BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2019040859
CASE NO. 2019070446

THE CONSOLIDATED MATTERS INVOLVING

PARENT ON BEHALF OF STUDENT, AND

LOMPOC UNIFIED SCHOOL DISTRICT.

DECISION

DATE ISSUED JANUARY 2, 2020

On, April 18, 2019, the Office of Administrative Hearings, called OAH, received a due process hearing request from Parent on behalf of Student, naming Lompoc Unified School District as respondent. On July 9, 2019, OAH received a request for due process hearing from Lompoc Unified School District, naming Parent on behalf of Student as respondent. On July 19, 2019, OAH consolidated the cases.

On August 6, 2019, OAH granted Student's request to file an amended complaint and deemed it filed on that same date, resetting all dates. The amended complaint remained consolidated with Lompoc's case. On September 13, 2019, the new hearing

scheduled on the consolidated cases was continued for good cause. Administrative Law Judge Penelope Pahl heard this matter in Lompoc, California on October 23, 29, 30, and 31, 2019; and on November 1, 4, 20, and 21, 2019.

Andrea Marcus and Daniel Robinson, attorneys at law, represented Student. Mother briefly attended the hearing on October 29, 2019, to confirm on the record that her attorneys had her permission to proceed in her absence. There was no party appearance for Student on any other hearing day. Sarah Garcia, attorney at law, represented Lompoc Unified School District. Cynthia Ravalin, Lompoc's Interim Director of Common Core and Innovation, attended all but the last hearing day on Lompoc's behalf.

Following the close of testimony, the matter was continued until December 5, 2019, at the parties' request, for the submission of written closing briefs. Briefs were timely received, the record was closed, and the matter was submitted on December 5, 2019.

ISSUES

The following issues were clarified and confirmed on the record on the first morning of hearing following discussions with the parties:

STUDENT'S ISSUES:

1. From April 18, 2017, to October 23, 2019, did Lompoc deny Student a free appropriate public education, called a FAPE, due its failure to address her needs for behavior support?

2. From April 18, 2017, to October 23, 2019, did Lompoc deny Student a FAPE due its failure to address chronic bullying?
3. From April 18, 2017, to October 23, 2019, did Lompoc deny Student a FAPE due its failure to assess Student in all areas of need, specifically, a) speech and language; and b) functional behavior?
4. From approximately March 5, 2019, to October 23, 2019, did Lompoc deny Student a FAPE by making educational decisions outside an individualized education program team meeting, called an IEP?
5. From April 18, 2017, to October 23, 2019, did Lompoc deny Student a FAPE by failing to offer IEPs reasonably calculated to provide Student with educational benefit?

LOMPOC'S ISSUES:

1. Was Lompoc's psychoeducational assessment, presented at the January 23, 2018 IEP team meeting, appropriately conducted;
2. Was Lompoc's speech and language assessment, presented at the January 23, 2018 IEP team meeting, appropriately conducted;
3. May Lompoc implement the offer of counseling services made in the March 19, 2019 IEP amendment without parent's consent?

ISSUES WITHDRAWN AT HEARING

During the hearing, Student withdrew the following issues, stated in the Prehearing Conference Order: issues 3(a) and (d), regarding the provision of psychoeducational and assistive technology assessments; issue 5, related to extended

school year services; and issue 6, regarding failure to hold an annual IEP team meeting in April of 2019. On November 4, 2019, Student's counsel stipulated that the psychoeducational assessment presented by Ms. Tijerina at the January 23, 2018 IEP team meeting was legally compliant. That same day, Mother consented to Lompoc's proposed assessment to conduct a functional behavior assessment. Lompoc then withdrew its issue number 3, stated in the Prehearing Conference Order, seeking permission to conduct a functional behavior assessment without parental permission. The issues were renumbered accordingly.

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 a free appropriate public education available 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, provided by the IDEA, are protected. (20 U.S.C. §1400(d)(1); see, Ed. Code, §56000, subd. (a).)

The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the

identification, assessment, or educational placement of the child, or the provision of a free, appropriate public education, usually called a FAPE, to the child. (20 U.S.C. §1415(b)(6) & (f); 34 C.F.R. 300.511(a); 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; and has the burden of proving their case 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, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see 20 U.S.C. §1415(i)(2)(C)(iii).) In these consolidated cases, Student has the burden of proof on the issues raised by Student and Lompoc has the burden of proof on issues raised by Lompoc. The findings of fact required by the IDEA and state law are incorporated into the discussions of each issue. (20 U.S.C. sec. 1415(h)(4); Ed. Code, §56505, subd. (e)(5).)

At the time of hearing, Student was 13 years old and enrolled in the 8th grade at Lompoc Valley Middle School, although, as of November 21, 2019, the last date of the hearing, she had not attended school during the 2019-2020 school year. Student is eligible for special education under the primary category of specific learning disability and the secondary category of emotional disturbance.

STUDENT'S ISSUE 1: FROM APRIL 18, 2017, TO OCTOBER 23, 2019, DID LOMPOC DENY STUDENT A FREE APPROPRIATE PUBLIC EDUCATION, CALLED A FAPE, DUE ITS FAILURE TO ADDRESS HER NEEDS FOR BEHAVIOR SUPPORT?

Student asserts that her behavior needs were not addressed by Lompoc from the spring of her fifth grade year to the first day of this hearing, resulting in an escalation of her behaviors that impeded her ability to access her education. Specifically, Student

argues that Lompoc should have provided her with a behavior intervention plan as part of her IEP and should have conducted a functional behavior assessment.

Lompoc argues that it provided behavior supports, including counseling and a behavior intervention plan, but that its efforts to provide additional services to Student were impeded by Mother. Mother refused to consent when Lompoc offered to conduct a functional behavior assessment and to provide counseling to Student.

A free appropriate public education is defined as special education and related services that are available, at no charge, to an eligible child who meets state educational standards. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) Parents and school personnel develop an IEP for an eligible student based upon the requirements of state law and the IDEA. (20 U.S.C. §§ 1401(14) and (26), 1414(d)(1)(A); Ed. Code, §§ 56031,56032, 56345, subd. (a) and 56363 subd. (a); 34 C.F.R. §§ 300.17, 300.34, 300.39 (2010); Cal. Code Regs., tit. 5, § 3001, subd. (p).)

In general, a child eligible for special education must be provided access to specialized instruction and related services which are individually designed to provide educational benefit through an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. (*Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*); *Endrew F. v. Douglas County School Dist.* (2017) 580 U.S. ____ [137 S.Ct. 988, 1000]; *E.F. v. Newport Mesa Unified School Dist.* (9th Cir. 2018) 726 Fed.Appx. 535.) "Related services" are transportation and other developmental, corrective, or 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 (2010); Ed. Code, § 56363, subd. (a).)

An IEP is a written statement for each child with a disability that is developed using the IDEA's procedures, with the participation of parents and school personnel. The IEP describes the child's present levels of performance, needs, and academic and functional goals related to those needs. It also provides a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to work towards the stated goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032: 56345, subd. (a).)

STUDENT'S BEHAVIOR NEEDS AND DISTRICT RESPONSES

FIFTH AND SIXTH GRADE

In April of 2017, Student was nearing the end of her fifth grade year in the Lompoc District. During the course of the year, Student demonstrated self-injurious behavior and was suspended on two occasions: once for being defiant and disruptive in class; and once for threatening another student. Student also engaged in altercations with peers, including instigating fights and engaging in either verbal or physical altercations when she believed someone spoke disrespectfully to her. Student did not receive any formalized behavior support in the fifth grade. She received group speech therapy once a week for 30 minutes; however, the therapy focused on using visual organizers and visual maps to help Student organize her thoughts.

Although this case begins on April 18, 2017, the IEP providing services to Student at that time was dated April 3, 2017. The school nurse gave Mother a list of counseling references when Student's self-injury was discovered. Mother informed the nurse Student was receiving outside counseling. In May of 2017 the following events

occurred: Student was suspended for a second time for threatening another Student; Mother was called in to the office to discuss a fight; and Student came to school with a box cutter. Student was involved in at least two more physical altercations before the end of the school year. No IEP team meetings were convened to address these concerns and no additional IEP services were offered.

In sixth grade, Student's last year in elementary school, Student's maladaptive behaviors increased significantly, resulting in Student's attendance at three different elementary schools that year: Fillmore, where she was enrolled for 17 days; La Canada, where she was enrolled for 33 days; and Hapgood, where she completed her sixth grade year. At each campus, she experienced increasing difficulties interacting with her peers. Each transfer was requested by Mother, who expressed concerns that Student was being bullied.

At Fillmore, Student attended school 8 of the 17 days she was enrolled. During the other 9 days, Student was suspended twice for fighting and missed five days due to absence. No evidence was presented as to the reason for the absences.

Student transferred to La Canada in early September, where she attended 17 of the 33 days she was enrolled. During that time, she was involved in at least four fights. In two she was the aggressor. In another 2 there was a question as to the identity of the aggressor. Student was suspended for 2 days of the 33 days enrolled at La Canada. She was absent for 11 days, 8 of which because Mother kept her at home due to concerns about her safety. No evidence was provided of the reasons for Student's other absences.

Mother refused to consent to social-emotional assessments, a functional behavior assessment, or counseling. The assessments and counseling were offered on

three occasions between October 9, 2017, and October 23, 2017. Mother believed that agreement to assessments or counseling was agreeing that blame should be placed on Student. Mother did not believe Student was to blame for the altercations.

Student transferred to Hapgood Elementary on October 24, 2017. The fighting continued there, although all witnesses agreed that there were many fewer altercations at Hapgood than at Fillmore and La Canada. However, Student was suspended for a day within the first 31 days of enrollment. Hapgood implements a school-wide positive behavior system. Through this general education program, positive behavior intervention supports were instituted to address Student's behavior. Student was assigned a teacher as a "check-in/check-out" point of contact. Student checked in on arrival to set goals for the day and then checked out to discuss how the day went. Student was also allowed to take breaks from class to seek out certain adults to talk when she was having a difficult time or when she just needed someone to talk to.

The school psychologist, Monette Tijerina, also made a point of checking in with Student whenever she was at the Hapgood campus. Ms. Tijerina noticed that Student had communication difficulties, including giggling inappropriately, which people perceived as Student laughing at them; and an inability to understand non-verbal social cues, resulting in Student's frequently misinterpreting her peers' intent as hostile when they looked at her. Despite the need to institute positive behavior intervention supports, knowledge of Student's communication deficits, and two school transfers in the first two months of the school year, the evidence established that Lompoc did not explore any communication skills training for Student, nor did it institute a behavior intervention plan in Student's IEP.

