

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

LAKE ELSINORE UNIFIED SCHOOL
DISTRICT.

OAH Case No. 2016040427

DECISION

Student filed a due process hearing request (complaint) with the Office of Administrative Hearings (OAH), State of California, on April 4, 2016, naming Lake Elsinore Unified School District. Student filed a first amended complaint on May 20, 2016, and a second amended complaint on August 4, 2016.

Administrative Law Judge Cole Dalton heard this matter in Lake Elsinore, California, on September 28 and 29, 2016, and on October 4, 5, and 21, 2016.

Tania White leather, Attorney at Law, represented Student. Mother attended the hearing on October 4 and 5, 2016. Student did not attend the hearing.

Cynthia Vargas, Attorney at Law, represented District and Rikisha Lane, Attorney at Law, was present intermittently. Donna Wolter, District's Director of Special Education, attended each day of the hearing.

At the conclusion of the hearing, OAH granted a continuance until November 14, 2016, for the parties to file written closing arguments; the continuance was extended until November 21, 2016, at the request of the parties. On November 21, 2016, upon the timely receipt of closing arguments, the record was closed and the matter was submitted for decision.

ISSUES¹

1. Did District deny Student a free appropriate public education during the 2014-2015 school year by:
 - a. Failing to offer a behavior intervention plan at the June 3, 2014 individualized education program team meeting;
 - b. Failing to offer a transition plan for Student's transfer from a private placement to a District placement at the June 3, 2014 IEP team meeting; and
 - c. Failing to timely file a due process complaint to establish that its June 3, 2014 IEP offered Student a FAPE?
2. Did District deny Student a free appropriate public education during the 2015-2016 school year by:
 - a. Failing to offer a behavior intervention plan at the December 4, 2015 IEP team meeting;
 - b. Failing to offer a transition plan for Student's transfer from a private placement to a District placement at the December 4, 2015 IEP team meeting; and
 - c. Failing to timely file a due process complaint to establish that its December 4, 2015 IEP offered Student a FAPE?

¹ At the beginning of the hearing, Student withdrew the issues regarding speech and language and occupational therapy services for the 2014-2015 and 2015-2016 school years. As such, neither party's argument on these issues was considered in this Decision. The remaining issues have been rephrased and reorganized for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

3. Did District deny Student a FAPE by failing to timely grant or file for due process in response to Student's March 2016 request for an independent functional behavior assessment?

SUMMARY OF DECISION

Student failed to demonstrate that District denied her a FAPE by failing to include a behavior intervention plan in its IEP's of June 2014 and December 2015. District could not develop an appropriate behavior intervention plan while Student attended a unilateral private placement in a nonpublic school. Student did not demonstrate that she required a transition plan prior to accepting District's IEP's as she was not transitioning from a nonpublic school into a regular school program. The evidence demonstrated that, once Student accepted a District placement, the private placement and District teams would collaborate on any needed transition services.

Further, Student did not show that District was required to initiate a due process hearing after the June 2014 or December 2015 IEP's, as Student was unilaterally privately placed and Parents never consented to implement any component of the IEP's. Finally, Student failed to demonstrate that District must provide an independent functional behavior assessment, as it has not performed its own evaluation.

FACTUAL FINDINGS

STUDENT'S BACKGROUND

1. Student, a 15-year-old girl, resided with her Parents within District's jurisdictional boundaries at all relevant times. She was eligible for special education as a Student with autism. Student exhibited deficits in communication, social interaction, focus and attention, life skills, academics, and behavior. Two prior OAH decisions

regarding Student were pending on appeal at the time of the underlying hearing in this matter.²

2. In June 2012, Student dis-enrolled from District. From mid-September 2012 through mid-November 2012, Parents unilaterally privately placed Student at Beacon Day School, a nonpublic school. Subsequently, Parents home schooled Student through April 2014.

3. Prior to dis-enrolling from District, Student's behavior issues included dunking herself or her clothes in the toilet, cutting her hair while using scissors, tearing off clothes and placing them in puddles of water, pinching peers and adults, pulling her hair, screaming, and swiping things off her desk. District determined that Student engaged in these behaviors to avoid/escape tasks or to gain attention. Through goals related to maladaptive behaviors, Student worked on communicating feelings, gaining attention or help through appropriate means, and using appropriate greetings and eye contact.

4. Student received behavior supports such as positive praise for appropriate behavior and a choice chart for earning preferred activities upon task completion. District provided behavior services and developed a behavior plan through a nonpublic agency, Center for Autism and Related Disorders.

5. Student's behaviors were cyclical. When one behavior was extinguished, another arose. Once that one diminished, an old behavior would come back or get worse.

UNILATERAL PRIVATE PLACEMENT AT PORT VIEW

6. On April 16, 2014, Parents sent a letter to District's Director of Special Education, Donna Wolter, of their intent to unilaterally place Student at Port View

² OAH Case No. 2012080373 and OAH Case No. 201508043.

Preparatory, a nonpublic school in Yorba Linda, California. In the letter, Parents expressed their intent that District pay for the nonpublic school tuition and asked whether District intended to offer Student a FAPE. Student attended Port View from April 28, 2014, through the time of hearing.

7. Dr. Edward Miguel and Dr. Melaura Erickson Tomaino are founders of Port View. They previously worked at Beacon Day School. Dr. Miguel holds a master of arts in teaching with a specialization in applied behavior analysis and a doctorate of education. He worked as the Chief Operating Officer at Beacon from 2008 through 2013. Dr. Miguel conducted Student's intake at Beacon, making him familiar with Student's needs prior to her attendance at Port View.

8. Dr. Tomaino became a Board Certified Behavior Analyst in 2011. She was the clinical director at Beacon and developed behavior plans for students, oversaw the department of behavior, led assessments, and supervised the occupational therapy and speech and language departments. Dr. Tomaino served as principal and lead BCBA at Port View. She hired employees, performed intakes, and developed student behavior programs. Behavior programs functioned to reduce challenging behaviors and replace them with functionally adaptive behaviors so students could access the curriculum more successfully.

9. Port View opened in 2014 as a certified nonpublic school, which accepted private students, as well as public school students through service contracts with school districts. Port View had 59 students at the time of hearing.

10. Port View developed a behavior plan for Student within 30 days of her arrival based on Parent interviews, record review, and interactions with Student. Dr., Tomaino and Dr. Miguel called this process a behavior assessment. Port View collected antecedent – behavior – consequence data of Student in an iPad program, which stored data in the cloud. The ABC data referred to what happened before a behavior, the

behavior itself, and what happened after the behavior. Through the behavior assessment, they were able to determine that the function of Student's behaviors was escape and attention. These were the same functions identified by District in May of 2012.

11. When Student transitioned to Port View from home-school in June 2014, she received functional communication; priming; visual cues/visual schedule; a token economy system to reinforce positive behaviors; and alternative functional replacement behaviors. These behavior supports worked for Student in 2014 in that she stopped flipping over tables, had fewer vocalizations, gained an ability to sit and attend, and participated in group instruction. These supports were similar to those offered by District in 2012.

