

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

LAKE ELSINORE UNIFIED SCHOOL  
DISTRICT.

OAH Case No. 2015080436

DECISION

Parents on behalf of Student filed a due process hearing request with the Office of Administrative Hearings on August 4, 2015, naming the Lake Elsinore Unified School District.

Administrative Law Judge Paul H. Kamoroff heard this matter in Lake Elsinore, California, on December 14, 15, 16, and 17, 2015, and January 19, 20, and 26, 2016.

Tania Whiteleather, Attorney at Law, appeared on behalf of Student. Student's mother attended the hearing intermittently. Student did not attend the hearing.

Cynthia Vargas, Attorney at Law, appeared on behalf of District. Donna Wolter, District's Director of Special Education, attended each day of the hearing.

The record closed on February 9, 2016, upon receipt of written closing briefs from the parties.

## ISSUES<sup>1</sup>

1. Whether District denied Student a free appropriate public education during the 2013-2014 school year, by failing to appropriately assess her in the area of behavior?
2. Whether District denied Student a FAPE during the 2014-2015 school year, by failing to appropriately assess her in the area of behavior?
3. Whether District procedurally denied Student a FAPE by failing to conduct appropriate triennial assessments prior to her triennial individualized education program team meeting, held in June 2014?

## SUMMARY OF DECISION

Student contends that she was denied a FAPE because District failed to timely assess her or to assess her in the area of behavior. District responds that it offered appropriate behavior and triennial assessments, but was prevented from conducting its assessments because Student's parents failed to consent to District's various assessment plans.

District took reasonable steps to timely provide Student a triennial evaluation, and to assess her in the area of behavior. However, Student's parents refused to consent to District's assessment plans. It was this lack of consent that prevented District from assessing Student, rather than any fault attributable to District. Evidence also shows that the behavior assessments offered by District were appropriate for Student.

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<sup>1</sup> At the beginning of the hearing, Student withdrew all issues alleging that District had denied her a FAPE by failing to appropriately assess her in the area of anxiety. No other issues are decided in the Decision. Therefore, District's February 12, 2016 motion to strike issues is denied as moot.

The Decision therefore finds that District's failure to assess Student did not constitute a denial of FAPE.

## FACTUAL FINDINGS

### THE STUDENT

1. Student was a 14-year-old girl who resided with her parents within District's boundaries during the applicable time frame. She was eligible for special education under the eligibility category autism. Student exhibited deficits in communication, cognition, sensory processing, and academic development. Concomitant with these delays, Student presented serious behavioral challenges. She frequently bit and pinched others, caused self-injury by pulling her hair and pinching herself, damaged property, was inattentive, and verbally disruptive.

2. In June 2012, Parents dis-enrolled Student from District. From September 17, 2012, through mid-November 2012, Parents unilaterally placed Student at the Beacon Day School, a nonpublic special education school located in La Palma, California. Following Beacon, Parents home schooled Student until April 2014.

3. On April 28, 2014, Parents unilaterally enrolled Student at Port View Preparatory, a nonpublic special education school located in Yorba Linda, California. Student attended Port View through the hearing.

### THE 2012 ASSESSMENT PLAN

4. District last assessed Student in February 2010, which was Student's triennial evaluation. In September 2012, the District IEP team determined that Student required additional behavior testing, a functional analysis assessment, because she was presenting self-injurious behaviors. Student frequently pinched herself and others, to the point of causing bleeding, and pulled her hair and eyebrows until she bled. Student frequently flipped over desks, destroyed property, and was verbally disruptive.

5. A functional analysis assessment was a behavior assessment that included three testing components. The first component involved the use of indirect measures to collect information regarding the subject student. Indirect measures could include a review of school records, interviews with staff or parents, or the use of rating scales and inventories. The second component required that the assessor directly observe the student. Direct observation permitted the assessor to collect first hand data regarding the events that preceded problem behaviors (antecedents), and the events that followed problem behaviors (consequences). The first two components, by themselves, could form a functional behavior assessment. The third component was a functional analysis. Functional analysis required replicating an environment and antecedents that triggered the maladaptive behavior, to observe the maladaptive behaviors, and to identify positive replacement behaviors.