STUDENT'S JANUARY 2018 TRIENNIAL SOCIAL-EMOTIONAL ASSESSMENTS

Student's triennial assessments were completed a few months early, in December of 2017 and January of 2018; and were discussed at a January 23, 2018 IEP team meeting. These assessments included a speech and language assessment and a psychoeducational assessment. The psychoeducational assessments included assessments of Student's social-emotional status.

Student's social-emotional assessments established that she was anxious, depressed, and lacking self-esteem. Student believed that her peers "hate to be with me." She had high levels of anxiety regarding what other people thought of her, including feeling as though others laughed at her, worrying about being made fun of, being thought stupid, as well as generally feeling shy and unable to ask other children to play with her.

Teachers saw her as sad and lonely. They observed that Student had disagreements with peers and did not appear to enjoy school. Teachers also stated Student had few or no friends, was unable to work well in group activities, felt rejected and avoided by peers, and felt picked on or persecuted. Student sometimes displayed aggression and was argumentative, defiant, or threatening to others; and had difficulty complimenting others or being tactful.

Mother also described Student as lonely and sad. Student had troubles sleeping. Student had disagreements with others and blamed herself for things. At home Student did as asked and enjoyed her family. Student internalized her problems, including her school problems.

From these assessments, Ms. Tijerina concluded Student met the eligibility criteria for special education under the category of emotional disturbance, which was a new eligibility category for Student. Ms. Tijerina based this conclusion on the facts that Student's difficulties with peers had been present for an extended period of time. Ms. Tijerina particularly noted that Student overreacted to real or perceived slights by peers, leading to verbal or physical altercations, with the other party sometimes not understanding why the situation escalated. Student had significant signs of depression at home and at school, at times becoming very anxious about school, and complaining of stomachaches, headaches, or needing to use the restroom to escape from class. Student was also having trouble sleeping. Ms. Tijerina recommended school-based counseling and a proactive behavior support plan to meet Student's needs at school. These recommendations were not made a part of Student's IEP.

The preponderance of the evidence established that despite Student's social emotional and behavior needs that required behavior supports, a behavior intervention plan was never developed or implemented. Although a behavior intervention plan dated September 28, 2018, was submitted in evidence, the evidence established it was never more than a draft and, despite notes of the manifestation determination meeting stating it was discussed, it was not actually discussed in an IEP team meeting. The behavior intervention plan was never incorporated into an IEP.

STUDENT'S JANUARY 2018 SPEECH AND LANGUAGE ASSESSMENT

Sally Quinlan, a speech pathologist working for Lompoc, conducted a speech and language assessment dated January 23, 2018, as part of Student's triennial assessments. Student was originally qualified for special education in kindergarten due to articulation

issues. In second grade her expressive and receptive language scores were found to be in the low range. At the time of Ms. Quinlan's assessment, Student was receiving speech and language services focused on organizing her thoughts using visual organizers and maps.

The speech and language assessment did not meet legal standards, as is discussed in more detail in connection with Lompoc's Issue 2. Significantly, it did not thoroughly evaluate the communication deficits that were known to Lompoc to be regularly interfering with Student's ability to have functional interactions with her teachers and peers. Based on this assessment, Student's speech and language services were removed from her January 23, 2018 IEP. There was no consideration during the IEP team meeting of whether Lompoc should investigate Student's expressive or receptive language abilities or other communication deficits, even though Ms. Tijerina's assessments indicated that Student had difficulties perceiving the perspectives of others. Lompoc did not offer any additional communication skills training in the January 23, 2018 IEP.

SEVENTH GRADE BEHAVIOR ESCALATIONS AND LOMPOC'S RESPONSES

Student began attending seventh grade at Lompoc Middle School in August of 2018. General education positive behavior intervention supports were instituted at the beginning of the school year. No special education supports were offered as part of her IEP; and despite the general education support, Student, was still unable to read social cues and properly interpret the intent of communications, resulting in additional escalations of her unacceptable behaviors. This included pushing peers from their chairs in class; starting verbal and physical altercations on the playground during breaks and lunches; and leaving class without permission.

Student continued to have conflicts with peers with whom she had conflicts in sixth grade. She frequently chose to leave class. While her IEP provided an accommodation allowing her to take breaks, Student frequently left class because she was frustrated or unable to manage interpersonal communications. On multiple occasions, administrators, including the school Principal, Schel Brown; the Vice Principal, Candice Grossi, and other school staff and faculty counseled Student on making good choices and on options for interacting with others. However, Student's patterns of conduct did not change. No evidence was presented that an IEP team meeting was convened to address these needs or that any additional services were implemented via an IEP amendment.

The incidents of peer altercations became so frequent that, beginning in September of 2018, just a few weeks after the beginning of the school year, Student was assigned a security monitor to escort her between classes. The security escort was not made part of Student's IEP until December of 2018. James Jones was the first security escort assigned as Student's primary monitor to help her control her behavior as she walked around the campus. Others relieved him for breaks, lunches, and on the days he was absent from work.

Mr. Jones was not trained in behavior modification techniques. Although he received training in his original position, as a security liaison, regarding how to address the students at the school and to refer any discipline problems with children to administrators in the office; he received no additional training in behavior modification when assigned to Student as a one-to-one monitor.

Initially, it was Mr. Jones' job to accompany Student whenever she was not in class. His options for controlling Student's conduct in the moment were limited. He

could encourage Student to avoid problems, and could step between Student and anyone else with whom she was having problems, but he had no authority to mete out discipline and no permission to physically restrain Student. Therefore, even though Student was monitored throughout the day, she still occasionally eloped from class and got away from her escorts, refused to follow directions, and sought out confrontations with peers.

Beginning in January of 2019, Lompoc decided that Student's behaviors in the classroom required more focused attention. Mr. Jones began accompanying Student to class as well as escort her when she was out of class. While functioning as Student's aide, Mr. Jones observed Student's inability to control her impulses result in numerous clashes with peers. Mr. Jones also witnessed Student lying about the reasons for altercations on several occasions, with Student accusing others of actions they did not do or intentions the other student did not intend. Examples include attributing malicious intent to a peer who simply caught Student's eye in passing or innocently brushed up against her in the hall.

In February of 2018, a female escort was hired for Student. Having an escort wait outside the bathroom for her was inadequate, as altercations often occurred in the bathroom, therefore, her new escort accompanied her into multi-stalled restrooms throughout the day. This constant monitoring of Student should have provided detailed information about Student's behavior needs but did little to change Student's conduct. At one point, another student transferred out of Lompoc Valley Middle School to get away from Student. Despite all of these facts, Lompoc did not assess Student for additional behavior support needs and did not institute adequate behavior supports through an IEP that addressed the increasing incidents of maladaptive conduct.

MOTHER'S REFUSAL TO CONSENT TO FUNCTIONAL BEHAVIOR ASSESSMENT AND TERMINATION OF COUNSELING SERVICES

Lompoc sought consent to a functional behavior assessment from Mother on several occasions during Student's sixth and seventh grade years. Mother did not provide consent.

The IDEA requires that if a child's behavior "impedes the child's learning or that of others," the IEP team must "consider the use of positive behavior interventions and supports, and other strategies, to address that behavior." (20 U.S.C. §1414(d)(3)(B)(i).) If a student's behavioral issues impede appropriate learning, the IEP must reasonably address those behavioral issues. (*See Endrew F. supra,* 137 S.Ct. at 996–997 (requiring the application of IDEA's "reasonably calculated" standard to IEP of student who "exhibited multiple behaviors that inhibited his ability to access learning in the classroom.") *Department of Education v. L.S. by and through C.S.* (D. Hawaii, Mar. 29, 2019, No. 18-CV-00223 JAO-RT) 2019 WL 1421752 [nonpub. opn.], at p.11.) The evidence established that in this case, Student's behavior impeded her learning.

On October 9, 2018, Mother stated her intention to withdraw her consent for Student to continue to receive counseling services from the school psychologist. After this, Dr. Lorenz, Lompoc Valley Middle School's school psychologist, established that Student became less forthcoming and more suspicious when they met. Mother terminated Student's regular counseling services at the December 3, 2018 IEP team meeting. Student was allowed to see Dr. Lorenz on an "as needed" basis, that is, when Student felt the need to go to the school psychologist to talk. Termination of the counseling services removed the only avenue being provided to work on Student's communication deficits.

THE EVIDENCE ESTABLISHES A DENIAL OF FAPE DUE TO A FAILURE TO PROVIDE BEHAVIORAL SUPPORTS

Lompoc argues that, pursuant to federal regulations, it "can't be held liable" for Mother's refusal to consent to the needed functional behavior assessment and that the refusal to consent constitutes a "complete legal bar" to the claim that Lompoc failed to provide needed behavioral supports. However, Lompoc's reading of the regulation is overbroad.

Title 34 of the Code of Federal Regulations, section 300.300, subdivision (c)(1)(ii) (2010), provides that, if a parent refuses to consent to a reevaluation of a student, the public agency may, but is not required to, pursue the reevaluation by using the IDEA's consent override procedures of filing for a due process hearing seeking permission to conduct the assessment without parental consent. Subdivision (c)(1)(iii) states that the public agency that does not pursue consent override procedures is not deemed to have violated its child find obligations or any obligations regarding reassessment if parent refused consent for the assessment. In order to trigger the protections of this regulation, a district must be able to establish that it made reasonable efforts to obtain parental consent and Student's parent failed to respond. (34 C.F.R. 300.300(c)(2)(2010).) However, there is no provision in the IDEA or state special education laws that declares a district free from the obligation to provide a FAPE because a parent refuses consent to an assessment.

Lompoc knew about Student's need for behavioral supports and was aware that those needs were impacting Student's ability to access her education and, in some cases, was impeding other students' education. Lompoc concedes in its closing brief

that, "Student has difficulty with perspective taking, conflict resolution and reading non-verbal cues … [and that] these deficits affect Student's ability to access her education."