12. Neither Dr. Tomaino nor Dr. Miguel opined that Student required a specific transition plan when moving from home schooling to Port View. However, both believed Student would need a transition plan in place if she changed placement from Port View to District. The transition plan should include a visual schedule, front-loading, and possibly having a Port View aid shadow or overlap services at District for a limited period of time.

13. The transition plan would be coordinated between Port View and District through collaboration and a transition IEP, if Parents decided to return Student to a District placement. Dr. Tomaino conceded that Student did not require a transition plan in her IEP prior to Parents agreeing to a District placement.

14. According to Dr. Tomaino, Port View always tried to transition students back to their districts. She opined that best practices would be to have both a behavior plan and transition plan in place before Student's move. The plans would have to be based on raw data, which Port View never provided to District.

DISTRICT'S RESPONSE TO NOTICE OF UNILATERAL PRIVATE PLACEMENT

15. Ms. Wolter served as District's Director of Special Education for five years, coordinator of student support services for two years, program specialist for over two years, and a special education teacher for approximately seven years. She held a master's degree in special education and an education specialist and administrative credential. Ms. Wolter met Student when Student was three years old and attended about 10 of her IEP team meetings.

16. On April 22, 2014, Ms. Wolter responded to Parents' notice of unilateral private placement. District denied Parents' request to fund the nonpublic school placement, and sent notice of an IEP team meeting for May 6, 2014, an assessment plan, a release of information for Port View and Beacon, and a Notice of Procedural Safeguards and Parents' Rights. The release of information would allow District staff to communicate with nonpublic school providers regarding Student's progress and needs, which was otherwise confidential information.

17. The April 22, 2014 assessment plan sought Parents' consent for assessments in academic achievement, social-adaptive-behavioral-emotional, processing, perceptual-motor development, communication development, cognitive development, and health-developmental. In June 2013, District sought consent for the same assessments in preparation for Student's August 2013 triennial IEP. Parents last consented to District assessments in 2010. District did not have consent to observe Student in any placement, after she left the District in June 2014.

18. District and Parents exchanged approximately 10 emails between April 25, and May 27, 2014, to obtain a mutually agreeable IEP meeting date. They eventually agreed on June 3, 2014, a date Parents initially declined. In these exchanges, Ms. Wolter reiterated her request for a signed release five separate times, through emails dated April 29, May 15, May 16, May 23, and May 26, 2014.

19. On May 21, 2014, Christopher Russell, a special education advocate, advised Ms. Wolter of his retention by Parents for the IEP development process. Parents did not sign the release of information, which precluded District from obtaining records and information from either Beacon or Port View. Parents agreed to fax present levels of performance from Port View once the IEP meeting date was set.

Present Levels From Port View

20. On May 29, 2014, Parents sent a present levels document from Port View to District. The Port View present levels document summarized strengths and preferences; academic and functional skills in readiness, listening, spelling, math, and writing; vocational skills; and adaptive/daily living skills in money, time, domestic tasks, exercise, and typing. The document also showed Student's progress on one goal in each of the following areas: math, reading, toileting, and writing. Port View's present levels were the same as those identified by District in May 2012. In some areas the wording was identical and in others, the present levels were summaries of District's prior information.

21. However, Port View's only mention of behavior was that Student engaged in swiping during vocational tasks. Vocational tasks consisted of sorting items by shape and size, packaging items into containers, folding and washing clothes, and shredding paper. Swiping meant that Student would use her hand and arm to move items from a surface, generally a tabletop, onto the ground. Port View's report did not contain categories for behavior or social-emotional functioning. Parents did not provide District with any other information regarding Student's social-emotional and behavioral needs from either Beacon or Port View.

22. Therefore, the IEP team met with very limited, and in some instances outdated, information on Student's then current levels of need and abilities.

JUNE 3, 2014 IEP TEAM MEETING

23. The June 3, 2014 IEP team meeting³ members were: Mother, Mr. Russell, Ms. Wolter, physical education teacher Melissa Upton, speech and language pathologist Ryan Forgette, school psychologist Monica Andrews, assistant principal Dawn Hernandez, behavior specialist Mireya Escelante, special education teacher Rachel Cohen, and District's counsel Ms. Vargas. Because the release of information was not signed, District could not invite anyone from Port View to the IEP team meeting. Neither Parents nor Mr. Russell invited Port View providers to the meeting.

24. District had no choice but to rely on Mother and Mr. Russell to provide the team with appropriate information upon which to describe Student's present levels of performance and fashion behavior supports, if any were needed.

Behavior Interventions

25. The 2014 IEP was drafted based on present levels from May 2012, when Student last attended District. That draft was augmented, in handwriting, by input from Mother and Mr. Russell. Some of the prior information was scratched through, which reflected that, based upon input, the behavior was no longer occurring or support was no longer needed.

26. At the time of the June 2014 meeting, the team identified the following Student social/emotional/behavioral needs: cutting her hair with scissors, putting

³ In OAH Case No. 2015080436, the parties litigated issues of the appropriateness of triennial and behavior assessments pertaining to the June 3, 2014 IEP and December 4, 2015 IEP meetings. This matter involves the discreet issues of whether a behavior intervention plan and transition plan should have been developed at the June 3, 2014 meeting and the findings of fact are, therefore, limited to these specific issues.

clothes in toilet, pinching peers and adults, swiping, responding inappropriately to the feelings of others, and inappropriately greeting/using eye contact with peers/adults. According to Mother and Mr. Russell, Student no longer injured herself by pulling out her hair, eyelashes, and nails, like she did in District's program. Student's maladaptive behaviors continued to serve the function of avoiding/escaping tasks and attention seeking.

27. Based upon the identified areas of need in behavior, the team developed goals; positive interventions, strategies, and supports; accommodations and modifications; related services, and a District placement. They did not develop a behavior intervention plan.

28. The team presented a draft social skills goal of using appropriate greetings and eye contact. District used Mother's input of improved eye contact to modify the goal. The modified goal called for Student to use appropriate greetings and/or eye contact when addressing adults and peers upon first greeting of the day. The team developed a social-behavioral skills goal for appropriate methods of gaining attention, encouraging Student's use of verbal requests or holding up her hand. The team added a goal addressing Student's ability to identify feelings of others and respond appropriately.

29. The IEP offered the following behavior supports: positive praise for appropriate behavior, choice chart for earning preferred activity after task completion, behavior intervention plan to be revised, organic foods for some rewards, physical rewards (treasure chest), and occupational therapy time. Occupational therapy time included movement breaks. Movement breaks addressed Student's need for sensory regulation, which, in turn, lessened the impact of her maladaptive behaviors. Mother and Mr. Russell did not inform the team of the type, frequency or duration of behavior

supports provided at Port View. They did not express any issues or concerns with the behavior supports offered by District at the June 2014 meeting.