6. District had previously assessed Student, so the request was for District to reassess Student. Reassessments required parental consent to an assessment plan. On September 16, 2012, District's Special Education Director, Ms. Wolter, sent Parents an assessment plan and a prior written notice to conduct a functional analysis assessment. District also sent a copy of the assessment plan and the prior written notice to conduct an assessment to Student's attorney, who, at that time, was Ralph Lewis. As of the hearing, Parents had not consented to this assessment plan.

#### THE 2013 ASSESSMENT PLAN

7. Student's triennial evaluation<sup>2</sup> was due in 2013. School districts are required to reassess pupils who, like Student, are eligible for special education, at least once every three years, unless the parent and school district agree that a reevaluation is not necessary. This three-year reassessment is referred to as a triennial evaluation. To

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<sup>2</sup> In California, the terms "evaluation" and "assessment" are used interchangeably.

prepare for Student's triennial evaluation, and the IEP team meeting held in conjunction with her triennial evaluation, Ms. Wolter sent Parents an assessment plan on June 27, 2013. Along with the assessment plan, Ms. Wolter sent Parents a prior written notice to reassess, a copy of Parent's notice of procedural safeguards and parental rights, and a release of information form. A release of information was a document that, if signed by a pupil's parents, permitted school district staff to communicate with private providers and private school staff regarding a pupil's needs. Student was then 11 years old, and had not been assessed by District since 2010, or observed by District staff, since June 2012.

8. The June 2013 assessment plan offered to assess Student in the areas of academic achievement by a special education teacher; in social, adaptive, behavioral, and emotional development, by a psychologist and a behavior interventionist; processing, by a psychologist; perceptual motor development, by a psychologist and an occupational therapist; communication development by a language, speech and hearing specialist; cognitive development by a psychologist; and, health, by a nurse.

9. The behavior components of the triennial evaluation included the Behavior Rating Inventory of Executive Function; the Student Annual Needs Determination Inventory; the Behavior Assessment System for Children, Second Edition; Conners Rating Scale, Third Edition Long Form; the Social Skills Improvement System; the Childhood Autism Rating Scale, Second Edition; a records review by the school psychologist and a behavior intervention specialist; and direct observations of Student by the school psychologist and a behavior intervention specialist.

10. The Behavior Rating Inventory of Executive Function included eight non-overlapping clinical scales to assess a pupil's behavior regulation and metacognition in the areas of inhibition, shifting, emotional control, initiation, working memory, planning and organizing, and monitoring. The pupil's behaviors were analyzed from three

perspectives: self, teacher(s), and parent(s). The Student Annual Needs Determination Inventory included, amongst other educational tests, social emotional and behavioral testing that utilized direct testing and observation. The Behavior Assessment System for Children utilized rating scales from the student, parents, and teachers, to analyze a pupil's behavior and emotion in the areas of adaptive skills, aggression, anxiety, atypicality, attention, conduct problems, depression, hyperactivity, leadership, functional communication, learning problems, social skills, somatization, study skills, withdrawal, externalizing problems, and internalizing problems. The Conners was an assessment tool used to obtain observations about a pupil's behavior from multiple perspectives. Parent and teacher rating scales analyzed behaviors in the areas of hyperactivity and impulsivity, learning problems and executive functioning, defiance and aggression, and peer relations. The Social Skills Improvement System used teacher rating scales to assess pupils who were suspected of having significant social skills deficits. Communication, cooperation, assertion, responsibility empathy, engagement, self-control, externalizing, bullying, internalizing, and autism spectrum, were all areas analyzed by the Social Skills Improvement System.

11. Ms. Wolter sent a copy of the June 2013 assessment plan, a prior written notice to reassess, a copy of Parent's notice of procedural safeguards and parental rights, and a release of information, to Parents via certified mail. She also sent a copy of these documents to Mr. Lewis. The certified letter containing these documents was eventually returned to District, unclaimed. Parents did not sign their consent to the assessment plan or for the release of information.

#### THE 2014 ASSESSMENT PLAN

12. District was unable to conduct Student's triennial evaluation because Parents had failed to consent to its plan to assess Student. District again attempted to reassess Student, and to hold a triennial IEP team meeting, during the following school

year.