The behavioral supports provided to Student were inadequate starting in May of 2017, when she was suspended in fifth grade for a second time, which is unusual at such a young age. Lompoc's knowledge that Student needed more behavioral supports is evidenced by its repeated attempts to obtain Mother's consent to a functional behavior assessment and to counseling. Furthermore, Lompoc was aware that Student's maladaptive behaviors were escalating and continued as she proceeded through sixth and seventh grade. This was evidenced by the need for Student to attend three different schools for sixth grade; the increasing difficulties Student created on the campuses she attended in sixth and seventh grade; her frequent habit of leaving class before its conclusion; the fact that only a month into seventh grade she required an escort from the time she came onto the middle school campus until she left the campus; and the fact that her conduct impeded her learning and the learning of others to such a degree that at least one other child transferred to a different campus to avoid her. Despite this knowledge, Lompoc did not attempt to provide Student any additional behavioral supports, instead blaming their inability to act on Mother's refusal to provide consent to a functional behavior assessment.

Lompoc was not required to file for due process to seek permission to conduct the assessment in order to meet its obligations to assess; but seeking permission to conduct it without parental permission was an avenue open to Lompoc if they believed the assessment was necessary to provide FAPE. (34 C.F.R. §300.300, subdivisions (c)(1)(ii) (2010).) However, even if Lompoc chose not to pursue permission to conduct an FBA, Lompoc had other options it did not pursue. It could have pursued the creation of a

behavior intervention plan without an FBA, which Cynthia Ravalin, Lompoc's Special Education Director through the 2018-2019 school year, acknowledged could have been done. Lompoc could also have invited a Board Certified Behavior Analyst to an IEP team meeting to talk to Mother about the benefits of behavior training for Student. Lompoc could even have had teachers record their day-to- day observations of Student in classes in order to review their observations together at an IEP team meeting and use the information to create a proposed behavior intervention plan. Lompoc could also have assessed Student's communication deficits thoroughly and provided intensive communication skills training to Student.

Lompoc chose not to take any of these actions. It relied, for a time, on the provision of counseling as its only means of addressing Student's behavior needs. However, when Mother revoked her permission for Student to attend counseling, Lompoc did not seek permission in due process to implement regular counseling services without parental consent for over 7 months. Instead, it relied on Student to choose when to seek out counseling.

Lompoc asserts its decisions were based on information from Mother that Student was receiving counseling outside of school. Despite this, Student continued to have behavior and social emotional needs in the school environment that impeded her access to her education. Furthermore, Lompoc offered no legal authority for the proposition that Student's receipt of outside counseling relieved Lompoc of its obligation to institute school-based counseling for Student's educationally related counseling needs or to institute a behavior intervention plan.

Lompoc's inadequate behavior supports did not meet Student's needs, as is evident from the fact that, ultimately, Lompoc determined it necessary to involuntarily transfer Student to a continuation school due to her escalating incidents of altercations with peers.

LOMPOC'S FAILURE TO OFFER NECESSARY SUPPORTS AND SERVICES WAS SUBSTANTIVE, NOT A PROCEDURAL, VIOLATION OF THE IDEA

Lompoc argues that any failure to "consider behavior interventions and supports" as it characterizes the issue, was a procedural violation at most; and any educational benefit Student suffered resulted from her parent's refusal to consent to the functional behavior analysis. The Ninth Circuit has consistently condemned this kind of resort to blaming parents for a district's failure to provide FAPE. "Neither the IDEA nor its implementing regulations condition any duty expressly imposed on a state or local educational agency upon parental cooperation or acquiescence in the agency's preferred course of action." (*Anchorage School Dist. v. M.P.*, (9th Cir 2012) 689 F.3d 1047, 1051.) Furthermore, Lompoc's characterization of this as a "procedural violation at most" is inaccurate. Student alleges that Lompoc failed to address Student's needs for behavior supports. The failure to provide necessary supports and services to meet a student's special education needs is a substantive violation of the IDEA. (20 U.S.C. 1414(d)(1)(A)(i)(III); Ed. Code §56345(a)(4).) The evidence clearly established that Lompoc's failure to provide needed behavioral supports and services denied Student educational benefit due to missed class and an inability to work with her peers.

Student's complaint did not plead that Lompoc should have filed for due process to seek permission to reinstate the counseling services. Therefore, that issue exceeds

the scope of this hearing and will not be addressed in this decision. But that issue need not be determined in order to conclude that Lompoc denied Student a FAPE from May 2017, at the point of Student's second suspension when Student was in fifth grade, to the end of the 2016-2017 school year; for the entire 2017-2018 school year, when Student was in sixth grade; and for the entire 2018-2019 school year. The behavioral supports provided throughout those years were inadequate and denied Student a FAPE.

STUDENT'S ISSUE 2: FROM APRIL 18, 2017, TO OCTOBER 23, 2019, DID LOMPOC DENY STUDENT A FAPE DUE ITS FAILURE TO ADDRESS CHRONIC BULLYING?

California Education Code section 48900, subdivision (r), defines bullying as:

> (1)… any severe or pervasive physical or verbal act or conduct, including communications made in writing or by means of an electronic act, and including one or more acts committed by a pupil or group of pupils as defined in Section 48900.2, 48900.3, or 48900.4 , directed toward one or more pupils that has or can be reasonably predicted to have the effect of one or more of the following:
>
> (A) Placing a reasonable pupil or pupils in fear of harm to that pupil's or those pupils' person or property.
> (B) Causing a reasonable pupil to experience a substantially detrimental effect on his or her physical or mental health.
> (C) Causing a reasonable pupil to experience substantial interference with his or her academic performance.

(D) Causing a reasonable pupil to experience substantial interference with his or her ability to participate in or benefit from the services, activities, or privileges provided by a school.

Student failed to establish that she was bullied at any time during the period in question. Student's security escort, James Jones, and the Lompoc witnesses with personal knowledge established that Student was the aggressor in most of the altercations in which she was involved. She was also not honest about her interactions with peers, and was observed to frequently lie about the way altercations developed. Additionally, there are at least two references in the school records to Student lying about injuries and bullying – one in the nurse's records documenting that Student told the nurse she was hit in the lip accidentally when a student was flapping her hands to dry them and then, per her Mother's written complaint to the school, told her mother she was attacked. And another time when Student, having asked for permission to call her Mother because she was not feeling well, was overheard on the telephone by her escort telling her Mother she needed to leave school early due to bullying. The Student then admitted to the escort that she told her Mother she was being bullied to get permission to leave school.

Mother sent two written complaints of bullying to the school. The complaints were vague and offered, for the most part, no information about dates or details of the conduct that Mother alleged constituted bullying. Some of the allegations in Mother's letters were contradicted by other evidence. Mother did not testify at hearing to offer any explanations of the information provided in the letters. This is not the kind of evidence "on which responsible persons are accustomed to rely in the conduct of

serious affairs." Therefore, her written complaints were inadequate to support a finding that bullying occurred. (Cal. Code Regs., tit. 5, §3082(b).)

Brian Jaramillo, Lompoc's new Director of Special Education as of the 2019-2020 school year, as well as Director of Pupil Support Services, investigated Mother's complaints of bullying at Fillmore and La Canada elementary schools; and at Lompoc Valley Middle School. The allegations were unsubstantiated. His responses to Mother's complaints, detailing his investigations, were specific and detailed. The results of his investigations were supported by the preponderance of the documentary evidence providing information regarding the altercations on the various campuses and by the testimony of all Lompoc staff members who testified to personal knowledge of Student's conduct. All members of staff who testified, including, James Jones, Candice Grossi, Schel Brown, Monette Tijerina, Ulla Lorenz, Krista Caniano, Student's special education case manager at Lompoc Valley Middle School, and Elizabeth Salvador, the school psychologist at La Canada, established multiple instances in which Student was the aggressor in altercations with peers and staff or faculty.

Student's adult brother testified inconsistently regarding Student's experiences of being bullied. He initially stated that Student had "mostly been bullying" at school, at which time Student's counsel corrected him by asking if he meant that she was bullied and he adopted that statement. He also stated that Student's experiences of being bullied started at Hapgood; but later changed his testimony to state that at Hapgood the bullying "wasn't nearly as bad but still continued." He then reiterated that it was not as bad as at the other schools but then stated that it was "always the same girls who did it" despite the fact that Student changed schools twice and there was no evidence any peers with whom she was having altercations also transferred to the new locations.

Brother admitted that his information about accusations that Student was the victim of bullying was second hand. His recollections of Student's own reports of bullying were quite vague and had none of the indicia of reliability that might come from recalling details of his conversations with her. He had no personal knowledge of any incidents of bullying at any of the Lompoc campuses. His testimony that Student was bullied was given little weight.

Student failed to submit evidence of pervasive actions by any particular student or group of students. In fact, the evidence established that Student had altercations with many different students and that there was no pattern to her difficulties with peers. No evidence was presented to establish that the one severe incident that occurred, when Student was attacked at a high school football game, was an incident of bullying. While this incident was very concerning, no evidence established why it occurred, so it could not be determined to be the result of bullying.

Student failed to establish she was the victim of a pattern of pervasive, targeted conduct that reached a level meeting the definition of bullying. While there was evidence that Student continued to have difficulties in middle school with some peers with whom she had been involved in altercations in elementary school, Student failed to establish a pattern of altercations or that a certain group of students targeted Student. Student failed to establish why the altercations that were not Student's fault occurred or how frequently they happened.

The preponderance of the evidence established that Student was the aggressor in most instances of verbal and physical altercations in fifth, sixth and seventh grade. The preponderance of the evidence also established that Mother's insistence that Student

was the victim of bullying, and the school was inappropriately blaming Student, was ill-informed. Student failed to meet her burden of proving that Lompoc denied Student a FAPE by failing to address chronic bullying.

STUDENT'S ISSUE 3: FROM APRIL 18, 2017, TO OCTOBER 23, 2019, DID LOMPOC DENY STUDENT A FAPE DUE ITS FAILURE TO ASSESS STUDENT IN ALL AREAS OF NEED, SPECIFICALLY, A) SPEECH AND LANGUAGE; AND B) FUNCTIONAL BEHAVIOR?

A school district must ensure that reevaluations of a child's needs are conducted if the district determines that the educational or related services needs of a child with special needs, including improved academic achievement and functional performance, warrant a reevaluation; or if the parent or teacher request a reevaluation. Reevaluations must be conducted in accordance with the procedural requirements of the IDEA. (20 U.S.C. 1414 (a)(2)(A).) Reevaluations must be conducted at least every three years, and may not be performed more frequently than once a year unless both the district and the parents agree. (20 U.S.C. §1414 (a)(2)(B).)

A school district must ensure that a child is assessed in all areas related to a suspected disability. (20 U.S.C. § 1414(b)(3)(B); Ed. Code § 56320, subd. (f).) The assessment must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the child is classified. (34 C.F.R. § 300.304(c)(6) (2010).)

