023070050 that Student's conduct constituted serious bodily injury.

BEHAVIOR INCIDENTS

Student argued his maladaptive behaviors significantly declined since the IEP containing Student's current behavior intervention plan was implemented in December 2022. Student further argued, Student's three targeted behaviors of aggression, elopement, and non-compliance were known to Palo Alto, and thus, should not be part of any calculus to determine if Student's on-going behavior is a risk to himself or others. Student's argument is unpersuasive.

Between December 2, 2022, the date Parents consented to Student's IEP, and May 18, 2023, Student had 18 incidents where his behavior caused injury to another student, his aide, or teacher. Three of the injuries occurred while the aide or teacher was assisting Student in a preferred activity.

Student's private behavior therapist, Van Kober, testified at this hearing. Kober acknowledged Student's behavior was not easy to read. Kober is a licensed board-certified behavior analyst, with more than 20 years of experience working in a mixture of settings including as a contractor for school districts. Kober's testimony was unpersuasive.

Kober identified specific traits she would require from an aide working under her supervision. She specifically identified the need for the aide to be quick and agile to respond to Student's aggression as it can quickly turn physical. She specifically identified Student's aide Jorge Ruiz as an aide who had the skills and ability to read Student's behavior and was quick and agile enough to avoid Student's rapid aggression.

However, even Ruiz's agility was not sufficient to prevent injury as Student attempted to strike Ruiz while they were walking back to the classroom. Ruiz was able to dodge Student's attack, but Student still managed to get in front of Ruiz, grab his hand and bite him.

Kober acknowledged Student was likely to have increased behaviors in a school setting. Kober further acknowledged Student's behaviors deteriorated with her when she worked with him in a more controlled setting than a comprehensive campus. Despite her own experience with Student's deteriorating behaviors, Kober determined he did not present a substantial risk to himself or others. Kober testified she reviewed all of Student's behavior incident reports. She testified she viewed substantial likelihood of injury as an injury requiring medical care. Her testimony ignored the significant injury inflicted by Student on Barbosa. An injury that required extensive medical treatment and left Barbosa with a visible scar.

Kober's testimony was given little weight.

Jessica Tolerba, one of Student's general education teachers, established extra adults were required in her classroom to support Student. She arranged Student's seating to be at the end of a section with an empty desk between him and other students to protect other students.

Tolerba testified other students were, at times, afraid of Student. Other students did not seek out Student as a peer. Their hesitance and his aggressive behaviors left her constantly vigilant.

Tolerba requested to attend the Safety Care training program to learn de-escalation strategies and best practices to mitigate physical harm in the classroom. Tolerba used the Safety Care strategies to keep herself safe when her hair was grabbed by Student on January 20, 2023. Tolerba did not believe Student could return safely to the classroom.

Student's other general education teacher, Holly Harrison, testified at hearing, completed the Safety Care training. During a preferred activity on May 4, 2023, Student hit Harrison in the chest. She described how the other students tried to understand Student and engage with him. Harrison echoed Tolerba's concern about Student's return to the classroom.

In addition to the May 18, 2023, injury, Student injured Barbosa many times. She also completed the Safety Care training. Barbosa was comfortable reading Student's behavior and could recognize when he was dysregulated. She described many instances when his behavior turned aggressive without warning.

Nestor Ramos, a board-certified behavior analyst for Palo Alto, took over management of Student's case when the other BCBA went out on leave. Ramos had significant knowledge of Student and his family as he worked with Student to create

Student's first behavior intervention plan when Student was in kindergarten. Ramos expressed concern that the severity of Student's behaviors in the second half of the 2022-2023 school year had increased.

Palo Alto's witnesses testified persuasively and consistently that Student's BIP was implemented with fidelity. Despite faithful implementation, Student's aggressive behaviors sometimes had observable antecedents; however, sometimes they did not. Student was physically aggressive with Tolerba, Harrison, Ruiz, and Barbosa and other students. Tolerba and Harrison both testified to the great lengths they went to include Student in the general education curriculum, but also how frightened other children were by his aggressive outbursts. Palo Alto established maintaining Student in his current placement was substantially likely to result in injury to others.

In his closing Student argued the two-prong test established in *Light v. Parkway School District C-2*, (8th Cir. 1994) 41. F3d. 1223, 1228 must be met prior to removing a child from their educational placement. Specifically, the court held that in addition to determining if a child is substantially likely to cause injury, a finding must be made that the school district made reasonable efforts to accommodate the child's disabilities with supplemental aides and services. Essentially, Student argues that even if Student is a danger to himself or others, he cannot be removed to an interim alternative educational setting unless Palo Alto also establishes it made reasonable efforts to accommodate Student's disabilities with supplemental aides and services. Student argued that Kober established Palo Alto did not provide sufficient aides and services such that it would be entitled to remove Student. Student's argument is unpersuasive.

