

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

TEMPLETON UNIFIED SCHOOL
DISTRICT.

OAH Case No. 2017051280

DECISION

Student filed a due process hearing request with the Office of Administrative Hearings, State of California on May 26, 2017, naming Templeton Unified School District as respondent. OAH granted the parties' joint request to continue the hearing date on June 20, 2017. Administrative Law Judge Penelope Pahl heard this matter in Templeton, California, on September 19 and 20, 2017. Student's request for an emergency continuance was granted on September 20, 2017. The hearing was re-convened on October 10, 11 and 12, 2017.

David Grey, Attorney at Law, represented Student. Student's Mother and Father were present throughout the hearing on behalf of Student who did not attend. Diane Willis, Attorney at Law, represented Templeton. Templeton's Special Education Director, Dorena Denise Mello-Wisch, was present throughout the hearing on behalf of Templeton.

On October 12, 2017, the matter was continued until October 31, 2017, to allow the parties to submit closing briefs, which were timely received. The matter was deemed submitted on October 31, 2017.

PROCEDURAL HISTORY

CASES CONSOLIDATED AND DISMISSED

On March 30, 2017, Templeton filed case number 2017031438 seeking an order declaring Templeton's October 4, 2016 offer of special education and services constituted a free appropriate public education (FAPE) for the 2016-2017 school year. The complaint also sought permission to conduct mental health and social emotional assessments without parental consent.

On May 26, 2017, Student filed this case, OAH Case number 2017051280, seeking an order that the offers of special education and related services for the 2015 -2016 and 2016-2017 school years were denied Student a FAPE and also seeking a determination that the functional behavior assessment conducted by Templeton was not appropriate under the law. The two cases were consolidated on May 31, 2017. On June 19, 2017, Templeton filed case number 2017060886 defending the functional behavior assessment.¹

At the time of the Prehearing Conference held on September 11, 2017, Templeton dismissed OAH case No. 2017031438, and Student dismissed all issues in case number 2017051280 except the issue of the appropriateness of the functional behavior assessment. During the prehearing conference, District's case number 2017060886 was consolidated with Student's case number 2017051280, challenging the assessment. During the September 11, 2017 Prehearing Conference, Student and Templeton stipulated that Templeton would bear the burden of proof in on the issue of the assessment as Templeton had filed the last case being considered.

¹ An evaluation under federal law is the same as an assessment under California law. (Ed. Code, § 56302.5.) The terms are used interchangeably herein.

DISMISSAL OF TEMPLETON'S CASE DEFENDING THE FUNCTIONAL BEHAVIORAL ASSESSMENT

On the morning of September 18, 2017, the day before the hearing was scheduled to begin, Templeton filed a notice of withdrawal of OAH case number 2017060886 (its defense of the functional behavior assessment). Templeton's case was dismissed by OAH, pursuant to the notice of withdrawal, on September 19, 2017.

MOTION TO DISMISS STUDENT'S CASE

At 4:10 p.m. on September 18, 2017, Templeton filed a motion to dismiss Student's case contesting the legal validity of the functional behavior assessment on the grounds that it was moot. Templeton attached a copy of a letter to Parents, also dated September 18, 2017, wherein it offered to pay "up to \$6,000" for the functional behavior assessment conducted by Student's expert Dr. Randall Ball.

The request for dismissal was denied at the beginning of the hearing on September 19, 2017 on the grounds that an offer to pay up to \$6,000 for Student's expert did not address all issues involved in the case. Still outstanding was the legal validity of the functional behavior assessment Student asserted was inadequate and its use as a basis for future decision making. The case proceeded as scheduled on September 19, 2017.

BURDEN OF PROOF

As Templeton had withdrawn its case, the issue of the burden of proof was revisited at the time of the hearing. Student asserted that he should have only the burden to prove he disagreed with the assessment and requested an independent educational evaluation in the area of functional behavior at which point the burden should shift to Templeton to prove the assessment met legal standards. Templeton asserted that the burden of proof should be entirely on Student as Templeton's case had been dismissed.

The parties were asked to bring authority to the hearing on September 20, 2017 so the issue could be addressed prior to any additional testimony being taken. The hearing was recessed earlier than usual on September 19, 2017 to allow the parties to review the documents that had been produced pursuant to Student's subpoena and to allow for the requested research. The parties chose not to provide the requested authority or argue the issue. Instead, on September 20, 2017, they entered into a stipulation that Student would have the burden of proof.

ISSUE

Was the January 16, 2017 functional behavior assessment conducted by Templeton inappropriate, thus entitling Student to a functional behavior assessment at public expense?

SUMMARY OF DECISION

Student seeks an order that Templeton's January 16, 2017, functional behavior assessment did not meet all legal requirements and, as a result, Student is entitled to reimbursement for his independent assessment.

Upon request for an independent educational evaluation, school districts are required either to pay for the independent assessment or file a due process hearing request to defend the assessment conducted by the district without undue delay. Templeton's decision to withdraw its request for a due process hearing resulted in a failure to meet either obligation. Based on the withdrawal of the complaint, Student is awarded reimbursement for the cost of the independent functional behavior assessment conducted by Dr. Ball.

