

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

LONG BEACH UNIFIED SCHOOL
DISTRICT.

OAH Case No. 2018090007

DECISION

Parent on behalf of Student filed a due process hearing request with the Office of Administrative Hearings on August 31, 2018, naming Long Beach Unified School District.¹ On October 16, 2018, OAH granted the parties' joint request to continue the hearing.

Administrative Law Judge Paul H. Kamoroff heard the matter in Long Beach, California, on January 15, 16, and 17, 2019.

Ushma K. Vyas and Damien R. Frogoso, Attorneys at Law, represented Student. Mother attended the hearing. Student did not attend the hearing.

Debra K. Ferdman, Attorney at Law, represented Long Beach. Rachel Heenan, Long Beach's Director of Special Education, attended most of the hearing. Briana Graham-Ramos, Long Beach's special education administrator, attended the remaining part.

¹ Long Beach filed its response to Student's complaint on September 10, 2018, which permitted the hearing to go forward. (*M.C. v. Antelope Valley Unified Sch. Dist.* (9th Cir. 2017) 858 F.3d 1189, 1199-1200.)

At the request of the parties, OAH continued this matter for closing briefs. The record closed on February 4, 2019, upon receipt of written closing briefs.

ISSUES²

1. Did Long Beach fail to offer Student a free appropriate public education during the 2017-2018 school year, by failing to offer Student an individual health aide in Student's August 2017 individualized health plan; October 2017 individualized education program; or May 2018 amendment IEP?
2. Did Long Beach deny Student a FAPE during the 2017-2018 school year by failing to assess her in functional behavior and occupational therapy?
3. Did Long Beach deny Student a FAPE during 2017-2018 school year, by failing to permit Parent to meaningfully participate in the development of Student's educational program by (a) failing to consider Parent's request for an individual health aide during IEP team meetings; and (b) retaliatory conduct against Parent outside of IEP team meetings?

SUMMARY OF DECISION

Student was medically fragile. As a result, she required substantial adult support at school, which Long Beach provided. The basis of this case was whether Student required an individual health aide due to seizures, in addition to the adult assistance provided in her educational program.

The evidence showed that the high adult-to-student ratio and high number of nurses provided at Student's placement were appropriate in light of Student's

² The issues have been rephrased and reorganized for clarity. The ALJ has authority to renumber and 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.)

circumstances.

The Decision finds that Long Beach did not deny Student a FAPE by failing to provide an individual health aide or deny Parent the ability to meaningfully participate in the development of Student's educational program. Further, Long Beach did not engage in retaliatory conduct against Parent. However, the Decision finds that Long Beach denied Student educational rights by failing to assess her in functional behavior and occupational therapy, areas of disability that warranted assessment.

FACTUAL FINDINGS

THE STUDENT

1. Student was a nine-year-old girl who resided with her mother within Long Beach's boundaries during the applicable time frame. Student received special education under the primary eligibility category orthopedic impairment due to mitochondrial disease. Student was also diagnosed with epilepsy and chronic lung disease.

2. Mitochondrial disease is a congenital disorder characterized by physical, developmental, and cognitive disabilities, with symptoms including hypertonia; seizures; vision and/or hearing loss; gastrointestinal problems; and learning disabilities. As a result of her disability, Student demonstrated global delays in cognition, adaptive skills, and social-emotional development. She required an adaptive mobility device to ambulate, gastronomy tube to eat, and adult assistance for self-care.

3. Student attended Long Beach since preschool, the 2015-2016 school year. Beginning in kindergarten, August 2016, Long Beach placed Student at Newcomb Elementary School. Student attended Newcomb through the time-frame in dispute, the 2017-2018 school year, and she remained at Newcomb the following school year.

4. At Newcomb, Long Beach placed Student in small, structured special day

classes, entitled specialized health care classes. Specialized health care classes were similar to moderate/severe special day classes, but with fewer students and less diverse disabilities. Long Beach designed the specialized health care classes for medically fragile students. Newcomb had four specialized health care classes separated by grade level, and each pupil had a medically related disability that made him/her susceptible to illness or injury. Each specialized health care class had one teacher, two adult aides, in addition to individual aides that a pupil may have had as part of his/her IEP, and a maximum of five students. Newcomb had one registered nurse and two licensed vocational nurses to oversee the medical needs of each student. It was normal for a school nurse to be present in Student's classroom, in addition to the teacher and aides. Several students attended school only during the morning, and Student's class was combined with a similar specialized health class during the afternoon. As such, there were frequently an equal amount of adults to pupils in Student's class and, from 1:00 p.m. to 2:00 p.m. daily, as Student's class had two teachers and four aides for approximately five students.