SPEECH AND LANGUAGE ASSESSMENT

Student asserts that she should have been reassessed for speech and language services from April 18, 2017, forward, due to her demonstrated communication deficits.

Lompoc argues that Student was assessed in January of 2018, at which time, Mother consented to the termination of Student's speech and language services. Lompoc asserts that, as there were no further requests for assessment or "any evidence presented to establish a trigger for additional speech and language assessment," Lompoc had no information warranting a reassessment in the area of speech and language.

A speech and language impairment exists when a student meets one of more of the following criteria: An articulation disorder significantly interfering with the ability to speak; a defective voice in quality, pitch, or loudness; a fluency disorder resulting in impaired flow of verbal expression; an expressive or receptive language disorder as demonstrated by a score of at least 1.5 standard deviations below the means, or below the seventh percentile for the student's chronological age on two or more standardized tests in specified areas of language development; or scores as designated above on a single test, accompanied by displays of inadequate or inappropriate usage of receptive or expressive language as represented by a language sample of a minimum of 50 utterances. The language sample must be recorded or transcribed and analyzed, and the results included in the assessment report. (Cal. Code Regs., tit. 5, § 3030, subd. (b)(11).)

Student began demonstrating difficulties interacting with peers, and some authority figures at school, from the fifth grade forward. A speech and language

assessment was conducted in two sessions, in December of 2017 and January of 2018, in the middle of Student's sixth grade year. However, a thorough assessment of Student's communication deficits was not completed despite Student's well known and well documented difficulties sustaining positive relationships with her peers, as well as incidents of defiance towards faculty and staff.

Lompoc's argument that there was no evidence presented to trigger a speech and language assessment at other times during the period in question is not persuasive. Lompoc concedes that Student's deficits in perspective taking and reading nonverbal cues were impeding her ability to access her education. Student established that there were steadily increasing numbers of incidents, and increasing intensity of difficulties interacting with peers, and with some adults, from at least May of 2017 to the time she arrived at Hapgood Elementary. While there was evidence establishing that altercations became less frequent at Hapgood, they did not completely disappear, as was evidenced by the fact that Student was suspended once, within the first month of her arrival, had positive behavior intervention supports established from the time she arrived at Hapgood, and continued to have disciplinary referrals. Lompoc should have assessed Student's communication deficits prior to her scheduled triennial assessments. The unusual, multiple fifth grade suspensions and multiple sixth grade campus transfers due to frequent interpersonal incidents, that sometimes resulted in violence, should have caused Lompoc to investigate whether social skills training or other communication skills training would have been useful to Student.

When Lompoc did conduct a speech and language assessment, in January of 2018, it was not legally compliant, as discussed in more detail in connection with Lompoc's issue 2. One of the aspects in which it failed to meet legal standards is that it

was not sufficiently comprehensive to thoroughly investigate Student's communication difficulties. (34 C.F.R. § 300.304(c)(6) (2010).) So, while an assessment was done, it was not done well; and failed to provide information Mother, and the rest of the IEP team, required to understand Student's needs and the possible means of addressing them. Instead of recommending additional speech and language therapy to correct Student's communication deficits in the January 23, 2018 IEP, Lompoc recommended that Student's speech services be discontinued.

Regardless of the quality of the January 23, 2018 speech and language assessment, however, the sharp increase in communication difficulties Student exhibited from the beginning of 7th grade and throughout the 2018-2019 school year should have made Lompoc suspect an expressive and receptive language disability that warranted assessment. This is especially true in light of the understanding Lompoc had of the nature of Student's communication deficits, as evidenced by the testimony of Lompoc administrators and the comments in Student's 6th and 7th grade IEPs.

Lompoc's failure to provide a speech and language assessment to explore expressive and receptive communication deficits was a procedural violation. The failure to conduct a reevaluation to ensure that a Student has been assessed in all areas of suspected disability can constitute a denial of FAPE. (*Dept. of Education of Hawaii v. Leo W. by and through his Parent Veronica W.*, (D. Hawaii, 2016) 226 F. Supp. 3d 1081, 1099.) However, not all procedural violations result in a denial of FAPE. Only procedural inadequacies that result in the loss of educational opportunity or seriously infringe the parents' opportunity to participate in the IEP formulation process clearly result in the denial of FAPE. (*Shapiro ex rel. Shapiro v. Paradise Valley Unified School District,* (9th Cir. 2003) 317 F. 3d 1072, 1079.)

The failure to provide Mother with adequate information with which to assist in the development of Student's IEP resulted in the procedural violation rising to a denial of FAPE. The procedural violation also rose to a substantive denial of FAPE because the failure to assess Student's communication deficits made Student unable to access her education and to sustain positive relationships with peers and teachers.

FUNCTIONAL BEHAVIOR ASSESSMENT

Student asserts that she should have been given a functional behavior assessment from April 18, 2017, forward, due to her demonstrated difficulties interacting with peers and some teachers or others in authority. Lompoc argues that it asked Mother for permission to conduct a functional behavior assessment on numerous occasions and Mother refused to consent because Mother believed consent to the functional behavior assessment was the same as agreeing her daughter was at fault for the altercations, which Mother adamantly denied.

Mother refused to allow a functional behavior assessment, often called an FBA, on several occasions from October of 2017 forward. Because of those refusals, federal regulations relieve Lompoc of its obligation to seek permission through a due process hearing in order to obtain an assessment, as long as a reasonable effort to obtain consent to the requested assessment was made. (34 C.F.R. §300.300, subdivisions (c)(1)(ii) and (iii) (2010).) Lompoc made reasonable efforts to obtain informed consent from Mother to conduct this assessment, including six requests that Mother consent to an FBA. Each time Mother refused. The public agency does not violate its obligation to assess Student in this area of suspected disability in these circumstances. (34 C.F.R.

§300.300, subdivisions (c)(1)(ii) (2010.)) As the regulation relieves Lompoc of the procedural obligation to provide the FBA in this instance; the failure to conduct an FBA did not deny Student a FAPE.

STUDENT'S ISSUE 4: FROM APPROXIMATELY MARCH 5, 2019, TO OCTOBER 23, 2019, DID LOMPOC DENY STUDENT A FAPE BY MAKING EDUCATIONAL DECISIONS OUTSIDE AN IEP?

Student asserts that Lompoc made the decision to change Student's placement to the Forinash Community Day School without first convening an IEP team meeting, denying Mother the opportunity to participate in the decision to change Student's placement.

Lompoc argues that it was entitled to proceed with the Alternative Placement Committee process, despite Student's status as a special education student entitled to the protections of the IDEA, because involuntary transfers do not "substantively affect a fundamental vested right." Lompoc further asserts that, even if a violation occurred due to the use of the involuntary transfer procedure, it would be a procedural violation. Lompoc submits that Student has failed to establish that the violation constituted a denial of FAPE because Student never actually attended Forinash Community Day School.

Title 5 of the California Code of Regulations, section 3042, defines placement as, "that unique combination of facilities, personnel, location or equipment necessary to provide instructional services to an individual with exceptional needs, as specified in the IEP, in any one or a combination of public, private, home and hospital, or residential

settings." (Cal. Code Regs. tit. 5, §3042(a).) The regulation goes on to require that the IEP team "document the rationale for placement in other than the pupil's school and classroom in which the pupil would otherwise attend if the pupil were not disabled," including why the Student's disability prevents the Student's needs from being met in a less restrictive setting with the use of supplementary aids and services. (Cal. Code Regs. tit. 5, §3042(b).)

The IDEA requires that a school district include parents in any decision that results in a change of Student's placement. (20 U.S.C. §1414(e); 34 C.F.R §300.327 (2010).) Student was entitled to remain in her current placement during the pendency of any IDEA proceeding challenging a change of placement. (20 U.S.C. §1415(j).) While special education students can be moved from one placement to another on an emergency basis on the grounds of imminent safety concerns, the IDEA requires the district to give notice to parents of their procedural rights in relation to the transfer and requires the IEP team to determine the interim setting. (20 U.S.C. 1415(k)(1)(G) and (H).)

LOMPOC'S ALTERNATIVE PLACMENT COMMITTEE PROCEEDINGS

The Alternative Placement Committee functions, in the general education environment, to review referrals for involuntary transfers to the local community day school or continuation school. Involuntary transfers are governed by California Education Code section 48432.5. On February 26, 2019, Student's name was put forth to the Alternative Placement Committee for consideration for involuntary transfer to Forinash Community Day School. Forinash is a continuation school that serves students in grades 7 through 12 in the Lompoc Unified School District. Student was considered for involuntary transfer due to her continued altercations with other students which

Lompoc determined was a violation of California Education Code section 48900. Lompoc subpoenaed both Mother and Student to attend the committee meeting and they were both present.

Students who engage in conduct prohibited by California Education Code section 48900 can be considered for involuntary transfer to Forinash. Schel Brown informed the committee of Student's history of disruptive conduct the middle school. The Principal asserted that Student's conduct was "very dangerous to other kids." However, no evidence was presented that Student constituted an immediate threat to herself or others such that an emergency removal from campus was required.

A vote was taken and the committee decided that Student would be transferred to Forinash until August of 2019. Brian Jaramillo noted that a manifestation determination meeting would need to be conducted "for this to go through" prior to the transfer, due to Student's status as a special education student. Student was enrolled in Forinash as of March 5, 2019. Her transfer was "effective" as of March 6, 2019. This inconsistency in the records was not explained at hearing.

No evidence was presented as to whether Student continued to attend Lompoc Valley Middle School during the four school days between the committee's vote to involuntarily transfer her and the date the transfer became effective. No evidence was submitted indicating a manifestation determination meeting was held.

Student was enrolled in but never attended Forinash. Parent informed Cynthia Ravalin, then Special Education Director for Lompoc Unified School District, that she wanted to appeal the APC involuntary transfer. Although Mr. Jaramillo had recused

himself from the decision regarding the involuntary transfer, he handled Mother's appeal. He met with Mother on March 14, 2019, to "review evidence that resulted in the transfer" and listen to Mother's argument for her appeal.

Lompoc held an IEP team meeting on March 19, 2019. Mother asked several times to discuss the involuntary transfer and was told that the conversation was not properly part of the IEP process. Lompoc staff had agreed in advance that the transfer would not be discussed in the IEP team meeting and that Mother would be required to participate in a separate meeting to discuss the transfer issue. Mother informed the team that she was not prepared to discuss Student's IEP until she was able to discuss the involuntary transfer. Lompoc staff suggested that Mother investigate the availability of the "homebound" program which was described by Lompoc staff at hearing as a program offering temporary home-based instruction, usually for health reasons.