Templeton also failed to hold the IEP team meeting required to discuss the assessment within the prescribed deadlines. This deprived Student of educational benefit and Parent of the right to meaningfully participate in the IEP development process. For

this reason as well, Student is entitled to reimbursement of the functional behavioral assessment conducted by Dr. Bell.

Additionally, the functional behavior assessment did not meet the substantive standards required by state or federal law. Deficiencies included an assessment that was not comprehensive, methodologies that were not valid, objective or reliable and a report that failed to meet legal requirements. As a result of the deficits in the assessment and reporting, the Individual Educational Program team was unable to rely on the evaluation results and report to properly determine Student's need for special education and related services. The totality of the inadequacies in the assessment and in the written report result in the functional behavior assessment being inappropriate for further use in the evaluation of Student's needs.

Each of these violations, the failure to fund or file, the procedural inadequacy and the substantive deficiencies are a basis alone under which Student is awarded reimbursement for the independent functional behavior assessment conducted by Dr. Ball.

FACTUAL FINDINGS

JURISDICTION

1. Student is an 11-year-old boy, one of two identical twins, who has resided within the geographical boundaries of Templeton Unified School District at all relevant times. Student has been diagnosed with attention deficit hyperactivity disorder as well as sensory and auditory processing deficits and qualifies for special education under the categories of speech and language impairment and other health impairment. His last placement in Templeton was in a general education fourth grade class at a Templeton elementary school during the 2016-2017 school year.

ASSESSMENT PLAN

2. In October of 2016, Parents requested a functional behavior assessment of

Student. Mother had concerns that Student was unable to access his education due to his aggressive behavior and elopement from class. An informal behavior plan had been in place since June 15, 2015, but Student's disruptive behaviors were escalating. Dorena Denise (Dee Dee) Mello-Wisch, Templeton's special education director, sent Parents an assessment plan on October 28, 2016 offering a functional behavior assessment. Parents signed and returned consent to the assessment plan on November 2, 2016.

DEVELOPMENT OF FUNCTIONAL BEHAVIOR ASSESSMENT

Selection of assessor

3. Templeton selected Jennifer Brooke Foster to conduct the functional behavior assessment because she was already conducting one for Student's twin brother. Ms. Foster has been a Board Certified Behavior Analyst since 2012.² The fact that Ms. Foster was conducting behavior assessments of both twins and was asked to complete emergency behavior intervention plans for both, in the middle of the behavior assessment assignment for Student, resulted in the behavior assessment and behavior intervention

² Ms. Foster holds a Bachelor of Science Degree in Psychology and a Master's Degree in Public Policy emphasizing special education law and policy. Ms. Foster began working in the field of applied behavior analysis in 2006 as an aide and currently has her own company, a sole proprietorship, J. Brooke Foster Board Certified Behavior Analyst, which she formed in December of 2012. Ms. Foster acts as a consultant for Supported Living Services of Santa Maria, is a vendor for Tri Counties Regional Center, teaches at Cuesta College in the Adults with Disabilities program, and conducts a social skills program for United Cerebral Palsy. She also consults for school districts including Templeton. Ms. Foster could not provide information or even an estimate of the number of functional behavior assessments she has conducted since becoming a Board Certified Behavior Analyst in 2012.

plan becoming conflated, being rushed, and, ultimately, limiting the scope of the functional behavior assessment.

Components of the functional behavioral assessment

4. In conducting Student's behavior assessment, Ms. Foster interviewed Parents; conducted two observations of Student; analyzed the Antecedent-Behavior-Consequence (A- B-C) data collection forms pertaining to Student dated October 6, 2016 through January 9, 2017; and reviewed documents provided by Templeton.

5. The purpose of the functional behavior assessment is to examine Student's disruptive behaviors to determine their function, that is, the reason Student engages in such behavior. To accomplish that, a behaviorist identifies the unacceptable behaviors, their antecedents or basis for the disruptive behavior, e.g. hunger, an argument with someone, frustration with a task; and then evaluates the consequences or functions that are reinforcing that behavior, such as gaining attention or escaping a lesson. To determine the basic elements, Ms. Foster examined the Antecedent-Behavior-Consequence (A-B-C) data collection forms that had been kept by Templeton staff and faculty who worked with Student from October 6, 2016 to January 9, 2017. However, Ms. Foster failed to clearly define the basic elements of behavior analysis when conducting her record review (see below).

INTERVIEWS

6. In completing Student's functional behavior assessment, the assessor relied on an interview she conducted with Parents on October 31, 2016, a date prior to the date of Parents' consent to the assessment plan. This interview had been scheduled to discuss Student's twin, although Ms. Foster also spoke with Parents about Student. No additional interview of Parents was conducted after the date Ms. Foster was assigned to complete Student's functional behavior assessment. Brief notes from the Parent interview are included in the assessment report. However, the notes are very general and do not

provide insight into how thorough an interview was conducted of Parents with regard to Student. Very little historical information about Student's cultural and economic background or his living environment was included in the report.

7. Ms. Foster did not interview Student's teachers. Nor did she interview the staff members who worked with Student at school. These were the people responsible for recording the information in the A-B-C forms.