5. As part of Student's IEPs, Long Beach provided Student an individualized health care plan. An individual health care plan documented a student's medical conditions, treatments, and medical needs. Student's health care plan was developed by Student's pediatrician, Mother, and the school's registered nurse. The health care plan described Student's medical history, current medical status, and general medical information. In addition, Student's health care plan prescribed Student's feeding needs, including specific guidelines for Student's gastronomy tube, fluid requirements, and seating position during feeding. Although the teacher and aides were familiar with the health care plan, a school nurse was responsible for feeding Student each day while at school. Student's individual health care plan was updated annually, and the operative individual health care plan for this matter was dated August 30, 2017. This health care

plan was overseen by Student's pediatrician Matthew Keefer, MD, and he did not prescribe an individual health care aide for Student.³

6. Long Beach also provided Student a seizure emergency action plan. Student had not had a seizure at school prior to the 2017-2018 school year. However, Long Beach cautiously addressed all of Student's health and safety issues, even those that had not arisen. Like the individual health care plan, Student's seizure emergency action plan was developed by Dr. Keefer, Mother, and the school nurse. The seizure plan identified signs of seizure activity and required measures if a seizure occurred. Unlike other children who experienced frequent seizures, Student did not require the administration of medication. If a seizure lasted more than three minutes, the plan directed school staff to call emergency services, 911. Several students in the specialized health care classes had seizure disorders and school staff was experienced in reacting to this disorder. For example, a registered nurse trained teachers and aides to identify and react to seizures; the classroom teacher kept a copy of each pupil's seizure plan taped to the wall next to his desk; and each class was overseen by a nurse who was experienced caring for individuals with seizure disorders. Similar to Student's individual health care plan, her seizure emergency action plan did not identify that Student required an individual health aide.

7. Long Beach convened an annual IEP team meeting for Student on October 20, 2017. Student was seven years old and attending the first grade in a specialized health care class at Newcomb. Mother attended the meeting, along with the following school employees: special day class teacher Juan Fernandez; physical therapist Kari Loudenback; occupational therapist Bernadette Pelayo; behavior intervention specialist Joyce Lee; and school principal Donna Ryono.

³ Dr. Keefer did not testify during the hearing.

8. The IEP team first reviewed Student's progress on prior annual goals. Student had met or exceeded goals in behavior, safety, working, functional mobility, and requesting objects. Student had not met, but made substantial progress on the remaining goal, selecting objects.

9. The IEP team next considered Student's present levels of performance. Student could play with objects independently for 10 seconds without placing the object in her mouth. She could be verbally redirected 75 percent of the time. Student produced some letter sounds and used physical gestures and eye gazing to request items. She required hand-over-hand prompting to grasp objects. Student exhibited maladaptive behaviors including not staying on task, dropping to the floor, crying, and pulling her hair. Student required adaptive equipment to move, and her behaviors were an obstacle to improving her mobility and gross motor skills. In addition, it was normal for Student to place her hand in her mouth when she was not holding an object.

10. Based upon Student's present needs, the IEP team developed seven new goals. Goal one required Student to stay on task for 30 seconds. The second goal sought to increase Student's fine motor skills by bringing a utensil to her mouth independently or with minimal support. Student's next goal sought to decrease Student's dropping behavior. The fourth goal required Student to place an item in her mouth instead of her hand. Goal five sought to improve Student's ability to ambulate independently. The sixth goal required Student to request a desired object when given three choices. The final goal called for Student to verbally express 10 new, simple words for highly desired objects.

11. To meet those goals, Long Beach offered Student various accommodations and the following services: specialized health care services, five days per week, 360 minutes each day; speech and language services, twice weekly, 20 minutes per session; physical therapy, twice annually, 30 minutes each session; and

extended school year services. Long Beach offered Student continued placement in a specialized health care class at Newcomb. The same adult-to-student ratio, one teacher and two adult aides for five students, existed during the 2017-2018 school year; but three students left at 11:20 a.m. daily, so the class then had three adults and two students, including Student. From 1:00 p.m. to 2:00 p.m. daily, the class was combined with another specialized health care class that consisted of two to three students, along with a teacher and two adult aides.

12. Long Beach provided Mother a copy of procedural safeguards and she actively participated during the IEP team meeting. Long Beach recorded Mother's primary concerns in the IEP written document. Mother was alarmed by Student placing her hands in her mouth and other behaviors, including intentionally dropping to the ground, crying, and whining. Mother requested a behavior assessment to identify ways to reduce Student's dropping, whining and crying, and to obtain information regarding behavior intervention services. Mother also requested an occupational therapy assessment to assist Student's fine motor skills and to identify a replacement behavior for the recurrent mouthing issue, a sensory-seeking behavior. Mother did not discuss or request an individual health aide for Student, nor did any other IEP team member.

13. The IEP team agreed that Student's behaviors interfered with her ability to access her education. Long Beach agreed to conduct a behavior assessment and to hold an IEP team meeting by November 3, 2017, to review a behavior intervention plan.

14. Long Beach's occupational therapist, Ms. Pelayo, was present during the IEP team meeting and attempted to respond to Mother's request for an occupational therapy assessment. Although Student demonstrated problems in sensory processing and fine motor skills, areas that fell under the purview of an occupational therapist, Ms. Pelayo did not believe Student required an occupational therapy assessment. Occupational therapy consultation was embedded in the specialized health care class,

and Ms. Pelayo collaborated with the classroom teacher regarding pupils' general occupational therapy needs. Ms. Pelayo believed that consultation was sufficient to inform her of Student's occupational therapy needs, including Student's difficulty grasping objects and her mouthing problems, so that an assessment was not necessary. This discussion formed the basis for the mouthing goal and the IEP team agreed to use a replacement item for Student to place in her mouth. Following this discussion, Mother verbally withdrew her request for an occupational therapy assessment.