30. District offered specialized academic instruction in a moderate to severe special day class using modified curriculum, with a cap of eight students, a special education teacher and a para educator. Visuals, manipulatives, and assistive technology were imbedded in the class. District offered a one-to-one instructional aide. District further offered nonpublic agency services for aide training, six hours of staff training, supervision, and monthly clinical meetings. Supervision included development and implementation of a behavior intervention plan, behavioral analysis, and collaboration between teachers and aides, for eight hours per month. Clinical meetings to ensure consistency in implementation of the program across providers, and to share information and concerns, would be held between all providers and Parents for one hour per month. District offered speech and language in a group, four times per month, 50 minutes per session and one-on-one, two times per month, for 30 minutes per session. Speech and language services provided a positive impact on Student's behaviors as it helped her communicate appropriately. Additional supports offered were: occupational therapy consultation on sensory needs (10 times per year for up to 30 minutes each), use of visual manipulatives (five times per day for five minutes each time), and movement breaks incorporated into the school day (five times per day for 10 minutes each time). Movement breaks included access to the sensory/motor occupational therapy lab so that Student could regulate her behavior.

31. Nonpublic agency support, occupational therapy, and speech and language were also offered during the extended school year.

32. School psychologist and behavior analyst, Ms. Escelante attended the June 2014 IEP meeting to review behavior interventions. Ms. Escelante holds a pupil personnel services credential as a school psychologist, an applied behavior analysis

certification, and was obtaining her doctorate degree in psychology at the time of hearing. She worked for District for 11 years as a school psychologist, and three years as a behavior specialist. She never assessed or observed Student.

33. Like Port View witnesses, Ms. Escelantede demonstrated appropriate training, experience, and candor supporting her explanation of Student's needs. She credibly described that, since behavior intervention plans are environment dependent, one would be developed if Student returned to a District placement, and not before. The team required feedback from Port View, data collection from observations, or an assessment in order to revise or develop Student's behavior plan. Though a formal functional behavior assessment would be helpful, the hypothesis of the function of Student's behavior could be developed without it. The function of behavior meant why the behavior occurred, for example, attention or escape. She agreed with Dr. Tomaino and Dr. Miguel, that the function of Student's behaviors could be determined through observation, interviews, and data review, without a formal assessment. However, other than the present levels document from Port View, District did not have access to Student or any other Port View data at the time of the June 2014 IEP meeting.

34. Ms. Escelante explained that behaviors are based on environment. District could not develop an appropriate behavior intervention plan without Student being in the placement offered. Typically, when students moved into a District placement, District used the functional behavior assessment or behavior interventions from the prior placement, observed Student in the new environment, collected further data, and revised the behavior interventions or plan.

35. Based on the information District had at the time of the June 2014 IEP meeting, it addressed Student's areas of need in behavior and developed appropriate goals, services, and supports to address those needs. The weight of the evidence showed that District's placement offer, along with behavior interventions, strategies, and

supports were sufficient to offer Student a FAPE in the June 2014 IEP, without a behavior intervention plan.

Transition Plan

36. The June 2014 IEP described Student's ability to follow routines and transitions within the classroom with minimal prompts and participate in small group instruction with appropriate accommodations. District witnesses credibly described how the structure, communication supports, visual supports, behavioral interventions, and sensory supports and services offered in the IEP would help Student regulate and transition between settings and activities.

37. The weight of the evidence showed that Student did not require a transition plan in order to be offered a FAPE in the June 2014 IEP. Student offered no evidence that a transition plan was in place prior to her placement change from District to Beacon; for her placement change from Beacon to home schooling; or from home schooling to her placement at Port View. District and Student witnesses credibly demonstrated that, once Student accepted a District placement, District and Port View would collaborate on current needs, and coordinate activities to develop a transition plan for Student as part of a change of placement IEP.

EVENTS FOLLOWING THE JUNE 3, 2014 IEP TEAM MEETING

38. Neither Mother nor advocate expressed rejection of the IEP during the meeting. Parents did not express either consent or rejection of any part of the June 2014 IEP prior to filing a request for due process in April 2016.

39. Port View generated an Individualized Behavior Intervention Report dated December 15, 2014. The report identified challenging behavior, summarized data collected on the frequency of each behavior, and provided proposed goals to address each behavior. The identified behaviors consisted of physical aggression (defined as

pinching and biting adults and peers); property destruction (throwing items across the room, swiping items off desks, flipping tables, tearing papers, and breaking items into two or more pieces); self-injurious behaviors (pulling out own hair from head, eyelashes or eye brows, picking off nails, gagging self with her fingers, and tearing clothing); sniffing (placing her head and nose in the neck or chest region of other individuals and sniffing); and verbal disruptions (yelling about past events or wants, repeatedly).

40. The report showed a frequency of physical aggression with a low of 0.57 occurrences per school day⁴ (October 2014) to a high of 25.47 (November 2014). For the first two months of attendance at Port View, levels of physical aggression were: 5.72 (May) and 3.55 (June). This was an increase from occurrences at Beacon (2.57), which contradicted information reported to District at the June 2014 IEP. Property destruction ranged from a low of 1.15 (June 2014) to a high of 10.05 (September 2014). Self-injurious behavior ranged from a low of 1.06 (May 2014) to a high of 15.89 (December 2014), showing a pattern of increase over time. Sniffing ranged from a low of zero (September, October, and November of 2014, and January of 2015) to a high of 2.5 (May 2014), again, showing very low levels of this behavior. Verbal disruption ranged from a high of 6.63 (September 2014) to a low of 1.25 (January 2015) showing a decrease over time.

41. The December 2014 report goals provided a baseline, benchmarks, and progress summaries. Each goal identified a targeted challenging behavior, intervention strategies, and functionally equivalent replacement behaviors. Similar to District's June 2014 goals, Port View's goals addressed social interaction with peers; completing work and gaining teacher attention; greeting others appropriately; and conversation

⁴ Each frequency number refers to a school day average, unless otherwise stated.

exchanges (to address perseveration). Port View also developed a goal addressing transitions from home to school and back.

42. The December 2014 report offered instructions on generalization and maintenance of new appropriate behaviors; a reinforcement schedule; and data collection. Under District's June 2014 IEP offer, the nonpublic agency would supervise implementation of these types of behavior supports.

43. The last page of the report showed Parents' signatures for approval of implementation of "this Behavior Intervention Plan." The report did not contain a formal behavior intervention plan. The behavior interventions, supports, and strategies identified in the report were similar to those offered by District in the June 2014 IEP. Neither included a formal behavior intervention plan.

44. On May 26, 2015, District initiated attempts to set Student's annual 2015 IEP team meeting and obtain consent for triennial assessments. Mother signed the assessment plan on August 3, 2015, but asked that Student be assessed at Port View because she was much more comfortable there than at her last District placement. Mother further wrote, "We have seen very little of the self-harming behaviors that we saw in her last District placement and know that she will perform better where she is more relaxed."

45. On September 10, 2015, Parent signed a release of information for Port View, but limited the release to documentation only. Parent refused to allow verbal communication between District and Port View unless a Parent-representative was present. Greg Cleave, Assistant Director of Special Education for District, sent the release to Port View that same day seeking any documentation related to Student's educational planning and present levels of performance. On September 16, 2015, Father wrote to Ms. Wolter asking that assessments be scheduled at a District location, outside of school hours, so that it would not interfere with Student's instructional day at Port View.