RECORD REVIEW

8. In her report, Ms. Foster notes that she reviewed the following records: the Antecedent-Behavior Consequences (A-B-C) data collection forms from October 6, 2016 to January 9, 2017; the Daily Communication Logs between the school and Parents dated November 1, 2016 through December 6, 2016; Student's October 6, 2015 IEP; the informal behavior intervention plan dated June 29, 2015; the progress reports on Student's IEP goals dated September 30, 2016; and the Fresno Diagnostic Center Assessment which was completed in February and March of 2015.

9. In gathering information to complete her assessment, Ms. Foster reviewed several documents. Although several were listed as being referenced, they were not discussed anywhere in the report. For instance, the Communication Logs which provided Parents with information about Student's day, and on which Parents were supposed to report to school staff about anything significant that occurred at home, were listed as reviewed but not discussed. The day to day information provided by the Communication Logs should have provided insight into Student's typical behavior. Additionally, none of the information in the informal behavior intervention plan, the Fresno Diagnostic Center Report, or Student's IEP or progress report on goals was discussed in the assessment report, although all were noted as reviewed. Other documents were mentioned in the body of the report in passing, but were not listed in the record review. A "rubric for daily ratings," a document developed for Student's twin that was being used for Student

without individualization, and a working draft of a Recess Plan were mentioned in the body of the report but were not listed in the section describing the documents reviewed for purposes of preparing the report. The sources of these documents were not provided and their content was not discussed.

10. At hearing, Ms. Foster was defensive on cross examination when asked how a reader would be able to know the full range of documents she reviewed and considered in reaching her conclusions. Ms. Foster could not offer a means by which a reader would know all of the information she considered. The report failed to include details about any of the documents reviewed other than the A-B-C data collection forms and whether the information in the previous reports was consistent with Student's current profile. In addition to failing to list all documents reviewed, the report did not provide the reader with insight into how the information contained in those documents impacted the conclusions of the functional behavior assessment nor was there any attempt to reconcile any previous data with the current data.

DATA ANALYSIS

11. The A-B-C data collection forms were generated by teachers and aides who worked with Student during the school day. The forms were intended to include information about the antecedent to any disruptive behavior, that is, what was happening immediately before the behavior occurred; the description of the action or behavior in which Student engaged; and the positive or negative consequence for Student as a result of his own behavior or action. No evidence was presented regarding the training the teachers or staff had received in completing the data collection forms or how they were to determine and record antecedents, behaviors or consequences on the forms.

12. The data from the A-B-C forms was unclear and Ms. Foster's interpretations of the data were not clear either. For instance, it appears that one long narrative in the A-B-C data collection forms for December 7, 2016 was counted as a single behavior despite

the fact that it describes a series of behaviors over a period of more than three hours. Furthermore, staff frequently described Student's "behavior" as simply "dysregulated conduct" over the course of an entire afternoon. Ms. Foster did not interview the staff members who completed the logs to understand the meaning of the information recorded. As there were no consistent definitions applied to the data input into the A-B-C forms, the lack of staff interviews to provide clarification as to the entries she was analyzing was a critical omission. Ms. Foster failed to identify the methodology she used to isolate the individual behaviors she analyzed. She did not differentiate individual behaviors in her analysis of the forms. The documents she relied upon demonstrated a lack of a relationship between individual behaviors, antecedents and consequences resulting in a superficial analysis of the information in the A-B-C data forms.

13. Ms. Foster also failed to specifically explain how she categorized the functions of behavior included in the A-B-C data collection forms. The information in the A-B-C forms is often confusing and does not follow a standardized notation method to describe the different behaviors described or their functions. Additionally, several of the coding marks made by Ms. Foster were uncertain, some even ending with a question mark indicating she was unsure of how to interpret the information on the data collection sheets. In at least one instance, a code is used that is never explained.³

14. Ms. Foster read and coded the data in the A-B-C forms according to her conclusions as to the probable "function" being exhibited. Ms. Foster defined the function of a disruptive behavior as being the reason why the behavior is occurring. No evidence was presented as to any formalized methodology used for coding and analyzing the forms. Nor was any evidence presented establishing the definition of what constitutes a behavior or a list generally accepted definitions of functions of behavior. Ms. Foster did

³ "S.D." is noted on the A-B-C sheets as a notation but is not explained. Only through Ms. Foster's testimony was it made clear that stood for skill deficit.

not identify a complete list of functions she believed were appropriately considered or the definitions of the functions of behavior she analyzed in evaluating Student's behavior. As a result, Ms. Foster's procedures for counting behaviors or identifying functions of behavior were difficult to understand. The lack of information regarding how the data was recorded and interpreted resulted in the analysis being unverifiable and unreliable. Ms. Foster's testimony is given little weight because she could not articulate a detailed, consistent approach to evaluating the data underlying the functional behavior assessment she performed.