15. Mother consented to the October 20, 2017 IEP, the same day as the IEP team meeting.

16. Long Beach did not provide Mother an assessment plan for the behavior assessment and failed to conduct a behavior assessment for Student during the 2017-2018 school year. And Long Beach did not hold an IEP team meeting to review a behavior intervention plan, as required by the October 2017 IEP. During hearing, the school's behavior specialist Ms. Lee, who was present during the IEP team meeting, testified that she did not know that the IEP called for a behavior assessment or behavior intervention plan. At the time of the IEP team meeting, Ms. Lee was unfamiliar with Student and had attended the meeting pursuant to a request by the classroom teacher, Mr. Fernandez. During the 2017-2018 school year, Ms. Lee briefly observed Student on one occasion, while observing another pupil in Student's classroom, also at the request of Mr. Fernandez. The observation was not part of an assessment or behavior plan. Ms. Lee assessed Student in functional behavior during the next school year, which was reviewed during a November 2018 IEP team meeting. The functional behavior assessment found that Student demonstrated behavior problems including grabbing and mouthing objects, which occurred every 10 seconds, the same duration identified in the October 2017 IEP. Other maladaptive behaviors, like dropping, were less prominent and had decreased since the last school year. Ms. Lee did not recommend a behavior

intervention plan for Student, yet recommended that various behavior strategies, including preventive strategies, teaching strategies, and reactive strategies, be added to Student's IEP.

17. On April 18, 2018, Student had her first seizure at school. While in the specialized health care class, Student had an absence seizure that lasted 15 minutes.⁴ Two special day class teachers, several adult aides, a licensed vocational nurse, and Mother, who was a classroom volunteer, were in the classroom when the seizure occurred. Classroom staff immediately detected the seizure and quickly called the school's registered nurse and emergency services, 911, to the classroom. School nurses and a classroom aide cared for Student until emergency medical technicians took over Student's care. The seizure resolved without incident and Student was not harmed during the seizure or as a result of the seizure. At the time of the hearing, Student had not experienced another seizure while at school.

18. Following the seizure, Mother desired to add an individual health aide to Student's IEP. On May 8, 2018, pursuant to Mother's request, Dr. Keefer sent a letter to Long Beach requesting an individual health aide. The letter stated: "[Student] has made incredible developmental progress during the past several years which also coincided with improved seizure control. ...Because of her mobility, curiosity and lack of judgment, she requires constant supervision and a 1:1 aide would be the best means of preventing her from injury."

19. On May 29, 2018, Long Beach convened an addendum IEP team meeting to address Parent's requests for an individual health aide and private nursing services at school, and Dr. Keefer's letter. Student was eight years old and finishing the first grade. Mother and Father attended the meeting, along with Mr. Fernandez, a school nurse, and

⁴ An absence seizure appears similar to a staring spell.

Ms. Ryono. Parents actively participated during the IEP team meeting.

20. Parents primarily requested that Long Beach provide Student an individual health aide because of the seizure. After discussing Student's present needs and educational program, Long Beach concluded that Student did not require an additional health aide due to seizures. Rather, school staff adequately met Student's health and safety need in all areas, including movement, feeding, and seizures. Long Beach denied Parents' request for an individual aide and private nursing services, and no changes were offered to Student's IEP during the addendum IEP team meeting. Parents did not consent to the IEP addendum.

21. In a letter dated June 6, 2018, Mother repeated her request that Long Beach provide Student an individual health aide due to seizures. Long Beach refused, and Parent filed the instant case regarding the 2017-2018 school year, which ended on June 14, 2018. Although Student's unique needs and IEP remained substantially the same during the following school year, Student did not request that Long Beach provide Student an individual health aide for the 2018-2019 school year.

LONG BEACH'S WITNESSES

22. Long Beach called the following witnesses during hearing: classroom teachers Mr. Fernandez and Andrew Tritz; school nurse Brianna Forman; school physical therapist Kari Loundenback; Ms. Pelayo; Ms. Lee; and school principal Ms. Ryono. Each witness had experience in their area of testimony and was familiar with Student. Long Beach's witnesses unanimously and persuasively established that Student's unique health and safety needs were met in the specialized health care class, without an individual health aide. In particular, Mr. Tritz, Mr. Fernandez, and Ms. Forman persuasively testified in support of the appropriateness of Student's educational placement.

23. Mr. Tritz was Student's specialized health care class teacher during the 2018-2019 school year; was her combined special education teacher during the 2017-2018 school year; and had observed Student since she began attending Long Beach during the 2015-2016 school year. Mr. Tritz had a master's degree in special education, taught moderate/severe special day classes for several years, and taught specialized health care classes since the inception of those classes at Newcomb. Mr. Tritz was present during Student's April 2017 seizure, and was familiar with Student's unique needs and educational program. Mr. Fernandez was similarly qualified and had been Student's specialized health care class teacher during the 2017-2018 school year. He was on leave when the April 2017 seizure occurred; a substitute special education teacher was present, along with Mr. Tritz. Nonetheless, Mr. Fernandez was familiar with Student's unique needs and educational program. Both teachers had received training in identifying and reacting to seizures, mobility assistance, feeding, and the education and care of pupils, like Student, who were medically fragile and susceptible to illness or injury. Each teacher persuasively testified that Student was provided constant adult care, as recommended by Dr. Keefer, and that additional adult assistance was unnecessary because of the high ratio of adults already embedded in the classroom. Student was provided hand-over-hand assistance to pick up objects, direct adult assistance when ambulating and feeding, and closely monitored by adult staff throughout the day for seizures or other health problems.