13. On April 22, 2014, Ms. Wolter sent Parents another assessment plan for triennial assessments, a prior written notice letter detailing District's desire to reassess Student, a copy of Parent's notice of procedural safeguards and parental rights, and a release of information form. The assessment plan contained identical assessments, by similarly qualified assessors, as those included in the June 2013 assessment plan. Ms. Wolter sent a copy of these documents to Parents via certified mail and email. She also sent a copy of these documents to Student's educational advocate Chris Russell, who was then representing Student instead of Mr. Lewis. Parents accepted the certified letter that included the April 2014 assessment plan and related documents.

14. Parents and Mr. Russell discussed the April 2014 assessment plan. Although the plan called for behavior assessments, Mr. Russell believed that the assessments offered by District were insufficient to meet Student's needs. Mr. Russell was under the misimpression that Student required a functional analysis assessment. On this basis, Mr. Russell believed that District had violated Student's educational rights. He also believed that, rather than request a functional analysis, it made better strategic sense for Parents to forgo District's triennial assessments altogether and to use this perceived violation against District in the present hearing. Parents followed Mr. Russell's advice. They declined to consent to the April 2014 assessment plan or to the release of information that would permit District to communicate with Port View staff regarding Student's then present educational needs.

#### THE TRIENNIAL IEP TEAM MEETING

15. District convened Student's triennial IEP team meeting on June 3, 2014. Student was 13 years old and in the seventh grade at Port View. Along with Student's mother and Mr. Russell, the following District IEP team members attended the meeting: Rachel Cohen, a special education teacher; Mireya Escalanate, a behavior intervention

specialist; Dawn Hernandez, assistant principle; Kristine Penwarden, occupational therapist; Monica Andrews, school psychologist; Ryan Forgette, speech and language specialist; Melissa Upton, general education teacher; Ms. Wolter; and, District's attorney.

16. The IEP team first reviewed Student's progress on her prior goals. Parents had not permitted District to assess or observe Student, or to communicate with Port View staff regarding Student's needs. District was therefore dependent on information provided by Parents and Mr. Russell to determine Student's present levels of performance, to develop new goals, and, in part, to offer a FAPE.

17. Mother provided the IEP team a recent progress report from Port View. The report provided details regarding Student's present abilities in academic functions, including her ability to read, spell, write, and in math. Although behavioral reports existed from Port View, Parents did not share this information with the District team. Based upon what was shared, District was able to determine Student's progress towards her prior academic goals; she met six and partially met three. District was receptive to the data included in the Port View progress report and used that information, along with input provided by Mother during the IEP team meeting, to develop six new goals in the areas of reading comprehension, writing, following instructions, and functional communication.

18. Mother and Mr. Russell shared information regarding Student's academic abilities, but carefully omitted their concerns that Student still exhibited maladaptive behaviors and their belief that she required a functional analysis assessment. Rather, Mother and Mr. Russell reported to the District team areas in which Student had made progress in behavior: Student no longer injured herself or others. The most serious of Student's maladaptive behaviors, which had included pulling her own hair to the point of causing herself to bleed, pinching herself and others to the point of causing bleeding, and flipping over desks, had been eliminated since Student last attended a school



district program. Mother also reported that lesser serious behaviors, including swiping items off desks, inattention, and verbal disruption, had decreased in severity and intensity. Mr. Russell reported that the triennial assessments offered by District, as delineated in the April 2014 assessment plan, were unnecessary, in light of Student's progress while at Port View. Parents, at Mr. Russell's suggestion, had decided to forego the triennial assessments.

19. Neither Mother nor Mr. Russell requested additional or different behavior testing, or indicated that such was warranted, during the June 2014 IEP team meeting.

20. Notwithstanding Parents request to forego the triennial assessments, District did not agree to this waiver and continued to offer the April 2014 assessment plan.

#### CONDUCT FOLLOWING THE TRIENNIAL IEP TEAM MEETING

21. On May 22, 2015, District again offered Student an assessment plan for triennial assessments and for a release of information to communicate with Port View. The assessments offered were identical to those included in the 2013 and 2014 assessment plans, and the persons identified to conduct the assessments were similarly qualified. On August 3, 2015, Parents consented to the assessment plan. District completed the triennial assessments on November 3, 2015, and reviewed the assessments with Parents and Mr. Russell during an IEP team meeting held on December 4, 2015. The November 2015 assessments, and the December 2015 IEP, are not issues in the present matter.