15. Dr. Randall Ball, the expert hired by Parents to evaluate Ms. Foster's assessment and to provide an independent behavior assessment of Student, testified that there were only five accepted functions of behavior: attention seeking, sensory satisfaction, attaining objects, avoidance/escape or reinforcement.⁴ Ms. Foster believed that a failure to communicate or a skill deficit on the part of the child could be a function of the behavior based on training she had received from an organization called Autism Partners. Overall, the evidence revealed a lack of generally accepted, standardized protocols used by behavior analysts in the course of their assessments. Thus, Ms. Foster's expansion of the list of functions of behavior to include a failure to communicate or a skill deficit was reasonable. However, she failed to apply a specific definition of these terms

⁴ Dr. Ball holds a doctorate of education in counseling and educational psychology and is a licensed Marriage and Family Therapist which allows him to diagnose mental disorders. He has been a practicing therapist since 1988. Dr. Ball is also a board certified behavior analyst at a doctoral level of competency. He has been a practicing behaviorist since 1990. Dr. Ball estimated that he has completed over one 1,000 functional behavior assessments and approximately 500 psychoeducational assessments. He has worked with Tri-Counties Regional Center among other organizations and has consulted with numerous central California school districts, including Templeton, in the past.

throughout her assessment, and ultimately determined the most common functions of behavior influencing Student's conduct were anxiety and emotional regulation. No evidence was presented substantiating either of these as validly identified functions of behavior.

16. Student had never been diagnosed with an anxiety disorder and was not referred for evaluation of a possible anxiety disorder by Ms. Foster. Ms. Foster did not administer any behavioral testing or collect any rating scales from Parents, teachers or staff that might have provided data that would have helped to clarify the antecedents and/or functions of Student's conduct.

OBSERVATIONS

17. Ms. Foster conducted two observations of Student at school: one which lasted one hour on December 5, 2016 in which Student was observed during writing and reading lessons; and one which lasted approximately 40 minutes on December 12, 2016. Ms. Foster scheduled her observations of Student prior to her record review, so that the content of the documents did not influence her observations. In the written report, Ms. Foster labeled the record of her observations as being "minute by minute." However, sometimes the cryptic notations made it hard to understand what was being observed or the significance of the notation. Only the observation of December 12, 2016, was analyzed beyond the recitation of Ms. Foster's observation notes. Ms. Foster testified that she did not analyze the December 5, 2016 observation because "it was not alarming." However, the notes of that observation include information that should have been explained and could have contributed to the analysis of Student's behavior. Unexplained comments from his aide such as, "This is the last time. They both began reading together"; or "I won't start like that again. He was toast;" beg the question of what information the aide possessed that contributed to her evaluation of the teaching session she had just completed. The absence of staff interviews in the assessment contribute to the lack of a comprehensive

assessment of Student.

18. On December 12, 2016, Ms. Foster was scheduled for her second observation of Student for purposes of developing the functional behavior assessment. She was escorted on campus by Lindsey Flatos, a Teacher on Special Assignment who was assigned to work with Student. Ms. Foster described this observation as "very alarming" and "very, very concerning." She arrived at the school to find Student and his brother on the playground refusing to come to class; climbing trees to a height 15 feet from the ground; throwing rocks; running into classes and stealing walkie-talkies and using them to communicate with each other; and pointing tree branches and sticks while making gun-like sounds and gestures. Student was not throwing rocks nor pointing the pretend "guns" at fellow students or school staff or at his twin. He was not injured in the course of climbing the tree.

19. Ms. Foster was informed the conduct had been ongoing for an extended period of time prior to her arrival. Overall it continued for well more than an hour although Ms. Foster observed approximately 40 minutes of the incident. Mother had been called to help gain control over Student. However, Ms. Flatos spoke with Mother and they agreed to delay Mother's arrival so Ms. Foster could observe Student engaging in the uncontrolled behavior. Ms. Foster described Student's behavior as "militant" based on his bearing and lack of shame in front of peers when engaging in the conduct. Ms. Foster analogized Student's behavior to the incidents at Columbine and Sandy Hook based on the comment by Student that he would kill Mother if she was called and what Ms. Foster described as the militant behavior being exhibited by Student. Ms. Foster testified that in five years of doing functional behavior assessments she had never seen this level of dangerous behavior by a student. Student only discontinued the behavior when Mother arrived at the school and exercised control over him by use of behavior modification methods being employed in their home.

20. Ms. Foster did not believe Student planned the incident in advance, but she

was concerned that the conduct of Student in concert with his brother evidenced planning in the moment (e.g. "split up!" or Student's brother telling Student to go into classrooms to steal walkie-talkies.) She emphasized her opinion that their conduct was militaristic and violent. She considered their conduct different than the typical conduct of boys their age due to the violence displayed in terms of directing aggression towards others.

21. While the conduct of Student was alarming, analogizing the incident to the conduct of the perpetrators of Columbine or Sandy Hook was not supported by the evidence, and rendered Ms. Foster's testimony less persuasive, especially in light of the fact that it was agreed that Mother would delay her arrival on the scene until Ms. Foster had observed Student. Such an extreme analogy denoted a lack of experience and measured consideration of the situation. Ms. Foster was disturbed by Student's verbalization of violence, the use of tree limbs as guns, and the walkie-talkie communication between Student and his twin which looked militaristic to her. She did not temper or support those impressions, or her analogy, with any information about the onset of the behavior, family background information or any other facts that might have clarified the understanding of the attribution of the conduct.