24. Ms. Forman had a master of science degree in nursing and was a registered nurse since 2013. She had vast experience managing the care of critically ill patients and was an emergency department nurse prior to working for Long Beach. Ms. Forman meticulously checked on Student, and each pupil with medical or health needs at Newcomb, several times each day, including two roll calls for each student each morning. Including two licensed vocational nurses that Ms. Forman supervised, there

was always a nurse present in Student's classroom or within a two-minute walk to the classroom. Ms. Forman was familiar with Student, her unique medical and health needs, and the staff and structure embedded in her educational placement. Ms. Forman directly trained teachers and staff, including Mr. Tritz and Mr. Fernandez, in the care of children with seizures, which comprised the majority of pupils in the specialized health care classes. Ms. Forman persuasively testified that school staff, including classroom teachers, aides, and school nurses, responsibly cared for Student's unique medical and health needs. Student was safe at school and able to access her educational program. Student did not require an individual health aide, nor would an additional aide have changed the manner in which Long Beach reacted to Student's seizures. Ms. Forman's testimony was given great weight as Student failed to present any witness or evidence that contradicted Ms. Forman's testimony or impugned her qualifications.

25. Long Beach's witnesses were less persuasive regarding Parent's request for behavior and occupational therapy assessments. Although the October 2017 IEP team had agreed to the behavior assessment, one had not been completed that school year. Ms. Lee attended the IEP team meeting, yet testified that she was not aware that a behavior assessment or behavior intervention plan had been offered by the IEP team. Mr. Fernandez mistakenly believed that he was responsible for developing the behavior intervention plan, although he was not a behavior specialist, had not previously assessed in behavior, and was not experienced in developing behavior intervention plans. Following the IEP team meeting, Mr. Fernandez attempted to draft a behavior intervention plan for Student was unable to complete the behavior intervention plan because it first required a functional behavior assessment, like the one Ms. Lee conducted in November 2018.

26. Ms. Pelayo opined that, although Student had not been previously assessed in occupational therapy, she did not require an occupational therapy

assessment. Ms. Pelayo believed that the October 2017 IEP adequately addressed Student's problems in fine motor skills and sensory processing, and therefore an assessment in those areas was not warranted. Ms. Pelayo assessed Student in occupational therapy the following school year, in October 2018. She found that Student had delayed abilities, at emerging levels, in fine motor skills, visual-motor skills, self-care, and sensory processing. Although seriously delayed in every area tested, Ms. Pelayo theorized that Student's abilities in those areas had improved since October 2017. Consequently, evidence overwhelmingly showed that, similar to behavior, occupational therapy was an area of deficit for Student as of October 2017.

27. Long Beach's witnesses attempted to justify Long Beach's failure to assess Student by pointing out that Student had met her October 2017 IEP goals, including those in behavior and occupational therapy. Therefore, the witnesses opined that assessments in those areas were not necessary. However, witnesses, including Ms. Lee and Ms. Pelayo, were unable to persuasively describe how the baselines for the behavior and occupational therapy goals were formulated, or how the IEP team was able to identify Student's unique need in those areas, when she had not been previously assessed. Consequently, Long Beach's witnesses were not persuasive in their attempt to defend Long Beach's failure to assess Student in behavior and occupational therapy, when the October 2017 IEP team had identified those areas of deficit.

STUDENT'S WITNESS

28. Mother was Student's sole independent witness during the hearing. Mother was a caring and loving parent who vigilantly advocated for Student. However, in substantial part, Mother corroborated the testimony provided by Long Beach's witnesses in regard to the lack of need for an individual health aide. Student had done well at Newcomb. Each year, Student could ambulate more independently, had constant adult supervision, and had met or progressed substantially towards each IEP goal.

Student was happy, enjoyed going to school, and had benefited academically, behaviorally, and socially during the 2017-2018 school year. Student had not suffered injury or harm at Newcomb, and classroom staff had promptly responded to the single seizure she had experienced at school.

29. Mother enjoyed volunteering in Student's classroom. Mother met Long Beach's prerequisites for volunteers, including being fingerprinted and passing a background check. After meeting those requirements, Mother had unfettered ability to volunteer in Student's classroom and often did so. However, in May 2018, school principal Ms. Ryono informed Mother that all parents were required to obtain preapproval from the classroom teacher or the school principal before volunteering in the classroom. Mother was upset by this requirement and believed Ms. Ryono had created the rule as retaliation for Mother's request for an individual health aide. During hearing, Student failed to present any persuasive evidence that supported this belief. Ms. Ryono more persuasively testified that the rule was established at the request of the classroom teacher, Mr. Fernandez, so that he knew when to expect parent volunteers and to ensure they were present only when needed to assist him in the classroom. From May through the end of the 2017-2018 school year, Mr. Fernandez worked cooperatively with Mother so that she was able to frequently volunteer in Student's classroom, albeit less often than before the rule was established.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA⁵

1. This hearing was held under the Individuals with Disabilities Education Act,

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

its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 et seq. (2006)⁶; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living; and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

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

⁶ All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

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 (*Mercer Island*) [In enacting the IDEA, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit,” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.)

4. The Supreme Court recently clarified and expanded upon its decision in *Rowley*. In *Endrew F. v. Douglas County School District*, the Court stated that the IDEA guarantees a FAPE to all students with disabilities by means of an IEP, and that the IEP is required to be reasonably calculated to enable the child to make progress appropriate in light of his or her circumstances. (*Endrew F. v. Douglas County School District* (2017) 580 U.S. __ [137 S.Ct. 988] (*Endrew F.*)) The Ninth Circuit recently affirmed that its FAPE

standard comports with *Andrew F. (E.F. v. Newport Mesa Unified School Dist.* (9th Cir. 2018) 726 Fed.Appx. 535.)