22. Brandie Del Real and Kevin Kinney were charged with completing the behavior testing in the 2015 triennial assessments. Ms. Del Real attained a bachelor's of science degree in 2009, and a master's of science degree in school psychology in 2012. She had worked as a school psychologist for District for approximately two years. She had experience assessing and providing services to students with autism and those with

behavior disorders. Mr. Kinney had been a behavior intervention specialist for 15 years, and routinely assisted in developing behavior plans for District. Ms. Del Real coordinated all of Student's triennial testing, reviewed Student's educational records, observed Student at Lake Elsinore High School, and performed and analyzed the following behavior assessments: the Behavior Rating Inventory of Executive Function; the Student Annual Needs Determination Inventory; the Behavior Assessment System for Children, Second Edition; Conners Rating Scale, Third Edition Long Form; the Social Skills Improvement System, and; the Childhood Autism Rating Scale, Second Edition.

23. Mr. Kinney observed Student at Port View for two and a half hours on October 1, 2015, and for over an hour on October 23, 2015. Mr. Kinney observed Student in class and interacting with peers and teachers. He meticulously recorded events occurring prior to maladaptive behaviors, the maladaptive behaviors, and what occurred after behavioral incidents. Student frequently engaged in property destruction, including flipping over desks and swiping items off desks, and, less frequently, engaged in physical aggression, including pushing and pinching staff. Student did not present self-injurious behaviors.

24. Ms. Del Real and Mr. Kinney analyzed the data obtained through the numerous behavior assessments and their observations. They determined that the function of Student's behavior was for attention and to avoid non-preferred tasks. Using this information, along with input from the December 2015 IEP team, they developed three new behavior goals, accommodations, behavior intervention services, amongst other goals and services; and an offer for a structured special education placement. Student has not challenged these goals, services or placement.

25. Ms. Del Real and Mr. Kinney were competent assessors and behavior specialists. Each persuasively testified at hearing that the records review, rating scales and behavior inventories from Student's parents and her teachers, and their direct

observations, constituted a sufficient behavior evaluation to determine an appropriate plan to identify and remediate Student's maladaptive behaviors. Overall, the behavior assessments offered by District in 2013 and 2014, and which were performed in 2015, were sufficient, without a functional analysis, to meet Student's unique educational needs.

#### STUDENT'S WITNESSES

26. Edward Miguel and Dr. Melaura Erickson Tomaino were directors at Port View. Each were previously administrators at Beacon. Dr. Tomaino was also Student's psychologist at Port View. She earned her master's of science in clinical psychology in 2007, and her doctorate in applied developmental psychology in 2011. Mr. Miguel earned his master's of arts in teaching with a specialization in applied behavior analysis in 2012, and he was working on a doctorate of education. Mr. Miguel and Dr. Tomaino had each observed Student on several occasions and were familiar with her behaviors. In significant part, each witness corroborated Ms. Del Real and Mr. Kinney's testimony that Student had not required a functional analysis to determine her unique behavioral needs or to deliver her an effective behavior plan.

27. Beginning in April 2014, Port View staff had the opportunity to assess Student in any manner that they deemed necessary. Dr. Tomaino and Mr. Miguel were each familiar with Student from Beacon, and had observed her engage in serious self-injurious behaviors, including hair pulling and pinching. As therapists, Dr. Tomaino and Mr. Miguel each considered a functional analysis to be inappropriate, and dangerous, for Student because it replicated the environment and antecedents that caused Student to hurt herself. Rather, Dr. Tomaino and Mr. Miguel persuasively testified that the first two components of a functional behavior assessment were better suited for Student and sufficient to meet her unique needs. For Dr. Tomaino and Mr. Miguel, the first component of a functional behavior assessment, indirect testing, was met by reviewing

Student's educational records. The second component, direct testing, was met by Dr. Tomaino directly observing Student in the classroom. This permitted Dr. Tomaino to collect data on Student's behaviors, which included various aggressive and off-task behaviors. Based upon her records review and observations, Dr. Tomaino was able to determine the functions of Student's behaviors and to formulate an effective behavior plan.

28. While at Port View, the seriousness of Student's behaviors had subsided. Student no longer engaged in self-injurious behaviors or seriously hurt others. She still frequently pinched others, damaged property, and was inattentive, but not at the same level of severity that she had presented when she first enrolled at Port View.