On April 1, 2019, Mother submitted a note from Student's physician recommending home instruction, after which Student was placed in the Homebound program. On April 20, 2019, Mr. Jaramillo denied the appeal. Despite the denial, Student was permitted to remain attending the Homebound program.

Through Homebound, Student was scheduled to meet with an instructor weekly for 60 minutes and complete other work at home. Home instruction began April 22, 2019, however, Student's mother cancelled the first two instruction sessions so instruction actually began on May 9, 2019. Student met weekly with the instructor through the end of May and evidence was presented that she was scheduled to meet with the instructor on June 6, 2019, the last day of the 2018-2019 school year, as well.

CHANGING STUDENT'S PLACEMENT WITHOUT IMPLEMENTING THE SPECIAL EDUCATION PROCEDURAL PROTECTIONS VIOLATED THE IDEA

Lompoc argues that involuntary transfers "are not determined by IEP teams." Lompoc fails to provide any legal authority for that assertion or explain why the change to the continuation school would not be considered a change of placement requiring an IEP team meeting. Several Lompoc staff members acknowledged that a manifestation determination meeting was required following the involuntary transfer determination, yet one was not held.

In its closing brief, Lompoc argues that an "involuntary transfer does not substantively affect a fundamental vested right," citing *Nathan G. v. Clovis Unified School District,* (2014) 224 Cal. App. 4th 1393, 1399-1402. However, Lompoc's statement does not accurately describe the decision. The court in *Nathan G.*, evaluated whether the involuntary transfer was a fundamental vested right because it was necessary to the state court's determination of the correct level of evidentiary scrutiny to apply to the lower court's decision. The court explained that, "Courts decide whether an administrative decision substantially affects a fundamental vested right on a case-by-case basis." (*Nathan G v. Clovis U.S.D, supra,* at p. 1404.) The court found that Nathan G's involuntary transfer did not affect a fundamental vested right, as it did not result in a denial of his education rights. However, *Nathan G.* was a general education student, not a special education student protected by the procedural requirements of the IDEA and state special education laws. The *Nathan G.* case did not hold that involuntary transfers involving special education students were not subject to the procedural protections of the IDEA and state special education laws.

The California Education Code provisions describing the grounds and procedures for the expulsion of general education students are invalid under the IDEA as applied to special education students and may not lawfully be used. (*Doe by Gonzalez v. Maher* (1986) 793 F. 2d 1470, 1481.) While the *Doe by Gonzalez* case analyzes this issue under the prior Education of All Handicapped Children Act, its analysis is still valid under the current IDEA and California Education Code.

Doe by Gonzalez addressed a case involving two students eligible for special education under the category of emotional disturbance who had been expelled by a San Francisco Unified School District Student Placement Committee. Among the issues raised on appeal was whether application of the expulsion procedure prescribed for general education students without the procedural protections of the special education statutes was allowable. The Ninth Circuit held it was not. The court held that the federal special education laws prohibit the expulsion of a handicapped student for misbehavior that is a manifestation of the student's disability and specifically stated that California Education Code section 48900 *et seq.* and any state or local administrative regulation or policy promulgated pursuant thereto applied to special education students violated federal law. (*Doe by Gonzalez, supra,* 739 f. 2d at P. 1481 and Appendix B, pg. 1500.) The court in *Doe by Gonzalez,* also clarified that the procedures for securing an expulsion under the general education statutes are invalid as applied to a special education student, as expulsion constitutes a change in placement within the meaning of federal special education laws and, thus, school officials seeking to expel a student with a disability must follow the procedures prescribed by the federal special education statutes. (*Doe by Gonzalez, supra,* at p. 1482.*)*

California Education Code section 48915.5 confirms that, in California, special education students "may be suspended or expelled from school in accordance with Section 1415(k) of Title 20 of the United States Code, the discipline provisions contained in Sections 300.530 to 300.537, inclusive, of Title 34 of the Code of Federal Regulations, and other provisions of this part that do not conflict with federal law and regulations." The application of procedures pursuant to California Education Code 48432.5, that assign a special education student to a continuation school for conduct prohibited by California Education Code 48900 without compliance with the procedural requirements of the IDEA, conflicts with federal law and regulations.

THE PROCEDURAL VIOLATION ROSE TO A DENIAL OF FAPE

Lompoc argues that any possible procedural violation arising from the involuntary transfer could not rise to a denial of FAPE. Lompoc asserts there is no evidence of a denial of educational benefit to Student because she never attended Forinash Community Day School. However, Lompoc's argument ignores the denial of procedural protections and the resulting impact on parental participation in the process of determining Student's placement that resulted from the involuntary transfer process Lompoc employed. It also overlooks the reduction in access to education that resulted from the improper involuntary transfer.

Student's involuntary transfer became effective either March 5, 2019, or March 6, 2019. Mother's appeal was denied on March 20, 2019. Student was transferred to Forinash without any manifestation determination or any discussion at an IEP team meeting, and without benefit of any of the protections of the IEP process. These were procedural violations of the IDEA. (20 U.S.C 1415(j); 20 U.S.C. 1415(k)(1)(G) and (H).)

As noted previously, a procedural error only constitutes a FAPE denial if it seriously infringes the parents' opportunity to participate in the IEP formulation process or results in a denial of educational benefit to student. (20 U.S.C. § 1415(f)(3)(E)(ii); see Ed. Code, § 56505, subd. (f)(2); W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23 (9th Cir. 1992) 960 F.2d 1479, 1484.)

In this case, the failure to engage in the procedures intended to protect a special education student being considered for suspension or expulsion seriously infringed Mother's opportunity to participate in the IEP formulation process, which was a denial of FAPE. (*Doug C. v. Hawaii Department of Education,* (9th Cir. 2013) 720 F. 3d 1038, 1045 citing, *Amanda J. v. Clark County School District,* (9th Cir., 2001), 267 F.3d 892.) Additionally, even if the IDEA's disciplinary procedures did not apply, all placement decisions need to be made by Student's IEP team. (20 U.S.C. 1414 (b)(4)(A) and (e); Ed. Code 56341(a).)

Mother was not informed that Student was entitled to special education protections during Lompoc's consideration of Student's involuntary transfer. When Mother specifically asked to discuss the involuntary transfer in the IEP team meeting of March 19, 2019, Lompoc staff members refused to discuss the matter, inaccurately informing Mother that the Alternative Placement Committee proceedings were entirely separate from the IEP process. Mother was told her only recourse regarding Student's involuntary placement at Forinash was to appeal the decision of the Alternative Placement Committee. Mother appealed and her appeal was denied.

Student was enrolled involuntarily in Forinash Community Day School. The IEP team was never convened to consider whether the conduct underpinning the decision to change Student's placement was a manifestation of her disability. Nor did the IEP

team consider whether Forinash was an appropriate placement. A proposed individualized educational program was never discussed after Student's involuntary transfer.

The change of placement without discussion in an IEP team meeting also denied Student educational benefit. Student was summarily denied access to the classes and services described in her IEP. Although Mother obtained a doctor's support for placing Student in the Homebound program and Student's participation in the program was approved, the need to secure the doctor's note and submit an application caused a delay in Student having access to home instruction. The doctor's note took until April 1, 2019, and Student was not assigned access to a Homebound teacher until April 22, 2019. No evidence was presented establishing whether Student received any alternate type of instruction from March 6, 2019, to April 22, 2019.

Had state and federal procedures pertaining to special education students being considered for suspension or expulsion been followed, Student would not have lost any instruction and would not have been deprived of the opportunity to be educated with her peers in compliance with the requirement of education in the least restrictive environment. (20 U.S.C. § 1412(a)(5)(A); 34 Code Fed. Regs. 300.114 (2010); Ed. Code 56520(b)(3).) The procedural violation of changing Student's placement outside an IEP team meeting also rose to a denial of FAPE due to its denial of Student's access to education. Not only did Student lose access to education from the effective date of the transfer, no IEP team meeting was convened to create an IEP for 2019-2020 school year so Student had no IEP in place this year. The denial of FAPE due to the improper change of placement continued to October 23, 2019.

STUDENT'S ISSUE 5: FROM APRIL 18, 2017, DID LOMPOC DENY STUDENT A FAPE BY FAILING TO OFFER IEP'S REASONABLY CALCULATED TO PROVIDE STUDENT WITH EDUCATIONAL BENEFIT?

Student's amended complaint does not designate which claims specifically pertain to this vaguely stated issue. The undersigned has reviewed the amended complaint in detail to determine the allegations of defects that resulted in a denial of educational benefit. Virtually all of the allegations are contained in other issues and have already been analyzed as part of Student's issues one through four. Those will not be reanalyzed here. Two of the allegations raised were withdrawn by Student during the course of the hearing, specifically the issue pertaining to the provision of extended school year services and the issue regarding a failure to convene an IEP team meeting in April of 2019. The only two contentions asserted in the complaint related to a denial of educational benefit that have not already been addressed, are as follows:

- A change of Student's specialized academic instruction minutes in the December 3, 2018 IEP; and
- Lompoc's failure to implement Student's IEP while she was participating in the "Homebound" program.

In her closing brief, Student asserts two new arguments in connection with this issue. Those are: Lompoc's failure to provide adequate goals in Student's IEP's, and a lack of clarity in various IEPs. A review of the allegations in the amended complaint revealed no allegations of a failure to provide adequate goals and no statements of fact alleging how any goals were deficient and, therefore, failed to offer educational benefit. Nor were issues seeking relief for any procedural violations involving a lack of clarity in

any of Student's IEPs or any facts stating the aspects of IEPS that lacked clarity alleged in Student's amended complaint. Neither deficient goals nor lack of IEP clarity were identified in the Order Following Prehearing Conference as issues; nor were these issues discussed in Student's PHC statement. Thus, any arguments regarding the inadequacy of goals or a lack of clarity of any of Student's IEPs are outside the scope of this decision.

CHANGE OF SPECIALIZED ACADEMIC INSTRUCTION MINUTES IN THE DECEMBER 3, 2018 IEP

In her complaint, Student alleged that the number of minutes Student was to receive for specialized academic instruction, often referred to as SAI, changed in the December 3, 2018 IEP. Although not specified, it is implied that Student was comparing the minutes offered in the December 3, 2018 IEP, to her prior IEP of January 23, 2018. Under the earlier IEP, Student was receiving 240 minutes per week of specialized academic instruction at Hapgood Elementary School. In the December 3, 2018 IEP, Student was offered 141 minutes of Specialized Academic Instruction at Lompoc Middle School for her Directed Studies, English, and Math classes.