22. The lack of analysis of the December 5, 2016 observation resulted in a failure to compare the two observations conducted. There was a sharp contrast between Student's behavior on the two different dates and that difference was not considered anywhere in the report. Furthermore, no additional interviews and no further observations were scheduled in an effort to provide context as to whether the December 12, 2016 incident was out of the norm or the possible impact on Student of being allowed to run unchecked for such a long period of time. Also left unexplored was the possible influence of the twin relationship on Student's behavior on December 12, 2016. Both observations occurred while Student was with his brother and notes of both observations note that interacting with his twin impacted Student's conduct. However, that impact was not analyzed.

REPORT

23. Ms. Foster's report did not include all of the elements required by state and federal law. Missing information included the methodological basis for her analysis, definitions of operative terms, and a comprehensive evaluation of all of Student's disruptive behaviors as well as a verifiable, valid analysis of the information that formed the basis of the assessment.

24. Ms. Foster's report did not describe the behaviors she was analyzing. Instead, a number of "behaviors" stated as listed in the A-B-C data collection forms were simply totaled and the reader was informed that there were 18 behaviors without any explanation of how that number was derived.

25. Antecedents were discussed but there was no information provided regarding how the antecedent was identified. In some instances, Ms. Foster made inferences that were not supported by the data. For instance, Ms. Foster identified one antecedent as being in the cafeteria at lunchtime with too much environmental noise or movement but no data in the A-B-C data forms identifies too much environmental noise or movement in the cafeteria as being an antecedent to any recorded behavior.

26. The functions of Student's behavior were described in very vague terms, without any mention of a methodology employed for determination of the functions she suspected were driving Student's conduct. "Suspected functions" were noted to be insufficient emotional regulation or anxiety; or escape/avoidance of a situation. However, Ms. Foster provided no explanation for the basis of those suspicions. She concluded that her analysis of the functions of behavior demonstrated that the functions for 78 percent of what she described as "disruptive events," a term that was not defined, appeared to be "multi- functional or having multiple causes." That statement is also not explained. Ms. Foster then opines that lack of appropriate communication was also a suspected function but admits that she has no data on which to base that conclusion.

27. Ms. Foster's assessment report erroneously notes that she conducted a

third observation of Student. Ms. Foster did not conduct any additional formal observations after December 12, 2016. It was her opinion that this single incident gave her enough information to determine which target behaviors Student needed to work on. Ms. Foster observed Student informally when she started to implement his behavior intervention plan beginning December 19, 2016. However, those observations were not described or analyzed in her written report. She was defensive in her assertion that she did not believe it was necessary to include information about every observation in the assessment report.

28. Ms. Foster testified that she limited the functional behavior assessment to only the behaviors of elopement and physical aggression however, that is not stated anywhere in her report, primarily because the behaviors being analyzed in the assessment are not specified. Ms. Foster testified that the limitation of the report was a decision she made based on the Parents' priorities and her determination of the need for Student's safety and the safety of others. This further calls into question how the behaviors from the data collection sheets were computed. However, it also raises the issue of whether the report was adequately comprehensive.

29. Assuming that Ms. Foster did indeed limit her analysis of Student's behaviors to physical aggression and elopement, the report did not consider all of the behaviors impeding Student's education or the education of others, such as refusing to complete work; suddenly crawling around on the floor among the computer cords; refusing to come in from recess; his inability to sit still long enough to complete an entire lesson; verbal aggression; and randomly grabbing items from classmates and breaking them, among others.⁵ All of these were mentioned in the A-B-C data collection forms. As

⁵ Although mention was made of verbal aggression, it was tangential and the topic was neither explored nor the basis of any specific recommended course of action in the assessment.

a result, information about how behaviors other than elopement or physical aggression might be negatively impacting Student's academic performance or social interactions was not analyzed. Allusions were made to the fact that Student's behaviors were an overall impediment to his education but no specific analyses of how the full range of Student's disruptive behaviors was detrimental to his academic performance, how they impeded the academic access of his classmates, or how they impacted Student's interactions at school were discussed in the report.

30. Ms. Foster also failed to include any information in her assessment report regarding Student's relevant health, development and medical background. All of this information was discussed in the Fresno Diagnostic Center Report. Minimal information on these topics was included in the notes of the Parent interview.

31. Ultimately, the conclusions of the functional behavior assessment report do not focus on Student as much as they focus on the need for training of staff and faculty. Various means that might be employed to address Student's behavioral problems are suggested. However, those suggestions are not the result of careful consideration of Student's specific behaviors and why they are occurring.

Impact of the development of the emergency behavior intervention plan of december 19, 2016, on the functional behavior assessment

32. On December 6, 2016, Mother sent an email to school asking that Ms. Foster develop an "interim or emergency" behavior plan due to Mother's concerns about continued elopement by Student. A new behavior plan was not started at that time.

33. After the December 12, 2016 incident, Mother took both boys away from the school and refused to have them return without a new behavior plan. Templeton asked Ms. Foster to write an emergency behavior plan for Student on an expedited basis. This process interrupted the production of the functional behavior assessment. Ms. Foster met with Mother and Ms. Mello-Wisch on Sunday, December 18, 2016, and developed a behavior intervention plan so Mother would allow Student to return to school. Neither the

fact that an emergency behavior plan had been requested nor the basis for the emergency nature of a new behavior plan was discussed in the assessment report.