46. Port View's Quarterly Progress Report dated August 15, 2015, summarized Student's behavior data from January 2015 through July 2015. Mr. Kinney reviewed this report prior to observing Student at Port View in October 2015. Student's physical aggression occurred from a low of 1.88 times (February 2015) to a high of 19.33 times (July 2015). Property destruction ranged from a low of 2.46 (June 2015) to a high of 16.44 (July 2015). Self-injurious behaviors, described to District as not occurring, ranged from a low of 3.31 per (June 2015) to a high of 25.74 per (February 2015). Sniffing ranged from a low of zero times (January 2015) to a high of 4 times (on May 29, 2015). Student did not engage in sniffing behaviors between April 28, 2014 and May 2, 2014, contrary to reports by Mr. Russell. Student engaged in sniffing behaviors only 7 times from January 2015 through July 2015, showing that this was not a significant issue. Verbal disruption occurred from a low of 2.58 times per school day (May 2015) to a high of 8.53 times per school day (March 2015).

47. On September 22, 2015 Mr. Cleave wrote to the Port View administrator and Dr. Miguel asking for "all behavior data collected by your staff for [Student] for the 2015 – 2016 school year," including "whatever has been recorded and collected..." so far for that school year. Port View provided its December 15, 2014 behavior report and August 15, 2015 Quarterly Progress Report. The reports included summaries of collected data. Port View never provided the underlying data, which described the frequency, duration, and intensity of each behavior as it was exhibited. Neither Port View nor Parents provided District with behavior reports prior to September 22, 2015. Other behavior reports existed but were not shared with District prior to the exchange of evidence for this hearing.

48. District conducted its triennial psycho educational assessments between October 1, 2015 and November 3, 2015. Kevin Kinney and Brandie Del Real conducted the behavior testing portions of the triennial assessments. Mr. Kinney earned a master's

degree in special education in 1997 and became a school psychologist in 2001. He earned a Pupil Personnel Services Credential in 1999. For the past two years, he worked as a behavior specialist and school psychologist for District. He conducted between 10 and 15 evaluations per year over the past 15 years at District. Ms. Del Real earned a master's of science in school psychology and a Pupil Personnel Services credential in 2012. She began her practicum in school psychology in 2010. She worked for District as a school psychologist for two years, ending in August 2016. At the time of hearing, she attended University of California, Los Angeles, to obtain a doctorate of education and worked as a school psychologist at Hesperia Unified School District.

49. The behavior portion of the triennial assessments involved record review, interviews, observations, and administration of various testing instruments. Prior to his observations, Mr. Kinney reviewed Port View's August 15, 2015 Quarterly Progress Report.

50. Mr. Kinney observed Student at Port View on October 1, 2015 for one hour and thirty-five minutes and on October 23, 2015 for one hour and five minutes. During that time, Student did not engage in sniffing, self-injurious behaviors, or verbal disruptions. Her classroom had 13 students with a moderately loud noise level. Whenever Student transitioned in the classroom, the teacher held Student's hands and walked closely beside her. Student's desk faced the back corner walls and she did not face other students in the class.

51. During academic instruction, the teacher used modeling, verbal and physical prompting, and a small white board as a visual support to identify letters, numbers, and words. Student did not demonstrate the ability to work independently while telling time or identifying coins and their values.

52. During the October 1, 2015 observation, Mr. Kinney noted seven acts of property destruction (flipped over her desk and a chair; swiped materials off a table top

- five times, swiped a sign off the wall) and one act of physical aggression (pushed staff member in chest area with an open hand while walking down hallway).

53. On October 23, 2015, Mr. Kinney observed five acts of property destruction (swiping items to floor – four times; grabbing for a water bottle – once) and two acts of physical aggression (pinched teacher’s arm – twice and attempted to kick her – once).

54. Ms. Del Real observed and assessed Student at Elsinore High School on October 2, 2015 and October 6, 2015. Rapport was difficult to establish, as Student tended not to make eye contact, was unaware of others’ affect, and ignored social cues. Student had either a mostly flat affect or was smiling. She interacted with school staff for 40 minutes without a single behavior incident. However, during a drawing activity, Student tried to place crayons in Ms. Del Real’s hand and then pinched her arm and breast. During the second assessment session, Student began pinching Ms. Del Real’s forearm, continued to pinch between tasks, and attempted to bite and kick her. Ms. Del Real massaged Student’s hands and provided her with a squeeze toy. Parent physically redirected Student several times, and did deep breathing, but Student continued to pinch. Parent stated these behaviors “do not happen at Port View” and “she always does this with new people.” District’s triennial psycho educational report thoroughly summarized the assessments and Ms. Del Real’s testing of Student.

55. Student was observed at Port View wearing garden gloves, to help avoid pinching; and a hat, weighted blankets, and/or a big pillow to provide sensory input. Both observation and assessment showed Student benefitted from deep pressure, proprioceptive input, and frequent movement breaks. Teachers reported clinically significant ratings on withdrawal. Withdrawal was defined as the tendency to evade others to avoid social contact. Based on the assessment, Student met the criteria for the following eligibility categories: autism, intellectual disability, and multiple disabilities.

56. District did not receive a formal behavior intervention plan from Port View. Neither Mr. Kinney nor Ms. Del Real knew whether one existed. They received the Individualized Behavior Intervention Reports dated December 15, 2014 and August 15, 2015, and neither contained a behavior intervention plan.

57. After reviewing the behavior reports from Port View, Ms. Del Real recommended a functional analysis be done. Because of the continued frequency, intensity, and variability in behavior data, it was possible that Student's behaviors were being unknowingly reinforced. Because environment would be critical to behavior, a functional assessment would have to be done at Student's placement by her provider, Port View.

58. Mr. Kinney, like Ms. Escelante, effectively demonstrated that a hypothesis about the function of Student's behavior could be developed without performing a formal functional behavior assessment. Mr. Kinney explained how behavior interventions for a student would be administered and progress monitored. If the interventions worked, the hypothesis would be assumed correct. If the interventions did not work, a formal behavior assessment would be done.

59. Mr. Kinney and Ms. Del Real, consistent with other witnesses, persuasively demonstrated that environment is critical to a behavior plan. Both agreed that, if Student transitioned to District, District would implement Port View's plan, collect data, and make adjustments. District did not have access to Student at Port View, which made it impossible to collect the kind of behavior data they needed prior to a transition. Further, Port View never provided Student's behavior data, which had been collected since April 2014.

60. Looking at District's assessment information, Mr. Kinney hypothesized that Student's pinching behavior was attention-seeking, task avoidance or a combination of both. He believed that sensory issues were involved. According to Mr. Kinney, behavior

goals could appropriately address these needs until further information was obtained, once Student moved to a District placement.