5. 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.) 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, 62 [126 S.Ct. 528, 163 L.Ed.2d 387].) By this standard, Student, as the petitioning party, had the burden of proof for the issues alleged in this matter.

6. To assist courts and administrative tribunals, the Supreme Court established a two-part test to determine whether an educational agency has provided a FAPE for a disabled child. (*Mercer Island, supra*, 592 F.3d at p. 947.) "First, has the State complied with the procedures set forth in the Act? And, second, is the individualized education program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" (*Rowley, supra*, 458 U.S. at pp. 206-207.) "If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more." (*Id.* at p. 207.)

7. A procedural violation constitutes a denial of FAPE only if it impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a FAPE to their child, or caused a deprivation of educational benefits for the child. (20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2); Ed. Code, § 56505, subd. (f)(2); see also, *W.G. v. Board of Trustees of Target Range School Dist.* (9th Cir. 1992) 960 F.2d 1479, 1483-1484).

ISSUE ONE: STUDENT'S NEED FOR AN INDIVIDUAL HEALTH AIDE DURING THE 2017-2018 SCHOOL YEAR

8. Student claims Long Beach denied her a FAPE during the 2017-2018 school year by failing to offer her an individual health aide in Student's August 2017 individualized health plan, October 2017 IEP, or May 2018 amendment IEP. Long Beach responds that the placement it provided Student met Student's medical and health needs so that an additional aide was unnecessary to provide Student a FAPE.

9. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the student with some educational benefit in the least restrictive environment. (*Ibid.*) Whether a student was offered or denied a FAPE is determined by looking to what was reasonable at the time the IEP was developed, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.) Here, Student's issue is limited to whether Student required an individual health aide for medical and health needs to receive a FAPE.

10. Pursuant to the October 20, 2017 IEP, Long Beach continued its offer of placement in a specialized health care class at Newcomb. Student had successfully attended a similar class the prior school year, and the same class during the 2017-2018 school year, up to the IEP team meeting. Student had met or substantially progressed on her prior IEP goals and had not suffered any injury or harm while at Newcomb.

Classroom staff and school nurses had met Student's ambulatory and feeding needs, and closely monitored her for seizures. There was no reason to believe that Student required additional adult staff in her classroom at the time of the IEP, and no one, including Parent, requested that an aide be offered or considered during the October 2017 IEP team meeting. Parent consented to the IEP at the time it was offered.

11. In addition to the adult support embedded in the specialized health care class, Student had an individual health care plan and seizure emergency action plan. Each plan was developed by Student's pediatrician Dr. Keefer, Mother, and the school nurse. The health care plan documented Student's medical needs and feeding requirements. Student's seizure plan described how to identify seizures and how school staff should react if a seizure occurred. Although Dr. Keefer and Mother helped develop the plans, neither plan indicated that Student required an individual health aide.

12. On April 18, 2018, Student experienced her first and only recorded seizure at school. Experienced classroom staff immediately identified the seizure and competently cared for Student in a manner that was consistent with the recommendations by Dr. Keefer, Mother, and the school nurse. Student was unharmed and there was no reason to believe that additional adult support, including an individual health aide, would have reacted differently to the seizure.

13. Following the seizure, Mother requested that Long Beach provide Student an individual health aide and provided Long Beach a letter from Dr. Keefer in support of that request. Long Beach timely responded to the request and convened an addendum IEP team meeting on May 29, 2018, to address Parents' concerns. Mother and Father attended the meeting, along with Mr. Fernandez, a school nurse, and Ms. Ryono. Parents actively participated during the IEP team meeting and the team carefully considered their requests. The IEP team concluded that Long Beach already provided Student constant adult assistance by qualified school staff throughout the school day, consistent

with Dr. Keefer's letter. Student did not require an additional aide because school staff adequately met Student's health and safety need in all areas, including movement, feeding, and seizures.

14. During hearing, Long Beach witnesses, including Ms. Forman, Mr. Tritz, and Mr. Fernandez, unanimously and persuasively established that Student's unique medical and health issues were met in the specialized health care class without an individual aide. The adult-to-student ratio in Student's specialized health care class never exceeded one-to-two, and was often more than one adult per student. There was normally a nurse in the classroom, and there were always three nurses within two minutes from the classroom. The special day class teachers and aides received specialized training to care for pupils with serious illnesses, feeding needs, and ambulation difficulty; and had specific training to identify and react to seizures. The classroom itself was developed for children like Student, who required additional support beyond what was provided in a regular moderate/severe special day class, because they were susceptible to illness or injury. Long Beach provided Student direct, side-by side, and/or hand-over-hand assistance when ambulating, eating, or utilizing objects. There was constant adult supervision for Student, as recommended by Dr. Keefer. Mother and the school witnesses agreed that Student had never been injured at school or exposed to a situation that compromised her safety. Mother's testimony substantially corroborated that school staff had met Student's medical and health needs during the 2017-2018 school year. In sum, unrefuted witness testimony established that, in light of Student's circumstances and the educational program she received, she did not require an individual health aide during the 2017-2018 school year to receive a FAPE.