34. The creation of the behavior intervention plan in the midst of completing the functional behavior assessment report served to limit the scope of the behavior assessment and delay its completion. The functional behavior assessment was negatively impacted because of the rush to complete both processes along with a similar assignment for Student's twin. The behavior assessment report was ultimately written after completion of Student's behavior intervention plan and during the period of time Ms. Foster was training staff and supervising implementation of the plan. Ms. Foster failed to broaden the behavior assessment to include a survey and evaluation of all of Student's maladaptive behaviors, instead focusing on the behaviors targeted in the behavior intervention plan. As a result, little of the analysis in the report focused on the reasons for Student's conduct. Most of the report focused on how to train staff to handle Student and how to establish new operational definitions of maladaptive behaviors and consequences for them, topics usually developed in a behavior intervention plan.

THE IEP TEAM MEETINGS

IEP Team meeting of february 1, 2017

35. Consent to the functional behavior assessment had been received by the District on November 2, 2016. A report regarding the assessment and an IEP team meeting to discuss the assessment were due by January 18, 2017.

36. The IEP team meeting to review the functional behavior assessment was scheduled for February 1, 2017. Templeton asked Parents to agree to the extension of the deadline to accommodate all necessary participants. No evidence was presented as to why such an extended delay was necessary to gather required participants or why an IEP team meeting was not otherwise timely held.

37. Ms. Foster completed her report on January 16, 2017. Parents were

provided with a copy of the assessment report within a few days of the date of the report. Ms. Foster presented the functional behavior assessment to the IEP team on February 1, 2017.

38. Discussions at the February 1, 2017 IEP meeting included specifics about the functional behavior assessment and questions from the IEP team. Mother asked several questions and expressed concern that the antecedents to Student's behavior and the functions of his behavior were not clearly defined. Her questions were not adequately answered. At one point during the meeting, Ms. Flatos observed that she believed Mother was "resisting the plan" prepared by Ms. Foster. The team was then informed that so long as the scope of the behavior plan was not changed, changes could be made without getting a new Parent approval signature. Discussions regarding Parents' concerns were not completed on February 1, 2017.

IEP Team meeting of february 9, 2017 and march 8, 2017

39. Follow-up meetings to discuss the behavior assessment and behavior plan were convened on February 9, 2017 and March 8, 2017. Parents were not present at the February 9, 2017 IEP team meeting, having informed Ms. Flatos via email and text message that Mother would not attend as Ms. Foster was ill. Mother believed that having a meeting to discuss Student's behavior would be unproductive without Ms. Foster.

40. A third meeting was scheduled for March 8, 2017. No evidence was presented regarding why nearly another month was required to schedule the next IEP meeting. At the March 8, 2017 meeting Mother asked additional questions about the behavior assessment and expressed a desire for more specific information about how staff working with Student would be trained. Her request was refused by Ms. Foster on the grounds that the training materials were proprietary materials from Autism Partners and could not be shared. Mother expressed concern that Student was being removed from the general education classroom for increasingly long periods of time. She believed the

behavior plan was not helping Student stay in class and that he was being allowed too many breaks. Parents consented to the March 8, 2017 IEP.

DR. RANDAL BALL'S EVALUATION OF MS. FOSTER'S FUNCTIONAL BEHAVIOR ASSESSMENT

41. Parents retained Dr. Ball, on February 27, 2017, to conduct a comprehensive functional behavior assessment incorporating both home and school information. Dr. Ball was also asked to review Ms. Foster's behavior assessment and provide an opinion as to its appropriateness as Parents believed the conclusions of the behavior assessment were incorrect. To do that, Dr. Ball conducted numerous interviews including: Parents, Student's former aide, Debbie Posten, Student's therapist, Hannah Warren, and the Board Certified Behavior Analyst who designed Student's home program Lindsey Reifinger. Dr. Ball also interviewed Ms. Flatos; Student's speech pathologist, Julie Halverson; and his fourth grade teacher, Ms. Lemieux.

42. Dr. Ball conducted six hours of observation over two different school visits and reviewed all of the documents considered by Ms. Foster. Dr. Ball issued a report on May 21, 2017 which Parents shared with Templeton on June 23, 2017. Templeton offered to schedule a meeting to discuss Dr. Ball's report. That meeting did not take place as Student was enrolled in a different district for the 2017-2018 school year.

43. It was Dr. Ball's opinion that Ms. Foster's behavior assessment was deficient in a number of different areas. Initially, she did not adequately describe her baseline data. Her report does not give information regarding the range of dates over which the behavior events analyzed occurred or describe the nature of the behavior of concern. The calculations of the frequency with which certain functions of behavior were present were faulty as the functions Ms. Foster was analyzing were not clearly defined and neither were the target behaviors being assessed.

44. Dr. Ball believed the limited observation forming the basis of Ms. Foster's

assessment, comprised of a total of 97 minutes of observation over two days, was inadequate to compare observations to the baseline data being used to form conclusions about Student's conduct. Dr. Ball noted that nowhere in the report did Ms. Foster state whether her observations constituted a typical day noting that, generally when assessing behavior, it is hoped that observations will expose the assessor to a range of conduct: a good day, a bad day, etc. Ms. Foster's report also lacked actual data in the form of rates or frequency counts of target behaviors observed.