DECEMBER 4, 2015 IEP TEAM MEETING

61. Mr. Cleave, assistant principal Jeremy Cassara, speech and language pathologist Connie Siegel, occupational therapist Irene Killany, District nurse Jennifer Edquist, special education teacher Dawn Gilders, special education specialist Eric Bremer, Ms. Del Real, Mr. Kinney, Mother and Mr. Russell attended Student's December 4, 2015 IEP team meeting. District held the meeting to review triennial assessments.

Behavior Interventions

62. District proposed goals to address appropriately gaining attention from peers and adults; engaging in social activities (board games, catch, puzzle); working independently; and gaining staff's attention appropriately. District developed the goal for gaining attention appropriately to address Student's pinching and swiping behaviors. Replacement behaviors including Student raising her hand or using words. District addressed student's withdrawal through the goal for engaging in social activity. The goal provided for implementation across different peers, settings, and activities. Working on this goal in a variety of situations addressed Student's difficulties with change. The goal for working independently addressed Student's need to initiate a task and sustain the task for a period of time. Mr. Kinney considered attention a crucial area of need for Student.

63. District determined that Student's behaviors of pinching and swiping were behaviors that impeded learning. District identified positive behavior interventions, strategies, and supports to address the behaviors, as follows: positive praise for appropriate behavior; first – then strategies; choice chart for earning preferred activity after completing tasks; behavior intervention plan – to be revised; physical rewards

(treasure chest); and occupational therapy time. Neither party offered a District behavior intervention plan into evidence. There was some reference to an old behavior plan developed by a nonpublic agency that previously worked with Student. Much was made of whether such a plan would be revised or a new plan developed. However, the weight of the evidence showed that District offered to develop a behavior intervention plan, once Student returned to District. Both Mother and the advocate substantiated that such an offer was made during the IEP meeting.

64. District offered supplementary aids, services, and other supports consisting of occupational therapy consult on sensory needs one time per month for up to 30 minutes each time; use of visuals, manipulatives five times per day for five minutes each time; movement breaks five times per day for 10 minutes each time; sensory diet as needed, five minutes per session; modified academics 1200 minutes weekly; inclusion with typical peers 30 minutes per day; and nonpublic agency staff training for personnel, six hours per year.

65. The December 2015 IEP offered placement and services of specialized academic instruction in a moderate to severe special day class with modified curriculum, using visuals, manipulatives, and assistive technology; a one-on-one support aide that would be an instructional aide given behavior training through a nonpublic agency; speech and language for 30 minutes per session, eight times per month; behavior intervention services by a nonpublic agency for 60 minutes per week to provide supervision for behavior intervention, behavior analysis, and collaboration with teacher and aides; and nonpublic agency behavior supervision for 60 minutes per month for a meeting with all providers to ensure program effectiveness and consistency across providers. District offered the same supports and services over the extended school year. District offered mainstreaming during lunch, break time, assemblies, and peer buddies time.

66. District witnesses persuasively demonstrated that the December 2015 IEP offered a FAPE for Student and appropriately addressed her behavior needs. According to Mr. Kinney, the functional curriculum class promoted independence, provided a small class size, allowed for movement breaks, and provided appropriate adult supervision. He described the similarity between District's placement offer and Port View. Further, unlike Port View's placement, District's placement offered engagement with neurotypical peers.

Transition Plan

67. District did not offer a transition plan for Student to move from Port View to a District placement. District witnesses believed the behavior supports offered in the IEP would help Student transition into the new school setting. The supports and services were similar to what Port View implemented. The weight of the evidence showed that the similarity of supports and services offered enough consistency to Student to aid in transition. Further, a transition plan could not be appropriately developed until Parents consented to a change of placement. At that time, District and Port View would collaborate on the necessary components of such a plan. Accordingly, District was not required to offer Student a transition plan as part of the December 2015 IEP.

68. Parent did not agree to any part of the December 2015 IEP. She would not even consider an offer by District unless they could create a program similar to Port View, which had 59 students and was run by two Behavior Certified Behavior Analysts.

PORT VIEW'S BEHAVIOR INTERVENTION PLAN

69. Dr. Tomaino described Port View's annual IEP and behavior intervention plan for Student, dated January 15, 2016. No evidence was presented that Port View ever drafted any other formal behavior intervention plan.

70. The behavior plan identified Student's areas of need in physical aggression, property destruction, self-injurious behavior and verbal disruption. It

identified the hypothesis of the function of behavior as attention. Dr. Miguel opined that the function of Student's behaviors was both attention and escape. District identified both escape and attention as functions of Student's behaviors. Port View's plan described functionally equivalent replacement behaviors as functional communication training on gaining attention, delayed access to attention, attending to tasks, independent work, and greetings/social exchange. These are the same areas of need identified by District in its behavior goals.

71. Port View's plan contained several pages of explanation on how it should be implemented. For example, it explained use of visual schedules, tolerance development for attention delay, and using reinforcers (such as sensory breaks) for motivation. District had also offered visual schedules/manipulatives, interventions to address attention seeking, and sensory breaks to regulate Student's behaviors and maintain attention to task. Port View's implementation plan described teaching Student appropriate communication, priming, and modifying tasks to Student's present levels of performance. Similarly, District's offer included speech and language to address communication issues; visual schedules and manipulatives for priming; and modified curriculum taught in a special day class with the support of a one-on-one aide. Port View's plan offered activity choices, breaks from tasks, and using prompts. Likewise, District offered a choice chart, movement breaks, and prompting. Port View and District staff credibly demonstrated that District offered strategies and supports in its IEP's of June 2014 and December 2015 that were very similar to those offered in Student's Port View placement.

72. Dr. Tomaino and Dr. Miguel agreed that a behavior plan should be developed for Student once she was in her new educational setting. Dr. Miguel believed that, if Parents agreed to a change in placement, District would implement the current behavior plan from Port View, while Student transitioned. He explained that IEP's usually

stay with the Student, for consistency. For that reason, he assumed the Port View's behavior plan would stay with Student and District would immediately start assessing Student to see what needed to be changed once she was in the new environment. At that point, a functional behavior assessment could be done in the new school, if needed. But he persuasively demonstrated that there was already enough information in the Port View behavior plan, such that District could just reformulate the plan for the new environment. This process would also act as part of Student's transition.

STUDENT'S MARCH 2016 REQUEST FOR INDEPENDENT FUNCTIONAL BEHAVIOR ASSESSMENT

73. On December 14, 2015, District learned that Port View collected data underlying their quarterly reports on a regular basis. Port View stored that data in the cloud. Further, District learned that Port View planned to conduct a functional behavior assessment of Student due to an increase in the intensity, frequency, and duration of her maladaptive behaviors. Port View's January 15, 2016 behavior report bears out significant increases in physical aggression, property destruction, and ongoing fluctuations in self-injurious behaviors and verbal disruption. In December 2015, Port View began tracking Student outbursts. Outbursts consisted of a combination of physical aggression, property destruction, and self-injurious behavior lasting 30 seconds or longer. They typically included crying and loud vocalizations.

74. On December 17, 2015, Mr. Cleave wrote to Port View seeking all academic and behavior progress reports, all data collection for Student for the 2015 – 2016 school year, and any new education records. He renewed the request on January 26, 2016.