15. For the foregoing reasons, Student failed to establish by a preponderance of the evidence that Long Beach denied her a FAPE during the 2017-2018 school year by failing to provide her an individual health aide.

ISSUE TWO: THE FUNCTIONAL BEHAVIOR AND OCCUPATIONAL THERAPY ASSESSMENTS

16. Student claims that Long Beach denied her a FAPE during the 2017-2018 school year by failing to assess her in functional behavior and occupational therapy.

17. A school district is required to assess a child in all areas of suspected disability 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. (20 U.S.C. §§ 1414(a), (b); 34 C.F.R. § 300.304(c); Ed. Code, § 56320.)

18. Here, the evidence submitted showed that Long Beach had not assessed Student in the areas of functional behavior and occupational therapy prior to or during the 2017-2018 school year. And evidence showed that functional behavior and occupational therapy were areas of identified disability, thereby warranting an assessment. (20 U.S.C. § 1414(a)(2)(A).)

Functional Behavior

19. During the October 20, 2017 IEP team meeting, Mother requested a behavior assessment to identify ways to reduce Student's maladaptive behaviors and to obtain information regarding behavior intervention services. The IEP team agreed to Mother's request and to meet by November 3, 2017, to review a behavior intervention plan, yet failed to present Mother an assessment plan.

20. In the case of a child whose behavior impedes his or her learning or that of others, the IEP team must consider, when appropriate, "strategies, including positive behavioral interventions, strategies, and supports to address that behavior." (20 U.S.C. §

1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i); Ed. Code, § 56341.1, subd. (b)(1).) If a functional behavior assessment is used to evaluate an individual child to assist in determining the nature and extent of special education and related services that the child needs, the functional behavior assessment is considered an evaluation under federal law. (*Letter to Christiansen*, 48 IDELR 161 (OSEP 2007).) Consequently, a functional behavior assessment must meet the IDEA's legal requirements for an assessment, such as the requirement that assessment tools and strategies provide relevant information that directly assists in determining the educational needs of the child. (34 C.F.R. § 300.304(c)(7).) Here, Long Beach agreed to a behavior intervention plan, which required a functional behavior assessment, consistent with the functional behavior assessment conducted by Ms. Lee in October 2018.

21. Assessments require parental consent. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (f)(1).) To start the process of obtaining parental consent for an assessment, the school district must provide proper notice to the student and her parents. (20 U.S.C. §§ 1414(b)(1), 1415(b)(3) & (c)(1); Ed. Code, §§ 56321, subd. (a), 56381, subd. (a).) The notice consists of the proposed assessment plan and a copy of parental procedural rights under the IDEA and companion state law. (20 U.S.C. §§ 1414(b)(1), 1415(c)(1); Ed. Code, § 56321, subd. (a).) The assessment plan must: appear in a language easily understood by the public and the native language of the student; explain the assessments that the district proposes to conduct; and provide that the district will not implement an individualized education program without the consent of the parent. (Ed. Code, § 56321, subd. (b)(1)-(4).) The district must give the parents and/or pupil 15 days to review, sign and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).) Here, the October 2017 IEP team agreed to provide Student a behavior intervention plan which required a functional behavior assessment, similar to the one conducted by Long Beach in November 2018. Long Beach was therefore obligated to

provide Parent an assessment plan for the functional behavior assessment.

22. However, Long Beach failed to provide Parent an assessment plan and to assess Student. Although the October 2017 IEP team had agreed to a behavior assessment, one had not been completed that school year. Long Beach's behavior specialist Ms. Lee testified that she had not assessed Student in behavior during the 2017-2018 school year, nor had anyone else on behalf of Long Beach.

23. Mr. Fernandez believed that he was responsible for developing the behavior intervention plan, and began collecting data for that purpose following the IEP team meeting. However, Mr. Fernandez testified that he was not a behavior specialist, was not familiar with behavior assessments, did not complete a written behavior plan, and did not share a behavior report during an IEP team meeting. Consequently, Mr. Fernandez did not assess Student within the meaning of the IDEA. (20 U.S.C. 1414(b)(2)(A); *W.H. ex rel. B.H. v. Clovis Unified Sch. Dist.* (E.D. Cal. June 8, 2009, No. CV F 08-0374 LJO DLB) 2009 WL 1605356, at *18 (suggesting that more than mere observation is required for an assessment).)

24. In its closing brief, Long Beach erroneously argues that behavior was not a suspected area of deficit for Student and therefore a behavior assessment was not warranted. Long Beach misses that once it agreed to assess Student it was obligated to do so, regardless whether or not needed, to comport with Student's IEP. Moreover, Long Beach's argument overlooks substantial evidence, including that the October 2017 IEP team found that behavior was an area of deficit and agreed to Mother's request for a functional behavior assessment. In fact, the IEP notes state that the IEP team would reconvene to review a behavior intervention plan. The IEP team also found that Student had behavior difficulties which impeded her ability to access her education and to meet her goals. Student grabbed objects, placed her hands in her mouth, intentionally dropped to the ground, cried, and whined when she was not provided a preferred

object. In light of the information available at the time the October 2017 IEP was developed, it was not reasonable to forego a formal assessment in the area of functional behavior. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)

25. Later acquired evidence also supported Student's need for a behavior assessment. (*E.M. v. Pajaro Valley Unified School Dist.* (9th Cir. 2011) 652 F.3d 999. (*Pajaro Valley*.) Ms. Lee assessed Student in functional behavior in November 2018, and found that Student demonstrated behavior problems including grabbing and mouthing objects, which occurred every 10 seconds, the same duration identified in the October 2017 IEP; along with less prominent behaviors like dropping. As a result of her functional behavior assessment, Ms. Lee recommended that various behavior strategies, including preventive strategies, teaching strategies, and reactive strategies, be added to Student's IEP. Consequently, evidence overwhelmingly showed that behavior was an area of deficit that warranted assessment.