29. A summation of Mr. Miguel and Dr. Tomaino's testimony showed that the behavior assessments offered in District's 2013 and 2014 assessment plans, and conducted by District staff in 2015, were appropriate to meet Student's behavior needs and to formulate an effective behavior plan. Similar to the assessments conducted by Dr. Tomaino and Mr. Miguel, District's testing included a review of Student's educational records and direct observations by a psychologist and a behavior intervention specialist. Similarly, District was able to analyze the antecedents, consequences, and functions of Student's behaviors. In addition to the assessments conducted by Port View, District's behavior testing included six behavior rating scales and inventories, completed in a multi-perspective manner by Student, her parents, and teachers. Consequently, District's evaluations exceeded what Student's experts recommended. From this testing, District was able to formulate behavior goals and to offer behavior services in the December 2015 IEP.

30. Mr. Russell and Mother also testified on Student's behalf. Mr. Russell did not have any training or expertise in education, behavior, assessments, or law. Nonetheless, he represented students with disabilities, and their families, as an

educational advocate. As Student's educational advocate, Mr. Russell advised Parents to waive the triennial evaluation and to omit their true concerns regarding Student's behavior needs during the June 2014 IEP team meeting. Mr. Russell wished to use the District's failure to offer a functional analysis assessment in the 2013 and 2014 assessment plans, which he mistakenly perceived as a legal violation, against District during the present hearing; rather than request that District add a functional analysis to its offer of behavior assessments for Student.

31. Parents had a history of animosity and distrust towards District. There have been several prior legal actions between these parties. This history impacted the manner in which Parents interacted with District. For example, Mother testified that she had received the 2012 assessment plan for the functional analysis assessment, but had refused to sign the plan due to a level of mistrust she had towards the District staff.

32. Mother claimed that she had not received the 2013 assessment plan, because she had not received the certified letter containing this plan. Although this certified letter was returned to District unclaimed, Mother was unable to confirm or deny whether her attorney Mr. Lewis had received a copy of this assessment plan. Mother's testimony was therefore less reliable than Ms. Wolter's recollection, who persuasively testified that she personally mailed a copy of the 2013 assessment plan, and related documents, to Mr. Lewis.<sup>3</sup> Ms. Wolter also recalled that, given the history of legal actions between Parents and District, it was her policy to always send a copy of anything that she sent to Parents, to their attorney. Because a copy of the assessment packet was provided by District to Student's attorney, receipt of this plan was conferred to Parents.

33. Mother acknowledged that she had timely received District's 2014

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<sup>3</sup> Mr. Lewis did not testify during the hearing.

assessment plan for a triennial evaluation, and related documents. However, she deferred to Mr. Russell's recommendations, and Parents refused to consent to District's offer to conduct a triennial evaluation for Student. She instructed Mr. Russell to communicate with District staff that Parents wished to waive District's triennial evaluation. Mr. Russell conveyed this message to District IEP team members during the June 2014 triennial IEP team meeting.

34. Similar to Mr. Russell, Mother had omitted information regarding Student's behaviors during the 2014 IEP team meeting. She withheld sharing her belief that Student still exhibited serious maladaptive behaviors and required more intensive behavior testing than the assessments offered in District's 2014 assessment plan. To the contrary, during the meeting, Mother enthusiastically described that Student had made significant behavioral progress and was no longer presenting serious behavioral challenges, in large part due to her placement outside of a District school program.

35. The District IEP team was receptive to Parent's input during the June 2014 IEP team meeting. The IEP team adopted information presented by Mother and Mr. Russell, and modified IEP goals based upon data included in the Port View progress reports. Parents, and their advocate, were given ample opportunity to participate in the planning and development of Student's IEP. There is no reason to believe that District would not have also modified its assessment plan, had it been requested to do so. District based its IEP offer, and offer for assessments, upon the information that was available at that time.

36. Overall, Student's witnesses and evidence fell far below what was needed to show that District had failed to offer appropriate behavior assessments, or to timely offer her triennial assessments. Evidence overwhelmingly pointed to the contrary, and showed that District took all necessary steps to make appropriate assessments available to Student.

## LEGAL CONCLUSIONS

### INTRODUCTION: LEGAL FRAMEWORK UNDER THE IDEA<sup>4</sup>

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300.1 (2006)<sup>5</sup> et seq.; Ed. Code, § 56000, et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School District v.*

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

<sup>5</sup> All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

*Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that “the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to” a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 (*Mercer Island*) [In enacting the IDEA, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit,” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56505, subd. (i).) 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].) In this matter, Student had the burden of proof on all issues.