75. On January 27, 2016, Parents sent a modified release of information, adding an end date of December 31, 2015.

76. On February 2, 2016 and March 16, 2016, Ms. Wolter sent Parents an assessment plan for a functional behavior assessment, with prior written notice on why District sought the assessment, a notice of procedural safeguards and parents' rights, and a release of information for Port View.

77. On March 18, 2016, Parent refused to consent to District's request to conduct a functional behavior assessment. Parent asked, instead, that District fund an independent functional behavior assessment by Dr. Tomaino.

78. On March 24, 2016, Ms. Vargas sent prior written notice denying the request for an independent functional behavior assessment and repeating District's offer to perform its own functional behavior assessment.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA⁵

1. This hearing was held under the Individuals with Disabilities Education Act (IDEA), its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)⁶ et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are:(1) to ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to

⁵ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

⁶ All subsequent references to the Code of Federal Regulations are to the 2006 version.

ensure that the rights of children with disabilities and their Parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the Parent or guardian, meet state educational standards, and conform to the child's individualized education program (IEP). (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are also called designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of Parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the 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).)

3. In *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*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the

potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 951, fn. 10.)

4. The IDEA affords Parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6)& (f); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D); Ed. Code, § 56505, subd. (l).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20

U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) Here, Student bears the burden of proof.

ISSUE 1(A) & 2(A): BEHAVIOR INTERVENTION PLAN FOR JUNE 3, 2014 & DECEMBER 4, 2015 IEP'S

5. Student contends that District did not develop and offer a behavior intervention plan to address behaviors that were impeding her learning and the learning of others. Further, Student contends she cannot provide informed consent to the IEP's unless a behavior plan is first developed. District contends it offered appropriate classroom interventions, strategies, and goals to modify Student's behavior, rendering a formal behavior plan unnecessary. District further contends that behavior plans are environment specific, rendering development of a plan prior to Student's return to a District placement, premature.

Applicable Law

6. When developing the IEP, the IEP team shall, in the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports and other strategies to address that behavior. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i); Cal. Educ. Code, § 56521.2, subd. (b).)The IEP must include a statement of the "special education, related services, supplementary aids and services, and program modifications or supports" that will be provided to the child. (20 United States Code 1414(d)(1)(A)(i)(IV).)There are no unique requirements regarding the documentation of any positive behavioral interventions and supports and other strategies that are identified in state or federal law. Further, there is no requirement that positive behavioral interventions and supports for a child whose behavior impedes the child's learning or that of others be based on a functional

behavioral assessment. (34 C.F.R. 300.324.(a)(2); 71 Federal Register 46683, August 14, 2006.)

7. An IEP that does not appropriately address behaviors that impede a child's learning denies a student a FAPE. (*Neosho R-V School Dist. v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028-1029; *County of San Diego v. California Special Educ. Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467-68.) An IEP is a "snapshot" and must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)

Analysis

JUNE 3, 2014 IEP

8. Student dis-enrolled from District in June 2012 and has not consented to return to a District placement. The weight of the evidence demonstrated that a behavior intervention plan could not be developed until Student returned to a District placement.

9. Dr. Tomaino and Dr. Miguel, along with District staff, persuasively demonstrated that behavior plans are environment specific. Different environments mean different teachers, different students, different class and campus environments, and other variables. Once Student returned to a District placement, appropriate protocol would be implementation of the Port View behavior plan, data collection over several weeks, and update of the behavior plan.

10. At the time of the June 2014 IEP team meeting, Port View did not have a formal behavior intervention plan in place. Rather, Student was provided with positive behavioral interventions, supports and other strategies to address targeted behaviors. Student did not share the Port View program with District at the IEP team meeting.

11. Nonetheless, with the input of Mother, the June 2014 IEP team identified target behaviors of pinching; swiping; cutting her hair with scissors; putting clothes in toilet; responding inappropriately to the feelings of others; and inappropriately

greeting/using eye contact with peers/adults. District developed a program to address these behaviors, which included functional communication; priming; visual cues/visual schedule; a positive behavior reinforcement system; and alternative functional replacement behaviors, similar to Port View's supports and services.

12. Like Port View, District offered a small, structured setting in a moderate to severe special day class using modified curriculum. The class embedded the use of visuals, manipulatives, and assistive technology. District offered Student a one-on-one instructional aide throughout the school day. District offered to train the aide in behavior modification through a nonpublic agency. District also offered to use the nonpublic agency to provide staff training on behavior interventions, engage in monthly meetings, and provide supervision for continuity in program implementation across providers. The nonpublic agency would take data and develop a behavior intervention plan, if needed, in the new environment.

13. Further, District offered speech and language services to address communication issues, which also impacted Student's behaviors. District offered occupational therapy and access to the sensory lab to provide movement breaks and proprioceptive input. Port View also addressed Student's behavior needs through communication and sensory input, with some success.

14. Based on the information they had at the time of the June 3, 2014 IEP, District's offer of positive behavioral interventions, supports, services, and strategies were appropriate to address Student's behaviors and offered her a FAPE. District could not evaluate the need for or develop a behavior intervention plan without observing Student in the placement offered and tracking behavior data over time in the District placement.

15. For the forgoing reasons, Student did not successfully demonstrate that District denied her a FAPE by failing to develop a behavior intervention plan as part of the June 3, 2014 IEP.

DECEMBER 4, 2015 IEP

16. In the months prior to the December 4, 2015 IEP meeting, Parents consented to triennial assessments and signed a release for documents only. Port View provided District with its December 15, 2014 and September 15, 2015 behavior reports, which were reviewed as part of District's assessment process. At the time of District's December 2015 IEP meeting, Port View did not have a formal behavior intervention plan in place. Port View, instead, developed behavior goals and other strategies, supports, and services to address Student's behavior needs.

17. Port View neither conducted a functional behavior assessment nor developed a behavior intervention plan until January 2016, due to the onset of a more intense behavior pattern they referred to as outbursts and a sustained increase in the frequency and intensity of physical aggression and property destruction by Student. The behavior reports supplied to District showed data collection through July 2015. The pattern of increased frequency of maladaptive behaviors emerged July 2015 through December 2015. District did not have access to either the summaries of these behaviors or the data collection underlying the summaries at the time of the December 2015 IEP meeting.

18. Nonetheless, District properly identified Student's behavior needs, the function of the behaviors, and developed a placement and services appropriate to meet the behavior needs. Student's Port View's January 2016 behavior intervention plan described functionally equivalent replacement behaviors as functional communication training on gaining attention, delayed access to attention, attending to tasks, independent work, and greetings/social exchange. These are the same areas of need identified by District in its December 2015 IEP.

19. District offered the same placement and services as the June 2014 IEP, with updated goals. The social/behavioral present levels and goals mirrored Port View's

goals, which had been provided in the August 15, 2015 behavior report. Placement in the moderate to severe special day class offered a functional curriculum, small class size, adult supervision, and would help foster Student's independence. District again offered behavior intervention and support services through a nonpublic agency, occupational and speech and language therapy, access to a sensory lab, visual manipulatives, movement breaks, modified academics, and staff training.