45. Dr. Ball believed that the lack of staff interviews and interviews of others who had worked with Student in the recent past was a serious omission that resulted in Ms. Foster having inadequate information on which to form opinions.

46. Dr. Ball noted a lack of historical data and stated that such an oversight was significant especially in light of the fact that the A-B-C data collection sheets indicated Student could go a number of days without an incident. Neither historical information nor the intervals without an incident were aspects of Ms. Foster's analysis.

47. Dr. Ball was critical of Ms. Foster's comments attributing anxiety to Student. Student has never been diagnosed with anxiety. Ms. Foster did not have the credentials to make a diagnosis and she did not make a referral to evaluate whether anxiety was a factor contributing to Student's behavior was a valid conclusion on her part. Ms. Foster based several conclusions in her report on the assumption that Student has anxiety.

48. Dr. Ball's comments about the functional behavior assessment at issue were thoughtful and specific. He carefully analyzed the deficiencies of the behavior assessment in detail and explained the impacts of the identified deficiencies on the sufficiency of the assessment clearly and professionally. He noted a few areas in which the report did provide useful information. However, overall, he found the assessment to be lacking in sufficient data analysis to be able to form theories about why Student conducted himself as he did and how his behavior could be modified. Dr. Ball's testimony and report were given significant weight.

FILING OF REQUEST FOR DUE PROCESS

49. On May 26, 2017, Parents filed a request for a due process hearing which, among other things, contested the appropriateness of the Ms. Foster's functional behavior assessment and asked for reimbursement for the independent functional behavior assessment conducted by Dr. Randall Ball.

WITHDRAWAL OF TEMPLETON'S CASE DEFENDING ITS FUNCTIONAL BEHAVIOR ASSESSMENT

50. On September 18, 2017, the morning before the due process hearing on the consolidated cases was to begin, Templeton withdrew its complaint requesting that OAH determine that Ms. Foster's assessment met legal standards. No settlement of the case had been reached with Student.

TEMPLETON'S OFFER TO PAY FOR DR. BALL'S ASSESSMENT AND MOTION TO DISMISS

51. Student did not submit an invoice for Dr. Ball's services or proof of payment during the course of the hearing. However, Dr. Ball testified that Parents paid him \$6,000 for the independent evaluation. Although Ms. Flatos testified that Mother told her the payment was for Student and his brother, no other evidence supporting this assertion was offered.

52. On September 18, 2017, the day before the hearing on Student's case was scheduled to commence, Ms. Mello-Wisch sent Parents a letter offering to pay up to \$6,000 for Dr. Ball's assessment. Specifically, the letter stated,

"Templeton ... has decided to reimburse you for Dr. Randal Ball's assessment and report for [Student] up to \$6,000 upon receipt and review of an itemized receipt for his assessment and report. To date, you have not provided the District with any invoice for Dr. Ball's assessment and you have not

indicated that you are seeking reimbursement for any other FBA. You had informed one of the District's employees that Dr. Ball's assessment of the boys cost \$6,000 but we have not seen an invoice and make this offer in good faith to resolve your disagreement regarding the District's FBA conducted by Brooke Foster."

The letter further stated:

"TUSD strongly stands behind the FBA conducted by Brooke Foster and believes it is appropriate in all respects and that she developed an appropriate BIP that addressed [Student's] behavioral needs. Ms. Foster's FBA and the BIPs proved to be successful as [Student's] behaviors improved and he made progress on his IEP goals."

The letter continued:

"Upon receipt of the invoice for Dr. Ball's assessment for [Student] the District will send you a check for the amount charged by Dr. Ball up to \$6,000.

The letter closed by offering to "make arrangements to pay Dr. Ball directly" if Parent's had not already paid him, "upon receipt and review of his invoice."

53. Despite the fact that a due process hearing was scheduled to begin imminently, this letter was directed to Parents who were represented by counsel rather than to their attorney. No date for payment was stated in the letter. Templeton admitted they were not certain how much the assessment cost but were cutting off the amount owed at \$6,000. The offer was contingent on "review" of the invoice, indicating that should Templeton question an aspect of the invoice they might choose not to pay or to pay less

than \$6,000.

54. At hearing, Ms. Flatos and Ms. Mello-Wisch both testified that Templeton questioned whether the \$6,000 figure was for Student only or for both twins.

55. Templeton's request for due process defending the functional behavior assessment asked that it be deemed legally appropriate. Student's request for due process asked that Ms. Foster's functional behavior assessment be deemed inappropriate.

56. On September 18, 2017, at approximately 4:35 p.m., Templeton filed a Motion to Dismiss Student's case on the grounds that it was moot based on Templeton's offer to pay up to \$6,000 for Dr. Ball's assessment. The motion was argued and ruled upon at the outset of the hearing on September 19, 2017. As noted above, the motion was denied.

LEGAL CONCLUSIONS

INTRODUCTION - LEGAL FRAMEWORK UNDER THE IDEA

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

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

identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415 (f)(3)(B); Ed. Code, § 56502, subd. (i).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62.) In this case, as noted above, the parties stipulated that Student would bear the burden of proof in the case.