#### ASSESSMENT AND REASSESSMENT STANDARDS

5. Prior to making a determination of whether a child qualifies for special education services, a school district must assess the child. (20 U.S.C. § 1414(a), (b); Ed. Code, §§ 56320, 56321.) After the initial assessment, a school district must conduct a reassessment of the special education student not more frequently than once a year, but at least once every three years. (20 U.S.C. § 1414(a)(2)(B); Ed. Code, § 56381, subd. (a)(2).) By this standard, the assessments requested in this case are reevaluations of Student.

6. In conducting a reassessment, a school district must follow statutory guidelines that prescribe both the content of the assessment and the qualifications of the assessor(s). (20 U.S.C. § 1414(b)(3)(A); Ed. Code, § 56320.)

7. Reassessment requires parental consent to a proposed assessment plan. Upon referral for an assessment, the school district has 15 days to develop the proposed assessment plan, not counting calendar days between the pupil's regular school sessions or calendar days of school vacation in excess of five school days, from the date of receipt of the referral, unless the parent or guardian agrees in writing to an extension. (Ed. Code 56043(a).) The school district must give the parents and/or pupil 15 days to review, sign, and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).)

8. A school district's failure to reassess a student with a disability constitutes a procedural violation of the IDEA. (*R.B., ex rel. F.B. v. Napa Valley Unified Sch. Dist.* (9th Cir. 2007) 496 F.3d 932, 940.) A procedural violation of the IDEA constitutes a denial of a FAPE "only if the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the IEP decision making process; or (3) caused a deprivation of educational benefits." (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, §

56505(f)(2); *W.G. v. Bd. of Trustees of Target Range Sch. Dist. No. 23, Missoula, Mont.* (9th Cir. 1992) 960 F.2d 1479, 1484 .)

9. School districts are not required to file for due process to force parents to consent to reassessments or to assess without parental consent. (34 C.F.R. § 300.300(c)(1)(ii) and (iii); Ed. Code, §§ 56381, subd. (f)(3), 56501, subd. (a)(3).)

#### ISSUE ONE: FAILURE TO ASSESS STUDENT'S BEHAVIORS DURING THE 2013-2014 SCHOOL YEAR

10. Student complains that she was denied a FAPE because District failed to assess her in the area of behavior.

11. A school district must conduct a reassessment if it "determines that the educational or related service needs of the child, including improved academic achievement and functional performance, of the child warrant a reevaluation," or if the student's parents or teacher request a reassessment. (20 U.S.C. § 1414(a)(2)(A)(i); see also Ed. Code, § 56381, subd. (a)(1).) A school district must conduct a reassessment of the special education student at least once every three years. (20 U.S.C. § 1414(a)(2)(B); Ed. Code, § 56381, subd. (a)(2).) By this standard, District was obligated to reassess Student because her last triennial evaluation was conducted in February 2010.

12. However, reassessment requires parental consent to a proposed assessment plan. (Ed. Code 56043(a).) Here, Student seeks to constrict District in an artificial catch-22: Parents refused to consent to District's assessment plans, and then claim District violated Student's educational rights by failing to assess her.

13. Student argues that (1) the assessments offered in the 2013 assessment plan were insufficient to assess Student's behavioral challenges, and; (2) that Parents did not receive a copy of the 2013 assessment plan. Student's arguments fail on several grounds.

14. First, District offered a functional analysis assessment in September 2012,

well before the 2013-2014 school year. Mother acknowledged her receipt of this assessment plan, but testified that she did not consent to this assessment because she did not trust the school district assessors. District was prohibited from conducting a functional analysis assessment due to Parents' failure to consent to the 2012 assessment plan.

15. More importantly, District's June 27, 2013 assessment plan for Student's triennial evaluation included sufficient and appropriate behavior assessments, despite its failure to offer another functional analysis assessment. District's experts Ms. Del Real and Mr. Kinney, and Student's experts Dr. Tomaino and Mr. Miguel, unanimously testified that Student did not require a functional analysis assessment to receive an appropriate behavior assessment or to collect sufficient behavioral data to offer an appropriate behavior plan. To the contrary, evidence overwhelmingly showed that a functional analysis was unnecessary and would have been potentially harmful to Student.