Student failed to meet her burden of establishing that the change in SAI minutes in the December 3, 2018 IEP deprived her of educational benefit. No testimony or documentary evidence was introduced regarding why the SAI minutes were changed or how the reduction impacted Student's receipt of educational benefit. Student did not establish that Lompoc denied her a FAPE due to the reduction of SAI minutes in the December 3, 2018 IEP.

FAILURE TO IMPLEMENT STUDENT'S IEP WHILE SHE WAS PARTICIPATING IN THE HOMEBOUND PROGRAM

In her complaint, Student alleged that, "while placed on home hospital, [Student's] IEP has not been implemented and she has been denied instruction." Student failed to introduce any evidence in support of this contention. No witness testified as to the services Student was receiving as part of the program. No witness testified that Student was not receiving needed services. No documentary evidence was submitted indicating that Student was not receiving required services under her IEP nor were documents submitted showing the services Student was receiving as part of the home instruction program. The only document pertaining to the home instruction was an email from the home tutor, Mr. Fantazia, listing the dates he had been scheduled to meet and the dates he actually had met with Student. Mr. Fantazia did not testify at hearing.

Student failed to meet her burden of proving that Lompoc denied Student a FAPE by failing to implement her IEP while she was participating in the Homebound program.

LOMPOC'S ISSUE 1: WAS LOMPOC'S PSYCHOEDUCATIONAL ASSESSMENT, PRESENTED AT THE JANUARY 23, 2018 IEP TEAM MEETING, APPROPRIATELY CONDUCTED?

On November 20, 2019, counsel for Student stated that Student was no longer challenging the legal sufficiency of the January 2018 Psychoeducational Assessment conducted by Ms. Tijerina. A critical element of a request for an independent

educational evaluation is that a Parent disagrees with the conclusions of the assessment. (34 C.F.R. §§ 300.502(b)(1) (2010).) Parents stipulated that the January 2018 psychoeducational assessment conducted by Ms. Tijerina was legally compliant. Therefore, Mother has not raised an issue with Ms. Tijerina's conclusions and Student is not entitled to an independent educational evaluation at public expense.

LOMPOC'S ISSUE 2: WAS LOMPOC'S SPEECH AND LANGUAGE ASSESSMENT, PRESENTED AT THE JANUARY 23, 2018 IEP TEAM MEETING, APPROPRIATELY CONDUCTED?

Lompoc asserts that the January 23, 2018 speech and language assessment conducted by Sally Quinlan complied with all requirements of state and federal law. The evidence established that the assessment was not thorough and failed to meet several procedural requirements necessary to establish legally compliant assessments.

Reassessments require parental consent. ((20 U.S.C. § 1414(c)(3); 34 C.F.R. §300.300(c)(1)(i) (2010).) Ed. Code, § 56381, subd. (f)(1).) To obtain parental consent for a reassessment, the school district must provide proper notice to the student and his parents. (20 U.S.C. §§1414(b)(1), 1415(b)(3) & (c)(1); Ed. Code, §§ 56321, subd. (a), 56329.) The notice consists of a proposed written assessment plan and a copy of the procedural safeguards under the IDEA and state law. (20 U.S.C § 1414(b)(1); Ed. Code, § 56321, subd. (a).) The assessment must be completed and an IEP team meeting held within 60 days of receiving consent, exclusive of school vacations in excess of five school days and other specified days. (20 U.S.C. § 1414(a)(1)(C); Ed. Code, §§ 56043, subds. (c)

& (f)(1), 56302.1, subd. (a), and 56344, subd. (a).) The evidence established that Mother signed consent to Student's triennial assessments which included consent to a speech and language assessment.

Assessments must be conducted by individuals who are knowledgeable of the student's disability and competent to perform the assessment, as determined by the school district. (Ed. Code, §§ 56320, subd. (g), 56322.) Lompoc failed to submit any evidence that established Ms. Quinlan was knowledgeable of Student's disability or that she was competent to perform the assessment. No curriculum vitae or resume was provided. Neither Ms. Ravalin nor Ms. Olson provided evidence establishing Ms. Quinlan's credentials as a knowledgeable, trained person qualified to conduct the speech and language testing performed. This is an issue brought by Lompoc. Therefore, Lompoc has the burden of establishing that the assessment met the requirements of state and federal law. (20 U.S.C. §1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast , supra,* at p. 56-62.)

Tests must be administered by trained and knowledgeable personnel in conformance with the instructions provided by the producers of the tests; used for the purposes for which they are valid and reliable; selected and administered so as to not be discriminatory; and administered in the language and form most likely to yield accurate information on the student's functioning. (20 U.S.C. §1414(b)(3)(A); 34 C.F.R. § 300.304 (c)(1); Ed. Code § 56320, subds. (a) & (b).) Lompoc failed to establish that the assessor who administered the January 23, 2018 speech and language assessment was either trained in or knowledgeable of how to administer the tests. No evidence was presented establishing that the testing was selected or that it was administered in a manner that met the requirements of the IDEA. Although statements were included on Ms. Quinlan's

report, reciting that all of the requirements had been met, this hearsay statement is self-serving. Without corroborating evidence, the statements in the report cannot form the basis for a finding that the testing met all requirements. (Cal. Code Regs. tit. 5, §3082(b).)

Ms. Quinlan did not testify at hearing due to health problems. Her credentials were not offered into evidence. Instead, Elizabeth Olson, a speech pathologist who previously worked for the Lompoc district was called an as expert witness to explain the January 23, 2018 speech and language assessment report. Ms. Olson has been a California licensed speech pathologist since 1998 and has a Master's of Science degree in communication disorders from Colorado State University. Ms. Olson did not have detailed knowledge of the January 23, 2018 assessment and could not sufficiently answer questions raised about the incomplete protocols for the Oral Passage Understanding Scales. Ms. Quinlan's failure to complete the scales properly or to score the instrument per the requirements of the manufacturer's instructions called its conclusions into question. Ms. Olson was also unable to explain why Ms. Quinlan chose the assessment instruments she chose and she was not familiar with all of the instruments used in the assessment. Ms. Olson's testimony as to the sufficiency of the January 23, 2018 speech and language assessment was given little weight.

Lompoc has failed to establish the threshold requirements for determining that its assessment met legal requirements. However, even if Lompoc had established that Ms. Quinlan was properly credentialed to conduct the testing or that the testing instruments were properly selected and administered, the speech and language assessment would not meet the requirements of state and federal law. (20 U.S.C. 1414(b); Ed Code §§ 56320(a) and (b); 56381(h).)

An assessment tool must "provide relevant information that directly assists persons in determining the educational needs of the child." (34 C.F.R. § 300.304(c)(7).) If the evaluation procedures required by law are met, the selection of particular testing or evaluation instruments is at the discretion of the school district. (*Letter to Anonymous* (OSEP Sept. 17, 1993) 20 IDELR 542.) No single procedure may be used as the sole criterion for determining whether the student has a disability or determining an appropriate educational program for the student. (20 U.S.C. § 1414 (b)(2)(B); 34 C.F.R. § 300.304(b)(2); Ed. Code, § 56320, subd. (e).) Rather, the assessor must use a variety of technically sound instruments. (20 U.S.C. § 1414 (b)(2)(B);34 C.F.R. § 300.304(b)(2).) The assessment must be sufficiently comprehensive to identify all of the child's special education and related service needs, whether or not commonly linked to the disability category in which the child has been classified. (34 C.F.R. 300.304(c)(6).) A written report must then be prepared that explains whether a Student requires services, the basis for that opinion, Student's behavior observed during the assessment process and the relationship of that behavior to Student's social and academic functioning. (Ed. Code, § 56327.) The report must be provided to the parent at the IEP team meeting regarding the assessment. (Ed. Code, § 56329, subd. (a)(3).)

Karen Schnee conducted a private assessment of Student's speech and language capabilities and deficits; and reviewed Ms. Quinlan's January 23, 2018 assessment. Ms. Schnee earned her multiple subject life teaching credential in 1978 and her Master of Arts in Special Education in 1980. She is a former special education teacher. Ms. Schnee has been a California licensed speech pathologist since 1985 and a board-certified Educational Therapist since 2004.

Ms. Schnee's review of Ms. Quinlan's assessment was meticulous and the explanations of her concerns were thoughtful and specific. The report Ms. Schnee prepared and Ms. Schnee's testimony describing her own testing of Student, including the basis for selection of testing instruments due to Student's specific history of peer interaction problems, was detailed and thorough. Her opinions were considered to be highly credible.

Ms. Schnee questioned the accuracy and thoroughness of Lompoc's January 23, 2018 speech and language assessment. She questioned Ms. Quinlan's heavy reliance on the results of the Oral and Written Language Scales, a test which was given to Student in 2013, 2016, and 2018. Ms. Schnee was concerned that the scores on this test, which had not shown statistical differences across the three years, were influenced by familiarity and believed other testing should have been used to check the possibility of that impact. Regardless of that influence, however, Ms. Schnee was concerned that the score on the oral and written language test was not compared to the psychoeducational processing scores. The combination of Student's practical communication struggles and the verbal reasoning and auditory comprehension scores on the psychoeducational assessment, compared to those on the oral and written language assessment should have triggered broader and deeper testing of Student's communication deficits. Instead, Ms. Schnee pointed out, oral and written language scores that had no statistical difference resulted in Student being eligible for speech and language services in 2016 but were used as a basis for terminating services in 2018.

Ms. Schnee also established Ms. Quinlan's report was incomplete. The observations of Student's test performance were minimal and most of the testing reports failed to include the scores of the subtests that were combined to reach the

composite scores. The lack of subtest scores eliminated critical information that would have revealed details about Student's ability to communicate. Information regarding the age equivalency of the testing level administered was missing and the testing protocol for Lompoc's Oral Passage Understanding Scales was not completed properly. Finally, Ms. Schnee pointed out that the oral passage testing protocols presented a standard score resulting from the oral passage test despite the protocols prohibiting the derivation of a standard score when the passages administered do not match the age range of the test taker, in violation of the publisher's guidelines.

In her assessment of Student, Ms. Schnee administered a number of tests to identify Student's communication deficits. She noted particularly that testing involving any kind of visual clue was likely to result in a higher score for Student than testing that did not provide visual supports.