Occupational Therapy

26. Mother also requested an occupational therapy assessment during the October 20, 2017 IEP team meeting. Mother was alarmed by Student's mouthing behavior and poor fine motor skills. Although Mother verbally withdrew her request, ample evidence submitted at hearing substantiated that occupational therapy was an area of suspected deficit that warranted assessment.

27. For example, the October 2017 IEP goals identified problems in the area of grasping items and sensory processing, areas that fell under the umbrella of occupational therapy. The IEP team recommended replacement items to reduce Student placing her hands in her mouth, a sensory-seeking behavior. Later acquired evidence, Long Beach's October 2018 occupational therapy assessment, found that Student had serious delays and was at emerging levels in every area tested, including fine motor skills, visual-motor skills, self-care, and sensory processing. (*Pajaro Valley, supra*, at 1004

[citing *Adams, supra*, 195 F.3d at p. 1149] “after-acquired evidence may shed light on the objective reasonableness of a school district’s actions at the time the school district rendered its decision.”) During the hearing, school occupational therapist Ms. Pelayo admitted that Student had more serious delays in those areas in October 2017. Consequently, substantial evidence showed that Student had deficits in the area of occupational therapy that were known to Long Beach during the 2017-2018 school year, thereby warranting an assessment at that time.

28. In its closing brief, Long Beach attempted to defend its failure to assess Student by arguing that Student had met her October 2017 IEP goals, including in behavior and occupational therapy, and therefore assessments were unnecessary. However, Long Beach disregards that is obligated to assess in all areas of suspected deficit. Courts have routinely held that a school district’s failure to assess in an area of suspected deficit constitutes a procedural violation, that by itself constitutes a lost educational opportunity and a denial of FAPE. (*Carrie I. ex rel. Greg I. v. Dep’t of Educ., Hawaii* (D.Haw. 2012) 869 F.Supp.2d 1225, 1247 (“The lack of assessments alone is enough to constitute a lost educational opportunity.”).)

29. Long Beach’s failure to assess Student in behavior and occupational therapy constitutes a procedural violation of the IDEA. (*R.B., ex rel. F.B. v. Napa Valley Unified Sch. Dist.* (9th Cir. 2007) 496 F.3d 932, 940 (“we have, more often than not, held that an IDEA procedural violation denied the child a FAPE.”).) A procedural violation of the IDEA constitutes a denial of a FAPE “only if the violation: (1) impeded the child’s right to a FAPE; (2) significantly impeded the parent’s opportunity to participate in the decision making process; or (3) caused a deprivation of educational benefits.” (*W.H. ex rel. B.H. supra*, 2009 WL 1605356, at *18; 20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505(f)(2); *W.G. v. Bd. of Trustees of Target Range Sch. Dist. No. 23, Missoula, Mont.* (9th Cir. 1992) 960 F.2d 1479, 1484.) Here, Student’s maladaptive behaviors created an

unsafe learning environment as she was placing items in her mouth and dropping to the ground. Those behaviors, along with grabbing objects, crying, whining, and her difficulty grasping items, impacted her ability to access her education and to work on goals. Because the IEP goals were written without the benefit of an assessment, Long Beach's witnesses were unable to persuasively describe how the baselines for behavior and occupational therapy goals were formulated, or how the IEP team was able to identify Student's unique need in those areas. Therefore, Long Beach's failure to assess Student in behavior and occupational therapy deprived her of educational benefits, and, accordingly, Long Beach denied Student a FAPE on that basis.

30. For the foregoing reasons, Student showed by a preponderance of evidence that Long Beach denied her a FAPE during the 2017-2018 school year, by failing to assess her in functional behavior and occupational therapy.

ISSUES THREE (A) AND (B): PARENTS' ABILITY TO PARTICIPATE IN THE DEVELOPMENT OF STUDENT'S IEPs AND RETALIATORY CONDUCT

31. Student alleges that Long Beach denied her a FAPE during 2017-2018 school year by failing to permit Parent to meaningfully participate in the development of Student's educational program, by (a) failing to consider Parent's request for an individual health aide during IEP team meetings; and (b) retaliatory conduct against Parent outside of IEP team meetings.

32. Federal and State law require that parents of a child with a disability be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, §§ 56304, 56342.5.) A school district must ensure that the parent of a student who is eligible for special education and related services is a member of any group that makes decisions on the educational placement of the

student. (Ed. Code, § 56342.5.) Here, Student's issue is narrowly tied to Mother's request for an individual health aide.

33. Evidence overwhelmingly showed that Long Beach met its obligation to include Parent in the development of Student's educational program as it pertained to Mother's request for an individual health aide. Long Beach provided Parents the ability to participate during each of the two IEP team meetings held during the time frame in dispute and provided Parents a copy of procedural safeguards.

The October 20, 2017 IEP

34. Mother was an active participant during the October 20, 2017 annual IEP team meeting. With Mother's input, the IEP team reviewed Student's present levels of performance, current educational needs, and developed annual goals to meet those needs. With Mother's input, the IEP team determined accommodations, services, and placement. Mother agreed with the IEP and signed her consent to the plan the day it was offered.