16. Dr. Tomaino and Mr. Miguel were each familiar with Student from Beacon and Port View. Each had observed Student engage in serious self-injurious behaviors, including hair pulling and pinching to the point of causing herself to bleed. Dr. Tomaino and Mr. Miguel each testified that a functional analysis would be inappropriate, and dangerous, for Student because it replicated the environment and antecedents that caused Student to hurt herself. Port View staff had the opportunity to perform a functional analysis of Student, and had elected not to do so. Rather, Student's experts believed that the first two components of a functional behavior assessment were better suited for Student and sufficient to meet her unique needs.

17. Evidence supported Port View's decision to forego a functional analysis for Student. For example, Dr. Tomaino was able formulate an effective behavior plan without further behavior assessments, and the seriousness of Student's behaviors had subsided during her tenure at Port View. Student no longer engaged in self-injurious

behaviors, and the intensity of her remaining maladaptive behaviors had decreased. Consequently, Student's argument that District denied her educational rights by failing to offer her a functional analysis assessment is not supported by the evidence submitted during hearing.

18. In the alternative, Student argues that District should have offered Student a functional behavioral assessment. However, a preponderance of evidence revealed that the behavior assessments included in District's 2013 and 2014 assessment plans surpassed what was necessary to complete a functional behavior assessment. Dr. Tomaino and Mr. Miguel each testified that the first component of Port View's functional behavior assessment was completed by reviewing Student's educational records. The second component was completed by directly observing Student in the classroom; to observe antecedents and consequences of maladaptive behaviors, and to determine the functions of her behaviors. Per Student's experts, this represented a complete functional behavior assessment for Student.

19. Similar to the assessments conducted by Dr. Tomaino and Mr. Miguel, District's testing included a review of Student's educational records and direct observations by a psychologist and a behavior intervention specialist. Similarly, Ms. Del Real and Mr. Kinney were able to analyze the antecedents, consequences, and functions of Student's behaviors. However, in addition to the assessments recommended by Student's experts, District's behavior testing also included six behavior rating scales and inventories, completed in a multi-perspective manner by Student, her parents, and teachers. The behavior components of District's evaluation that exceeded Port View's functional behavior assessment included the Behavior Rating Inventory of Executive Function; the Student Annual Needs Determination Inventory; the Behavior Assessment System for Children, Second Edition; Conners Rating Scale, Third Edition Long Form; the Social Skills Improvement System, and; the Childhood Autism Rating Scale, Second

Edition. For these reasons, the evidence submitted by Student's experts corroborated District's experts' testimony that the behavior assessments offered in the 2013, 2014, and 2015 assessment plans, were appropriate to meet Student's behavior needs and to formulate an effective behavior plan.

20. Student next argues that her parents did not receive the 2013 assessment plan. In contravention of this argument, Ms. Wolter testified that she sent Parents the assessment plan for a triennial evaluation that included the behavior assessments, on June 27, 2013. Along with the assessment plan, Ms. Wolter sent Parents a prior written notice to reassess, a copy of Parent's notice of procedural safeguards and parental rights, and a release of information form. Ms. Wolter sent a copy of this assessment packet via certified mail to Parents, and a copy to their attorney Mr. Lewis.

21. Mother claimed that she did not receive the June 2013 assessment plan because she did not receive the certified letter containing this plan. Although this certified letter was returned to District unclaimed, Mother was unable to confirm or deny that her attorney Mr. Lewis had also received a copy of this assessment packet. Mother's testimony was therefore less persuasive than Ms. Wolter's testimony, who persuasively recalled that she personally mailed a copy of the assessment packet to Mr. Lewis on June 27, 2013. Ms. Wolter also persuasively testified that, given the parties history of litigation, it was her policy to always send a copy of anything that she sent to Parents, to their attorney. Because a copy of the assessment packet was provided by District to Student's attorney, receipt of this plan is therefore conferred to Parents.

22. Consequently, a preponderance of the evidence indicates that Parents received the 2013 triennial assessment plan, and refused to consent to the assessment plan. District was not permitted to assess without parental approval, and therefore cannot be held liable for failing to assess Student.

23. For the foregoing reasons, a preponderance of the evidence shows that

District did not deny Student a FAPE by failing to assess her in the area of behavior during the 2013-2014 school year.