To address Student's needs, Ms. Schnee recommended two 30-minute, individual sessions of speech and language therapy per week for 60 weeks to focus on front-loading major vocabulary and key topics from upcoming coursework in core classes, as well as to teach abstract concepts including non-literal statements, idioms, humor, and sarcasm. She also recommended one hour per week of group social skills training for 60 weeks to aid Student in building positive interactions with peers and with "reading" nonverbal social cues.

Ms. Schnee's comparisons and explanations were detailed and professional. Her opinion was given significant weight. However, there were aspects of her report that were not persuasive, such as her unquestioning reliance of Mother's assertions that Student was a victim of bullying; or that Student's low scores on the Woodcock Johnson

Tests of Oral Language were the result of "recent head injuries." However, Ms. Schnee's ready acceptance of Mother's assertions did not impact the overall thorough and careful presentation of her testing of Student or her thoughtful review of the testing conducted.

Lompoc failed to conduct a thorough assessment of Student that was sufficiently comprehensive to encompass all areas of suspected disabilities that might have been impacted by speech and communication deficits. Lompoc also failed to establish that the assessor was sufficiently qualified or knowledgeable to perform the assessments, chose the proper assessment instruments, or administered them according to manufacturer's instructions. The report did not meet the requirements that it provide necessary information to the parent or the IEP team, in violation of state and federal law. (34 C.F.R. 300.306 (a)(2) (2010); Ed. Code, § 56327; 56329, subd. (a)(3).) Most importantly, though, the assessment failed to comprehensively evaluate Student's communication deficits and their impact on her peer relationships or her ability to access her education. Lompoc's speech and language assessment did not comply with the requirements imposed by state and federal law.

LOMPOC'S ISSUE 3: MAY LOMPOC IMPLEMENT THE OFFER OF COUNSELING SERVICES MADE IN THE MARCH 19, 2019 IEP AMENDMENT WITHOUT PARENT'S CONSENT?

Lompoc argues that it should be allowed to implement the counseling services proposed in the March 19, 2019 IEP amendment. This IEP amendment was not fully discussed in the IEP as Mother did not want to discuss IEP services prior to discussing the involuntary transfer of Student to the continuance school.

Special education laws require that when a child is receiving special education and related services, a school district has an obligation to file for a due process hearing to seek permission to provide a service that is a necessary element of a free, appropriate public education if a parent refuses to consent to the provision of the service. (20 U.S.C 1415(f); Ed. Code 56346(f); *I.R. v. Los Angeles Unified School District* (9th Cir. 2015) 805 F. 3d 1164, 1168.) However, there is no provision of state or federal law that authorizes a hearing officer to approve a single component of an IEP. Instead, it provides, "a due process hearing shall be initiated in accordance with Section 1415(f) of Title 20 of the United States Code." That section, in turn, provides that "a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education." (20 U.S.C. § 1415(f)(3)(E)(i).)

California Education Code section 56501 allows a school district to file a complaint when "[t]here is a proposal to initiate or change the identification, assessment, or educational placement of the child or the provision of a free appropriate public education to the child," and when "[t]here is a disagreement between a parent or guardian and a local educational agency regarding the availability of a program appropriate for the child . . ." (Ed. Code, § 56501, subds. (a)(1), (4).) The California Code of Regulations provides a detailed description of the elements of a child's educational placement as including ". . . that unique combination of facilities, personnel, location or equipment necessary to provide instructional services to an individual with exceptional needs, as specified in the IEP . . ." (Cal. Code Regs. tit. 5, §3042.) These provisions require OAH to determine the validity of entire educational program. Neither state nor federal law provides for determining the validity of discrete elements of an educational program at a due process hearing as the validity of one aspect of an offer of FAPE may rely on the other supports and services being offered.

Here, Lompoc failed to present evidence as to the validity of the entire March 19, 2019 IEP. The sufficiency of the amount of counseling offered or the type of counseling offered cannot be determined without an understanding of what the IEP determined Student's needs to be. Lompoc failed to present evidence that the IEP as a whole offered Student a FAPE. Therefore, Lompoc's request to implement counseling services, which were an element of the March 19, 2019 IEP is denied.

CONCLUSIONS AND PREVAILING PARTY

Pursuant to 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.

STUDENT'S ISSUES:

1. Student established that, from April 18, 2017, to October 23, 2019, Lompoc denied Student a free appropriate public education, called a FAPE, due its failure to address her needs for behavior support. Accordingly, Student prevailed on this issue.
2. Student failed to establish that, from April 18, 2017, to October 23, 2019, Lompoc denied Student a FAPE due its failure to address chronic bullying. Therefore, Lompoc prevailed on this issue.
3. Student established that, from April 18, 2017, to October 23, 2019, Lompoc denied her a FAPE due its failure to assess her in the area of speech and language. Therefore, Student prevailed on issue 3(a); However, Student failed to establish that Lompoc denied her a FAPE during the period at issue by failing to conduct a functional behavior assessment. Therefore, Lompoc prevailed on Student's issue 3(b).

4. Student established that, from approximately March 5, 2019, to October 23, 2019, Lompoc denied her a FAPE by making educational decisions outside an IEP team meeting. Therefore, Student prevailed on this issue.
5. Student failed to establish that, from April 18, 2017, to October 23, 2019, Lompoc denied her a FAPE by failing to offer IEPs reasonably calculated to provide Student with educational benefit on any basis that was not already addressed in other issues addressed in this decision.

LOMPOC'S ISSUES:

1. Lompoc established that its psychoeducational assessment, presented at the January 23, 2018 IEP team meeting was appropriately conducted. Therefore, Lompoc prevailed on this issue.
2. Lompoc failed to establish that its speech and language assessment, presented at the January 23, 2018 IEP team meeting, was appropriately conducted. Therefore, Student prevailed on this issue.
3. Lompoc failed to establish that its March 19, 2019 IEP offer provided Student a FAPE allowing it to implement the offer of counseling services made in the March 19, 2019 IEP amendment without parent's consent. Therefore, Student prevailed on this issue.

REMEDIES

The following denials of FAPE have been proven:

1. Failure to provide adequate behavior supports from May 2017 to October 23, 2019;

2. Failure to assess Student in the area of speech and language which was an area of need;
3. Changing Student's placement outside the IEP process;

In her closing brief, Student seeks remedies including placement in a residential treatment facility, and compensatory education in the form of private speech and language and behavior assessments, and services; private tutoring to compensate for missed general education classroom time; and extended school year services through graduation from high school. Student notes that her experts recommended the use of the Lindamood Bell program for academic tutoring. Student failed to explain why another speech and language assessment would be necessary after the recent one conducted by Ms. Schnee. Student also failed to submit any evidence of how much compensatory education should be provided for speech and language or behavior services or what forms they should take; or how much compensatory education from Lindamood Bell is due. No evidence of the costs for any services was provided.

As an affirmative defense to its liability in Student's case, Lompoc asserts that it is relieved of its obligation to provide a FAPE because Student was no longer a resident of the district due to her placement in a foster home or licensed children's institution. However, Lompoc failed to establish that Student's residency changed. The only evidence that Student was living outside of Lompoc at any time during the period in question was the testimony of her brother and a petition to have Student removed from the custody of her mother. While the evidence established that Student had been placed in short term placements by various child welfare agencies and the police, there was no reliable evidence as to the length of the placements or the exact locations. More importantly, however, there was no evidence that Mother's custody of Student was ever removed or that Mother moved out of the district. Student's residence is determined by

the residence of her parent or guardian. (Civ. Code §244; Ed. Code §48200.) Lompoc failed to establish that it was relieved of the obligation to provide Student a FAPE at any time period addressed by this case. Accordingly, Lompoc's affirmative defense is rejected.

ALJs have broad latitude to fashion appropriate equitable remedies for the denial of a FAPE. (*School Comm. of Burlington v. Department of Educ*. (1985) 471 U.S. 359, 370 [105 S.Ct. 1996, 85 L.Ed.2d 385 (*Burlington*)]; *Parents of Student W. v. Puyallup School Dist., No. 3,* (9th Cir, 1994) 31 F.3d 1489 31 F.3d at 1489, 1496 (*Puyallup).*) In remedying a FAPE denial, the Student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3).) The purpose of the IDEA is to provide Students with disabilities "a free appropriate public education which emphasizes special education and related services to meet their unique needs." (*Burlington*, *supra*, 471 U.S. 359, 374.) Appropriate relief means "relief designed to ensure that the Student is appropriately educated within the meaning of the IDEA." (*Puyallup*, *supra*, 31 F.3d. at p. 1497.)

School districts may be ordered to provide compensatory education or additional services to a Student who has been denied a FAPE. (*Id.* at p. 1496.) The authority to order such relief extends to hearing officers. (*Forest Grove Sch. Dist. v. T.A*. (2009) 557 U.S. 230, 243-244, fn. 11;129 S.Ct. 2484.) These are also equitable remedies that courts and hearing officers may employ to craft "appropriate relief" for a party. (*Puyallup*. *supra*, at p. 1496.)

An award of compensatory education need not provide "day-for-day compensation." (Id. at p. 1497.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual Student's

needs. (*Reid v. District of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be fact-specific. (Ibid.) Hour-for-hour relief for a denial of FAPE is not required by law. (*Puyallup*, *supra*, at p.1497.) Neither is it prohibited, and at a minimum it can form a beginning basis for calculating relief, in the absence of a better measure.

RESIDENTIAL PLACEMENT

Student argues that residential treatment is an appropriate remedy for Lompoc's FAPE denials. Student further asserts residential treatment is necessary due to her chronic running away and because she has been a victim of sex trafficking. Lompoc argues that residential treatment is not an appropriate remedy. Specifically, it asserts that even if Student could benefit from residential treatment, it would be to address her trauma or drug use. As there was no evidence that those impacted her ability to access her education or educational needs it would not be appropriate remedy.

Evidence was presented that Student ran away at least three times during the time period addressed in this case. On at least two of those occasions, evidence established that Student had been sexually assaulted and was using illegal narcotics. Dr. Lois Lee, founder of the nonprofit organization, Children of the Night, testified at hearing and recommended a locked residential treatment facility as an appropriate placement for someone who has been trafficked due to unhealthy attachments to gangs or pimps and their proclivity to run away. However, Dr. Lee had never met student and acknowledged that she did not know exactly what had happened to Student. She admitted she would need to speak with Student to develop appropriate recommendations for Student's particular situation.