First, the Ninth Circuit has not adopted this two-pronged test requirement. Further, Kober's testimony was given less weight than Palo Alto's witnesses because her testimony downplayed the seriousness of Student's attack on Barbosa. Kober also

ignored the frequency and increasing severity of Student's aggression toward others. Moreover, even if the Ninth Circuit adopts the standard in *Light v. Parkway*, Palo Alto would still prevail.

The evidence in this case, as discussed more fully below, established Palo Alto did provide supplemental aides and services. Palo Alto established Student remained a risk to others despite implementation of supplementary aids and services to control the child's propensity to inflict injury.

The evidence established Palo Alto did make reasonable efforts to accommodate Student. Student had an assigned one-to-one aide, specialized seating to minimize distractions, choice of tasks, reduced instruction demands, extra and immediate privileges and rewards, advance warning to changes in the environment, movement breaks, fidget objects, and alternative response methods. Student also had a behavior intervention plan. Student's behavior intervention plan identified Student would be more likely to express aggression during non-preferred tasks or when attempting to gain attention from others.

Student's private BCBA, Kober, was critical of Student's behavior intervention plan. She argued she did not believe the behavior intervention plan was being followed. She was specifically critical of the use of hand-over-hand technique utilized to assist Student in completing his educational tasks. Student's aggressive behaviors were not limited to events where the hand-over-hand technique was utilized. To the contrary, 16 of Student's behaviors since December 2, 2022, involved Student demonstrating aggressive behavior independent of any aide or teacher contact.

Student had at least 18 behavior incidents that resulted in injury to staff and other students from December 2, 2022, until May 18, 2023. The incidents occurred in a variety of settings during preferred and nonpreferred tasks. All Palo Alto personnel testified convincingly about the injuries they sustained from Student and their on-going concerns about his escalating behavior.

Palo Alto showed by the preponderance of the evidence that maintaining Student's placement at El Carmelo Elementary is substantially likely to result in injury to others.

IS CREATIVE LEARNING CENTER AN APPROPRIATE INTERIM ALTERNATIVE EDUCATIONAL SETTING?

Palo Alto seeks permission to change Student's placement from El Carmelo Elementary to Creative Learning Center, a nonpublic school, for not more than 45 school days without parental consent. Palo Alto asserts Creative Learning Center is a placement that will allow Student to participate in the general education curriculum and make progress on his goals.

Student did not contest the appropriateness of Creative Learning Center in his closing argument. It is, however, Palo Alto's burden to establish the appropriateness. Therefore, the lack of addressing it in Student's closing argument is not considered.

Creative Learning Center is a nonpublic school certified through the California Department of Education. Cynthia Loleng-Perez, Palo Alto's Director of Special Education testified at the hearing she began researching appropriate interim alternative education settings for Student following the May 18, 2023, incident. Loleng-Perez was

familiar with Creative Learning Center as she had facilitated placement of other Palo Alto students there. A parental tour is required before Creative Learning Center will initiate the application process. A tour was originally scheduled for June 13, 2023. It was later cancelled by Parent. A tour was completed on August 22, 2023.

Ramos endorsed Creative Learning Center's high level of services including its Applied Behavior Analysis program, the smaller class size, and the higher level of training its behavior aides and support staff receive. Ramos further argued, Student has demonstrated success with Applied Behavior Analysis programming and its use by Creative Learning Center will benefit Student. Ramos further stated he believed the 45-day period would be sufficient to conduct a functional behavior assessment of Student.

Tamila Sayer, Executive Director of the Creative Learning Center, testified at the hearing. Sayer described Creative Learning Center's intake process, the initial observations conducted of prospective students, and the general program. As a nonpublic school, certified by the California Department of Education, Sayer established that all students at Creative Learning Center participate in the general education curriculum. Sayer explained that if a student's IEP required a service or support that her program did not have, on-site arrangements would be made between the placing district and Creative Learning Center to ensure implementation of the IEP. Creative Learning Center had three BCBA's on staff, and two more awaiting their board examinations. All classroom aides were Applied Behavior Analyst trained. This is a higher level of training for the paraprofessionals assisting in Student's classroom than

Palo Alto could provide. A class that could serve Student would have a credentialed special education teacher, a registered behavioral technician, and a BCBA. Should Student also require a one-to-one aide, the Creative Learning Center program could support it.

Palo Alto demonstrated by the preponderance of the evidence that Creative Learning Center was an appropriate interim alternative education 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.

Palo Alto proved maintaining Student's current placement at El Carmelo Elementary School causes a substantial risk of injury to others and may place Student at Creative Learning Center for no more than 45 school days as an appropriate interim alternative education setting.

REMEDIES

1. Within 15 days of this Decision, Palo Alto may remove Student from his current placement at El Carmelo Elementary School and place Student at Creative Learning Center, as an interim alternative educational setting.
2. Placement at Creative Learning Center may not exceed 45 school days, at which point Palo Alto must return Student to his placement at El Carmelo Elementary 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.

Tiffany Gilmartin

Administrative Law Judge

Office of Administrative Hearings