#### ISSUE TWO: FAILURE TO ASSESS STUDENT'S BEHAVIOR DURING THE 2014-2015 SCHOOL YEAR

24. Student reasserts her argument that District failed to assess her in the area of behavior for the following school year. Again, Student seeks to trap District in a catch-22: Student refused to consent to District's offer to assess, and then claims she was denied educational rights because District did not assess her. Student's claim fails for the same reasons cited in Legal Conclusions 10 through 23.

25. On April 22, 2014, Ms. Wolter sent Parents an assessment plan for a triennial evaluation that included behavior assessments, a prior written notice letter detailing District's desire to reassess Student, a copy of Parent's notice of procedural safeguards and parental rights, and a release of information form. The assessment plan contained identical assessments, by similarly qualified assessors, as those included in the June 2013 assessment plan. Consequently, for the same reasons found in Legal Conclusions 10 through 23, District was not required to offer Student a functional analysis assessment. There was simply no evidence submitted during hearing that supported this contention. In addition, for the same reasons cited in Legal Conclusions 10 through 23, the behavior assessments offered by District in the April 2014 assessment plan, met and exceeded what was required to complete an appropriate functional behavior assessment.

26. Ms. Wolter sent a copy of the April 2014 assessment packet to Parents via certified mail and email. She also sent a copy of these documents to Student's educational advocate Chris Russell, who was then representing Student. Parents accepted the certified letter and, along with Mr. Russell, testified that they had timely received the enclosed assessment plan.

27. Parents and Mr. Russell discussed the April 2014 triennial assessment plan prior to the June 2014 triennial IEP team meeting. Although the assessment plan called for behavior assessments, Parents and Mr. Russell mistakenly believed the assessments offered were insufficient to meet Student's unique needs. Parents therefore elected to not sign the 2014 assessment plan. School districts are not permitted to assess a pupil without parent consent. For this reason, District was not able to conduct the triennial evaluation, or to perform the various behaviors assessments included in the triennial evaluation.

28. Consequently, a preponderance of evidence showed that District did not deny Student a FAPE by failing to assess her in the area of behavior during the 2014-2015 school year.

### ISSUE THREE: FAILURE TO CONDUCT TRIENNIAL ASSESSMENTS PRIOR TO THE JUNE 2014 TRIENNIAL IEP TEAM MEETING

29. Student asserts that District denied her educational rights by failing to conduct the triennial evaluations prior to her triennial IEP team meeting of June 3, 2014. For the same reasons found in Legal Conclusions 10 through 28, Student's argument is ill conceived and contrary to facts surrounding this matter.

30. District convened Student's triennial IEP team meeting on June 3, 2014. Prior to this meeting, on June 27, 2013, and again on April 22, 2014, District sent Parents a copy of an assessment plan for a comprehensive triennial evaluation. As found in Legal Conclusions 21 and 22, Parents received the June 2013 assessment plan, yet refused to permit District to assess Student.

31. During the hearing, Mother acknowledged that she had timely received the April 2014 triennial assessment plan. Yet, Parents knowingly elected to refuse to consent to the 2014 triennial assessment plan. During the June 3, 2014 IEP team meeting, on Parents' behalf, Mr. Russell told the District IEP team members that Parents

wished to waive Student's triennial evaluation. Moreover, during this meeting, Mother and Mr. Russell shared information regarding Student's academic abilities, but carefully omitted information regarding Student's behaviors. Rather, Mother and Mr. Russell reported to the District team that Student had made substantial progress in behavior. In light of Student's progress while at Port View, Mr. Russell reported that District's triennial evaluation was unnecessary. A preponderance of evidence therefore supported that Parents waived the 2014 triennial evaluation. Regardless of Parents' true concerns regarding Student's behaviors, without Parents' written consent to its assessment plan, District was unable to perform the triennial assessments prior to the June 3, 2014 triennial IEP team meeting.

32. For the foregoing reasons, Student failed to meet her burden to show that District's failure to reassess resulted in a denial of FAPE.

## ORDER

Student's requests for relief are denied.

## PREVAILING PARTY

Pursuant to 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. In accordance with that section the following finding is made: District prevailed on all issues heard and decided.

## RIGHT TO APPEAL THIS DECISION

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56506, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)



Dated: March 1, 2016

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*/s/*

PAUL H. KAMOROFF

Administrative Law Judge

Office of Administrative Hearings