35. Mother was a vocal and informed participant during the IEP team meeting. However, Mother did not request that the IEP team consider offering Student an individual health aide at that time, nor did anyone else from Student's IEP team. Student had not had a seizure at school and there was no question that her medical, feeding, and ambulatory needs were competently addressed by school teachers, aides, and nurses. Moreover, Student's individual health care plan and seizure emergency action plan did not identify that Student required an individual health aide, although the plans were developed by Dr. Keefer, Mother, and the school nurse. Consequently, it is not equitable to hold Long Beach liable for failing to consider a Parent request that did not exist.

The May 29, 2018 IEP

36. Mother first requested an individual health aide at the end of the 2017-2018 school year, in May 2018. In support of the request, she provided Long Beach a letter from Dr. Keefer. Long Beach promptly held an addendum IEP team meeting on May 29, 2018, to consider Mother's requests and Dr. Keefer's letter. Mother and Father participated during the addendum IEP team meeting, along with qualified school staff. Long Beach ultimately denied Mother's request for an individual health aide. As found herein, that denial was lawful.

37. While Long Beach did not agree to an individual health aide as requested by Parents, that does not mean that Parents did not actively participate during the IEP team meetings, or were not informed of Student's educational needs as the "IDEA's encouragement of parental participation does not require the District to bend to every parental demand, only that the District give due consideration to the parents' requests in developing an IEP that meets an eligible student's educational needs." *Cupertino Union School District v. K.A.* (N.D. Cal. 2014) 75 F.Supp.3d 1088, 1103 fn. 12.) Here, Long Beach duly considered Mother's request for an individual health aide and lawfully concluded that the constant adult supervision already provided in the specialized health care class was appropriate for Student in light of her circumstances.

38. For those reasons, the evidence does not support that Long Beach denied Student a FAPE by denying Parents the ability to meaningfully participate in the development of Student's educational program as it pertained to their request for an individual health aide.

The Retaliatory Conduct

39. Similarly, Student's allegation that Long Beach retaliated against Parents because they requested an individual health aide was not supported by a preponderance of evidence. The school's rule that parent volunteers first gain approval

from the classroom teacher or school principal was a reasonable means to inform the classroom teacher when a parent volunteer would be present and to ensure that parents volunteered during a time that would assist the teacher and classroom. There was no evidence submitted that showed Long Beach applied the rule only to Parents, or in response to Parents' request for an individual aide. To the contrary, evidence showed that Long Beach permitted Mother to continue volunteering in Student's classroom following the establishment of the rule.

40. Consequently, Student failed to show by a preponderance of evidence that Long Beach denied her a FAPE, by (a) failing to consider Parents' request for an individual health aide during IEP team meetings; and (b) retaliatory conduct against Parents outside of IEP team meetings.

REMEDIES

41. Courts have broad equitable powers to remedy the failure of a school district to provide a FAPE to a disabled child. (20 U.S.C. § 1415(i)(1)(C)(iii); Ed. Code, § 56505, subd. (g); see *School Committee of the Town of Burlington, Massachusetts v. Dept. of Education* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385] (*Burlington*)). This broad equitable authority extends to an ALJ who hears and decides a special education administrative due process matter. (*Forest Grove School Dist. v. T.A.* (2009) 557 U.S. 230, 244, n. 11.)

42. When a school district fails to provide a FAPE to a student with a disability, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (*Burlington, supra*, 471 U.S. at p. 369-371.) Parents may be entitled to reimbursement for the costs of placement or services that they have independently obtained for their child when the school district has failed to provide a FAPE. (*Ibid.*; *Student W. v. Puyallup School District* (9th Cir. 1994) 31 F.3d 1489, 1496.) A school

district also may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Ibid.*) These are equitable remedies that courts may employ to craft “appropriate relief” for a party. The award must be fact-specific and be “reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.)

43. As found herein, Long Beach denied Student a FAPE by failing to assess her in functional behavior and occupational therapy during the 2017-2018 school year. Functional behavior and occupational therapy were areas of suspected deficit that had not been previously assessed, and Long Beach’s failure to assess procedurally denied Student a FAPE by denying Student educational opportunities. Therefore, as a compensatory remedy, it is equitable to order Long Beach to fund independent educational evaluations in the areas of functional behavior and occupational therapy, as requested by Student in her closing brief as the only relief for these FAPE denials.

ORDER

1. Within 30 days of this Decision, Student shall identify to Long Beach a qualified independent assessor to conduct a functional behavior assessment, at a rate commensurate with the prevailing rates in the community. Within 30 days of Student identifying the assessor, Long Beach shall fund an independent functional behavior assessment, including the assessor’s participation at an IEP team meeting to consider the assessment.

2. Within 30 days of this Decision, Student shall identify to Long Beach a qualified independent assessor to conduct an occupational therapy assessment, at a rate commensurate with the prevailing rates in the community. Within 30 days of Student identifying the assessor, Long Beach shall fund the independent occupational therapy

assessment, including the assessor's participation at an IEP team meeting to consider the assessment.

3. Student's additional claims for relief are 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, Student prevailed fully on issue two. Long Beach prevailed fully on issues one and three.

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: March 1, 2019

_____/s/_____
PAUL H. KAMOROFF
Administrative Law Judge
Office of Administrative Hearing