20. The placement and services offered by District were comparable to those offered by Port View, except that the District placement offered engagement with neurotypical peers. District based its offer on behaviors observed during assessments, and those identified in the two behavior reports received from Port View.

21. District persuasively demonstrated that it identified Student's behavior needs, drafted behavior interventions, supports, and services designed to address those needs, and, along with the offer of placement and services, offered Student a FAPE.

22. Parents did not agree to any portion of the IEP and did not express a desire to consent to a District placement. For all the reasons stated in paragraphs 8 through 15, above, District was not required to develop a behavior intervention plan for Student at the time of the December 2015 IEP.

23. Student did not meet her burden of proving District denied her a FAPE by failing to include a formal behavior intervention plan as part of her December 2015 IEP.

ISSUE 1(B) & 2(B): TRANSITION PLAN TO MOVE FROM NONPUBLIC SCHOOL TO DISTRICT SCHOOL IN IEP'S OF JUNE 3, 2014 AND DECEMBER 4, 2015

24. Student contends District's failure to offer a transition plan for Student to return to a District school from a nonpublic school in both the June 2014 IEP and December 2015 IEP resulted in the denial of a FAPE. District contends it was ready, willing, and able to develop a transition plan, once Student consented to receiving services from District.

Applicable Law

25. The IEP is a written statement for each individual with exceptional needs that includes, if appropriate, “[p]rovision for the transition into the regular class program if the pupil is to be transferred from a special class or nonpublic, nonsectarian school into a regular class in a public school for any part of the school day”. (Ed. Code, § 56345, subd. (b)(4).) The transition plan must include a description of the activities provided to transition the child into the regular program, including the nature of each activity, and the time spent on the activity each day or each week.*(Ibid.)*

Analysis

26. Neither the June 3, 2014 nor December 4, 2015 IEP’s offered Student placement in a regular class program. Rather, District offered a moderate to severe special day class, with some mainstreaming. While the evidence showed Student would benefit from a transition plan, District’s IEP’s did not require such plans to offer Student a FAPE.

27. District persuasively demonstrated that behavior interventions, supports, and services offered in Student’s IEP’s would address transition needs. The similarity of placement and services between District and Port View offered consistency that would also benefit a transition. Student had difficulty with change due to her disability. Both Port View and District viewed consistency as an important part of transitioning Student. Like Port View, District offered visual schedules, which would be used to front-load Student with information about the transition. Student required front-loading as part of her daily routine.

28. Even if Student required more supports for transition, such supports did not need to be developed until Parents consented to a change in placement. Port View persuasively described development of the transition plan as a collaborative process

that would begin with parental consent and lead to discussion of the plan's components at a transition IEP meeting.

29. Student's behavior needs changed over time in type, intensity, frequency, and duration. As some behaviors receded, other old or new ones emerged. Development of a transition plan would be dependent on Student's behavior needs existing at the time of transition. For the forgoing reasons, Student did not meet her burden of proving that she was denied a FAPE by District failing to offer a written transition plan in either the June 2014 or December 2015 IEP.

ISSUE 1(C) & 2(C): DISTRICT'S DUTY TO TIMELY FILE FOR DUE PROCESS

30. Student contends District violated its duty to timely file for due process to show that its IEP's of June 3, 2014 and December 4, 2015 offered Student a FAPE. District contends it was not required to file for due process to override lack of parental consent as Student was unilaterally privately placed at a nonpublic school and Parents did not want Student to return to a District school. Further, District did not dispute that Student received an appropriate education at Port View.

Applicable Law

31. If a parent of a child who is an individual with exception needs consents in writing to the receipt of special education and related services for the child but does not consent to all of the components of the individualized education program, those components of the program to which the parent has consented shall be implemented so as not to delay providing instruction and services to the child. (Ed. Code, § 56346, subd.(e).)

32. If the local educational agency determines that the proposed special education program component to which the Parent does not consent is necessary to

provide a FAPE to the child, a due process hearing shall be initiated. (Ed. Code, § 56346, subd. (f); *I.R. v. Los Angeles Unified School District* (9th Cir. 2015) 805 F.3d 1164.) The local educational agency must act with reasonable promptness to override lack of consent by adjudicating differences with the Parents. (*I.R., supra*, at 805 F.3d at 1169-1170.))

Analysis

33. Parents dis-enrolled Student from District in June 2012. On April 16, 2014, Parents notified District of their intent to place Student at Port View and asked District for an offer of FAPE. District made two FAPE offers (June 2014 and December 2015) before Parents filed the instant due process action on April 4, 2016. Neither Parent nor advocate expressed perceived deficiencies with any component of District's offers during the IEP meetings. Parents did not notify District of a disagreement with any component of the IEP's between the FAPE offers and Parent's filing. Student was not enrolled in District, did not attend a public school, and was not subject to stay put at a public placement at any time between April 16, 2014 and April 4, 2016.

34. The requirement of a formal written offer creates a clear record, alerts parents to the need to seriously consider whether the offered placement was appropriate, and provides a basis upon which to oppose a placement or accept it, with the supplement of additional educational services. (See, *Union School Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519.)

35. In *I.R.*, the Ninth Circuit addressed a district's failure to file a request for due process hearing after it could not obtain parental consent to a component of student's IEP. The dispute arose when parent rejected district's offer of placement in a special education environment but consented to services offered. The district implemented the components of the IEP to which parent consented. Student remained in a general education classroom with an aide for over a year and a half. District IEP

team members believed Student required placement in a special education environment, smaller class setting, in order to receive a FAPE. The Court in *I.R.* underscored the importance resolving disputes over IEP components with reasonable promptness: minimizing the duration of the denial of a FAPE.

36. The court's analysis in *I.R.* was applied to situations under Education Code section 56346, where parent consented in writing to the receipt of special education and related services, but did not provide consent to all components of the IEP. Further, the student there was publicly placed and remained so throughout the hearing. Had student rejected the entire IEP and remained a public school student, district would have been required to continue providing services under the last agreed upon and implemented IEP, until the dispute was resolved. (*Thomas v. Cincinnati Bd. of Educ.* (6th Cir. 1990) 918 F.2d 618, 625.) In either case, the district would be mandated to file a request for due process with reasonable promptness to minimize the time period during which student would otherwise have been denied a FAPE in her public placement.

37. The analysis set forth in *I.R.* does not apply where a student is not in a public placement. Where a student is privately placed, it is up to the parents to decide whether to return the student to a district placement after requesting a new FAPE offer. Neither California law nor the IDEA requires districts to file for due process every school year that a parent opts to maintain their child's private placement. Rather, districts are required to offer a services plan to parentally placed private school students. (34 C.F.R. §§ 300.130 through 300.144.) Districts are not mandated to file for due process when a disagreement over the services plan arises. (34 C.F.R. § 300.140(a).) Parents of children with disabilities are not required to accept district services. Districts have no right to compel provision of such services.