Similarly, Dr. Gary Katz, a clinical psychologist and psychology professor at University of California at Irvine, also testified at hearing and recommended a residential treatment program due to Student's history of running away and due to her trauma. However, he acknowledged that everything he knew about Student's trauma and running away was second-hand information provided by Mother. At the time he assessed Student he had no knowledge of any trauma she had experienced; nor had he been informed that she was a chronic runaway. Dr. Katz' recommendation for residential treatment was not based on an educational need. Neither Dr. Katz' nor Dr. Lee's recommendations that Student be placed in a residential treatment facility were given any weight.

Student seeks placement in a residential treatment facility to remedy the FAPE denial and not as prospective placement. Accordingly, the law governing residential placement is not applicable. However, it provides guidance in the context of determining the appropriateness of a compensatory education placement. In order for a residential placement to be considered necessary under the IDEA, a student must demonstrate that the residential facility is necessary for *educational* purposes. (*Clovis Unified School District v. California Office of Administrative Hearings,* (9th Cir.1990) 903 F.2d 635, 643 (emphasis in original).) Residential treatment as a placement option is limited to those instances when required for educational purposes and when Student is "incapable of deriving educational benefit outside of a residential placement." (*Ashland School Dist. v. Parents of Student R.J.*, (9th Cir, 2009) 588 F.3d 1004,1010; citing Seattle Sch. Dist., No. 1 v. B.S., (9th Cir.1996) 82 F.3d 1493,1499.)

Here, Student is seeking an extreme remedy, placement in a locked facility, when the only special education efforts to address her educationally related behaviors have

been resource support and counseling. There was no evidence that the running away or that the trauma of her sexual assault impacted Student's needs for educationally related behavior supports, the provision of a speech and language assessment during the period of time at issue here, or Lompoc's failure to follow the IDEA when it involuntarily changed Student's placement. Student failed to prove that trauma had impacted the needs for which remedies are due in this case. Student failed to establish that residential treatment was an appropriate remedy for the violations found in this case.

Student argues that she is currently homeless and/or a Foster Child thus entitled to the protections of the McKinney-Vento Homeless Assistance Act, Title 42 United States Code, section 11301 *et seq.* Student's status as homeless or a Foster Child was not established by the evidence. However, it is irrelevant to this case. Student's current legal residence or prospective placement are not at issue here.

ASSESSMENTS

Student established Lompoc failed to provide an assessment required due to a suspected disability. Lompoc failed to establish that the speech and language assessment provided by Ms. Quinlan dated January 23, 2019, met the requirements of state and federal special education laws. Student is entitled to reimbursement for the speech and language assessment conducted by Ms. Schnee. While Student did not present evidence of the fees charged by Ms. Schnee, Ms. Schnee conducted a very thorough speech and language assessment. Ms. Schnee was qualified and knowledgeable about the testing and her assessment was sufficiently comprehensive to address the range of speech and language deficits impeding Student's ability to positively interact with peers on a regular basis and access her education. Student is

required to submit a copy of Ms. Schnee's invoice for her assessment of Student to Lompoc within 15 days of the date of this order and Lompoc is ordered to reimburse Mother for the assessment within 45 days of receiving the invoice.

COMPENSATORY EDUCATION

Determining the proper compensatory education remedy is made difficult by the lack of evidence submitted by Student as to what compensatory education would remedy the denials of FAPE alleged. Therefore, the undersigned has used her broad equitable powers to determine the appropriate remedy. This equitable analysis accounted for the difficulty of accessing services from Student's remote rural location and the possible need to seek services in larger cities where services may be more expensive. Having carefully considered the various denials of FAPE and multiple options for remedying them, the cost for services shall be capped at $150 per hour. The following remedies are deemed appropriate in this case:

BEHAVIOR SUPPORTS

Student was not provided with adequate behavior supports from May of 2017 to October 23, 2019. Both Lompoc's school psychologist and Student's expert psychologist agreed that Student needs counseling to address educationally related mental health needs.

Based on the lack of significant, focused counseling being received by Student since December 3, 2018, Student is awarded counseling as part of the compensatory education owed due to Lompoc's failure to provide adequate behavioral supports. Lompoc shall reimburse Student's educational rights holder for 60 hours of counseling

at a rate that does not exceed $150 per hour. The services shall be provided by a licensed therapist of Student's educational rights holders' choice within 60 miles of Student's location, wherever that may be and may be individual or group therapy as determined most effective for Student by the therapist providing services. The distance allowed is based on the fact that Lompoc is a small rural town and available counseling services in the area are limited. The counseling services shall be used within two years of the date of this decision.

Communication skills training is also awarded as additional compensatory education for failure to provide adequate behavioral supports. Lompoc shall provide 60 hours of speech and language therapy in the form of either individual or group social skills therapy as determined most effective for Student by the speech pathologist providing the services. The services shall be provided by the licensed speech pathologist of Student's educational rights holders' choice within 60 miles of Student's location, wherever that may be, at a rate not to exceed $150 per hour. The distance allowed is based on the fact that Lompoc is a small rural town and available speech therapy services in the area are limited. The services shall be used with two years of the date of this decision.

MISSED INSTRUCTION DUE TO INVOLUNTARY TRANSFER

Student failed to submit evidence to establish the amount of time Student was denied the opportunity to attend school due to the involuntary transfer to Forinash Community Day School that was effective March 5 or 6, 2019. Student also failed to submit evidence regarding how much compensatory education should be awarded due to the failure to provide educational benefit or the remedy for the denial of Mother's opportunity for meaningful participation in the IEP process.

However, the undersigned carefully considered that Student missed a significant amount of specialized academic instruction that would have focused on English language arts and math, and the loss of access to education in general that resulted due to the significant violation of the IDEA in failing to observe any of the procedural protections due either Student or Mother in effecting the improper involuntary change of placement. The ALJ relied upon her broad equitable powers to craft a remedy for a violation of the IDEA. Lompoc shall reimburse Student's educational rights holder for 120 hours total of academic tutoring, at a rate not to exceed $150 per hour, at a tutoring service of the educational rights' holder's choice, within 60 miles of Student's location, wherever that is.

LOMPOC'S ARGUMENTS REGARDING REDUCTION OR DENIAL OF COMPENSATORY EDUCATION ARE NOT PERSUASIVE

Lompoc argues that Student should not receive compensatory education for the period from August 14, 2019, through October 22, 2019, during which time she did not attend school in Lompoc; or for the days she was absent in the 2018-2019 school year. Lompoc argues Student's lack of attendance indicates she is not interested in attending school and cites to a *T.B. v. Prince George's County Board of Education* (4th Cir. 2018) 897 F. 3d 566 and a *Garcia v. Board of Education* (10th Cir. 2008) 520 F. 3d 1116, as support for compensatory education being denied on this basis. These cases are not precedent in the Ninth Circuit appellate district. Furthermore, this argument is not found to be persuasive.

No evidence was presented establishing that Student did not have an interest in attending school. The fact that student returned, day after day, despite her substantial daily difficulties, weighs against such a conclusion. Nor was evidence submitted

establishing the reasons for all of Student's absences. What has been established is that Lompoc offered inadequate behavioral and communication skills supports, and no IEP subsequent to the March 5, 2019, change of placement outside the IEP process. Thus, Student's denial of FAPE spanned the period from May, 2017 when Student's fifth grade conduct showed an alarming change, to October 23, 2019.

Lompoc also argues that compensatory education should be reduced due to Mother's failure to cooperate in allowing a functional behavior assessment, a behavior intervention plan or counseling. However, the Ninth Circuit has made it clear that the obstinance of a parent does not excuse a district's obligation to a child. (*Doug C., supra,* 720 F. 3d at p. 1045.)

TRAINING FOR LOMPOC STAFF

To remedy the failure to follow procedures required by the IDEA, Lompoc shall arrange for a one-hour training for each member involved in Student's 2018-2019 IEP team still employed by Lompoc in the 2019-2020 school year, and for each administrator involved in the Alternative Placement Committee that considered Student's involuntary Transfer, on the topic of the legal requirements pertaining to disciplinary changes of placement for special education students. The training shall be done by someone not employed by Lompoc, and shall be completed within six months of the date of this decision.

ORDER

1) Lompoc shall reimburse Student for the speech and language assessment conducted by Karen Schnee, SLP. Student is required to submit a copy of Ms. Schnee's invoice for her assessment of Student to Lompoc within 15

days of the date of this order. Lompoc is ordered to reimburse Mother for the assessment within 45 days of receiving the invoice.

2) Student is entitled to 60 hours of counseling at a rate not to exceed $150 per hour in an individual or group setting as determined best by the therapist providing services. The services shall be accessed from a licensed therapist of Student's educational rights holder's choice within 60 miles of Student's location, wherever that may be. The education rights holder may submit an invoice to Lompoc for services. Lompoc shall reimburse educational rights holder or pay the therapist directly within 30 days of receiving the invoice. The counseling services shall be used within two years of the date of this decision.
3) Student is entitled to 60 hours of speech therapy at a rate not to exceed $150 per hour in an individual or group setting as determined best by the speech therapist providing services. The services shall be accessed from a licensed speech pathologist of Student's educational rights holder's choice within 60 miles of Student's location, wherever that may be. The education rights holder may submit an invoice to Lompoc for services. Lompoc shall reimburse Student's educational rights holder or pay the speech therapist directly within 30 days of receiving the invoice. The speech and language services shall be used with two years of the date of this decision.
4) Student is entitled to 120 hours of academic tutoring at a rate not to exceed $150 per hour in an individual or group setting as determined best for Student by the tutor providing services. The services shall be accessed from an educational tutoring service of Student's educational rights holder's choice within 60 miles of Student's location, wherever that may

be. The education rights holder may submit an invoice to Lompoc for services. Lompoc shall reimburse Student's educational rights holder or pay the tutor directly within 30 days of receiving the invoice. The tutoring shall be used within two years of the date of this decision.

5) Lompoc's request to implement counseling services as stated in its March 19, 2019 IEP offer, without parental consent, is denied.

6) Lompoc shall arrange for a one-hour training on the topic of the legal requirements pertaining to disciplinary changes of placement for special education students to each member of Student's IEP team and for each administrator involved in the Alternative Placement Committee consideration of Student's involuntary Transfer still employed by Lompoc in the 2019-2020 school year. Lompoc shall have each participant sign in to evidence their attendance at the training and retain the sign-in sheet for two years. The training shall be done by someone not employed by Lompoc, and shall be completed within six months of the date of this decision.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56506, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within 90 days of receipt.

/S/
Penelope S. Pahl
Administrative Law Judge
Office of Administrative Hearings