38. Further, unlike *I.R.*, neither party contends that Student was denied a FAPE during her enrollment at Port View. Rather, Parents contend, and District did not

dispute, that Port View offered an appropriate placement for Student. Both Port View and District identified the function of Student's behaviors as task avoidance/escape and attention seeking. Based on the functions of behavior, Port View implemented behavior supports, services, and interventions. The needs and interventions were consistent with those identified by District in its IEP's. Port View providers persuasively demonstrated that Student was making progress in her placement, despite the cyclical nature of her maladaptive behaviors. Parents were happy with Student's progress at Port View.

39. Even though District was not required to file for due process in this situation, District may still be required to reimburse Parents for the cost of Student's private placement if District failed to make a FAPE available after Parents sought an IEP for their child.

40. In order to obtain reimbursement for a child's unilateral private placement, a court or hearing officer must find that: (1) the district had not made FAPE available to the child in a timely manner prior to the private placement enrollment; and (2) that the private placement is appropriate. (34 C.F.R. § 300.148(c).)

41. The cost of reimbursement may be denied or reduced where parents did not advise the public educational agency that they were rejecting the offer of FAPE, including stating their concerns and their intent to enroll their child in a private school at public expense either before the last IEP team meeting prior to such removal or at least 10 business days before the removal. (34 C.F.R. § 300.148(d).)The notice requirements allow the parties to resolve disputes prior to the removal.

42. The burden of proof is on Parents to demonstrate that District's failure to provide FAPE necessitated Student's placement in a more restrictive private placement. *South Kingstown School Dist.* (SEA RI 08/26/13) 113 L.R.P. 41744.)

43. Parents, here, dis-enrolled Student from District two years prior to the June 2014 IEP. Student began attending Port View prior to District's development of the 2014

and 2015 IEP's, not after. Even after District developed an offer of FAPE, Parents did not notify District of any concerns they had with either IEP until the filing the complaint. However, notice issues can be overcome by considerations of equity.

44. Here, District responded to Parents request for an offer of a FAPE in its June 2014 and December 2015 IEP's. Parents did not dispute the entirety of District's FAPE offers. As set forth above, District offered Student a FAPE in regards to the components of the IEP's addressed in this decision.

45. For the forgoing reasons, Student failed to meet her burden of proof that District was required file a request for due process to override Parents' rejection of District services. Further, Student failed to demonstrate that District denied her a FAPE. As such, Parents are not entitled to reimbursement for Student's unilateral private placement.

ISSUE 3: DISTRICT'S RESPONSE TO MARCH 2016 REQUEST FOR INDEPENDENT FUNCTIONAL BEHAVIOR ASSESSMENT

46. Student contends that District should have either filed for due process or agreed to fund an independent functional behavior assessment after Student requested the assessment on March 18, 2016. District contends it did not have to file a request for due process because it had not done its own functional behavior assessment.

Applicable Law

47. Before any action is taken to place a student with exceptional needs in a program of special education, an assessment of the student's educational needs must be conducted. (20 U.S.C. § 1414(a)(1)(A); Ed. Code, § 56320.) An assessment may be initiated by request of a parent, a State educational agency, other State agency, or local educational agency. (20 U.S.C. § 1414(a)(1)(B); Ed. Code, § 56302, 56029, subd. (a), 56506, subd. (b).)

48. A school district must conduct assessments in a way that: 1) uses a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent; 2) does not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability; and 3) uses technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. The assessments used must be: 1) selected and administered so as not to be discriminatory on a racial or cultural basis; 2) provided in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally; 3) used for purposes for which the assessments are valid and reliable; 4) administered by trained and knowledgeable personnel; and 5) administered in accordance with any instructions provided by the producer of such assessments. (20 U.S.C. § 1414(b) & (c)(5); 34 C.F.R. § 300.304 & 300.305; Ed. Code, §§ 56320, subds. (a) & (b), 56381, subd. (h).)

49. The procedural safeguards of the IDEA provide that under certain conditions a student is entitled to obtain an independent evaluation at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1); Ed. Code, § 56329, subd. (b); Ed. Code, § 56506, subd. (c).) "Independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question." (34 C.F.R. § 300.502(a)(3)(i).)

50. To obtain an independent educational evaluation, the student must disagree with an evaluation obtained by the public agency and request an independent evaluation. (20 U.S.C. 1415(b)(1); 34 C.F.R. § 300.502(b)(1) and (b)(2); Ed. Code §§ 56329(b); 56506(c).)

51. The provision of an independent evaluation is not automatic. Code of Federal Regulations, title 34, part 300.502(b)(2), provides, in relevant part, that following

the student's request for an independent evaluation, the public agency must, without unnecessary delay, either: (i) file a due process complaint to request a hearing to show that its evaluation is appropriate; or (ii) ensure that an independent evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to parts 300.507 through 300.513 that an evaluation obtained by the parent did not meet agency criteria. If a parent elects to obtain an independent evaluation by an evaluator not on the public agency's list of evaluators, the public agency may initiate a due process hearing to demonstrate that the evaluation obtained by the parent did not meet the public agency criteria applicable for independent evaluations, or there is no justification for selecting an evaluator that does not meet agency criteria. (*Letter to Parker*, 41 IDELR 155 (OSEP 2004).) If the parent obtains an independent educational evaluation at public expense or shares with the public agency an evaluation obtained at private expense, the results of the evaluation may be presented by any party as evidence at a hearing on a due process complaint. (34 C.F.R. § 300.502(c)(2).)

Analysis

52. District's 2015 triennial evaluations of Student did not include either a functional behavior assessment or functional analysis assessment. District's psychoeducational evaluation included interviews, observations, and rating scales pertaining to Student's behaviors, but no formal behavior assessment.

53. On February 2, 2016, District sought Parents' consent to conduct a functional behavior assessment. On March 18, 2016, Student requested that District fund an independent educational evaluation in functional behavior by Dr. Tomaino. District sent prior written notice on March 24, 2016, denying Student's IEE request.

54. The right to an IEE is not triggered until there is an evaluation by District with which Parents disagree. (34 C.F.R. § 300.502(b); *F.C. v. Montgomery County Public Schools, et.al.* TDC-14-2562, 2016 WL 3570604 (D. Md. June 27, 2016); *G.J. Muscogee Cty.*

School Dist. (11th Cir. 2015) 792 F.3d 1284, 1293; *see Shaffer*, 546 U.S. at 60.)

Administration of observations, interviews, and rating scales, alone, do not constitute an evaluation under the IDEA. (*F.C.*, 2016 WL 3570604.) Rather, the IDEA requires several other steps, including administration of “a variety of assessment tools and strategies to gather relevant...information.” (34 C.F.R. §§ 300.304 & 300.305.)

55. Since District did not conduct a functional behavioral assessment, Student’s right to an IEE was not triggered. District was not required to file a due process complaint to defend a nonexistent evaluation. (*F.C.*, 2016 WL 3570604.)

ORDER

All relief sought by Student is denied.

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. Here, District was the prevailing party on all issues presented.

RIGHT TO APPEAL

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

DATED: December 7, 2016

/s/

COLE DALTON

Administrative Law Judge

Office of Administrative Hearings