Compliance with procedural requirements

ASSESSMENT NOTICE

3. To obtain parental consent for an assessment, the school district must provide proper notice to the student and his or her parent. (20 U.S.C. § 1414(b)(1); 20 U.S.C. § 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 related state law. (20 U.S.C. §§ 1414(b)(1), 1415(c)(1); Ed. Code, § 56321, subd. (a).) The assessment plan must be 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 IEP without the consent of the parent. (Ed. Code, § 56321, subd. (b)(1)-(4).)

4. Templeton's assessment plan was given to Parent and there was no allegation that Parent did not receive a copy of the procedural rights at the same time. The assessment plan was in language easily understood by the general public, was provided in Mother's native language of English, described the assessment to be conducted, and indicated that no educational placement or services would result from the assessment without the consent of the parent. All statutory requirements of notice were met and the assessment plan complied with the applicable statutes. A signed consent to

the assessment plan was returned to Templeton on November 2, 2016, by Mother.⁷

Requesting an Independent Education Evaluation at Public Expense

5. The procedural safeguards of the IDEA provide that, under certain conditions, a student is entitled to obtain an independent educational evaluation at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1); Ed. Code, § 56329, subd. (b) [incorporating 34 C.F.R. § 300.502 by reference]; Ed. Code, § 56506, subd. (c) [parent has the right to an IEE as set forth in Ed. Code, § 56329]; see also 20 U.S.C. § 1415(d)(2) [requiring procedural safeguards notice to parents to include information about obtaining an independent educational evaluation].) "Independent educational assessment means an assessment 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).) To obtain an independent educational evaluation, the student must disagree with an assessment obtained by the public agency and request an independent educational evaluation. (34 C.F.R. § 300.502(b)(1), (b)(2).)

6. Here, Templeton argues that it was unaware that Parents were contesting the validity of the Functional Behavior Assessment. Templeton asserts that Parents did not disagree with the report at the time of the IEP team meeting scheduled to review it nor during later IEP's reviewing the Behavioral Intervention Plan associated with the behavior assessment. Student asserts that Parents comments expressing concern at IEP team meetings about the lack of clearly defined antecedent and functions should have put Templeton on notice of their disagreement with the assessment. Furthermore, their filing

⁷These issues are included for purposes of thorough analysis. All educationally related issues between Student and Templeton were waived through November 17, 2016. Issues of an inadequate assessment plan or failure to provide Parent safeguards were not raised by Student in this case.

of the due process claim challenging the validity of the assessment and requesting reimbursement for their independent assessment was an adequate request for an independent educational evaluation.

7. Templeton was aware, at least as of May 26, 2017, that Parents disagreed with the behavioral assessment because the Request for Due Process Hearing filed on that date said they disagreed. As a proposed resolution, District was asked to pay for Student's independent evaluation. There is no requirement in the regulation limiting the timing or form of an expression of disagreement so long as the claim is made within the applicable statute of limitations. No specific form of expression of disagreement is required by state or federal law. (34 Code Fed. Regs. §300.502(b).) The only requirements are that Parents disagree and request that an independent educational evaluation be paid for. (Ed. Code 56329(b).)

District's obligations to "fund or file"

8. When a student requests an independent educational evaluation, the public agency must, without unnecessary delay, either file a request for due process hearing to show that its assessment is appropriate or ensure that an independent educational assessment is provided at public expense. (34 C.F.R. § 300.502(b)(2); Ed. Code, § 56329, subd. (c).) The public agency may ask for the parent's reason why he or she objects to the public assessment, but may not require an explanation, and the public agency may not unreasonably delay either providing the independent educational assessment at public expense or initiating a due process hearing. (34 C.F.R. § 300.502(b)(4).) (*Horne, on behalf of minor Child R.P. v. Potomac Preparatory P.C.S.*(D.D.C. 2016) 209 F. Supp. 3d 146, 155.)

9. Templeton had an obligation to either file to defend the behavior assessment without undue delay or to fund the requested independent assessment without undue delay. (*Ibid.*) The purpose of this requirement is to address a student's

needs as expeditiously as possible. Templeton, upon discovering that Student was challenging the functional behavior assessment, filed a request for due process asking that the assessment be determined to be appropriate. They did that in a timely fashion. However, by withdrawing their request for due process on September 18, 2017 without explanation, that filing is no longer operative as a discharge of Templeton's responsibility under the statute. Upon withdrawal of the request for due process, Templeton had not filed without undue delay as four months had passed since Student indicated disagreement with the assessment and requested funding of an independent functional behavior assessment.

10. Whether a school district funds or files a due process complaint without unnecessary delay is a fact-specific inquiry. In *Pajaro Valley Unified School Dist. v. J.S.* (N.D. Cal., Dec. 15, 2006, No. C06-0380 PVT; 2006 WL 3734289,) the court determined that the school district unnecessarily delayed filing to defend its assessment by waiting three months to file its request for a due process hearing after the pupil first requested an Independent Education Evaluation at public expense. (*Pajaro Valley, supra*, 2006 WL 3734289 at p. 3.) The court held, "the District's unexplained and unnecessary delay in filing for a due process hearing waived its right to contest Student's request for an independent educational evaluation at public expense, and by itself warrants entry of judgment in favor of Student." (*Ibid.*)

11. The decision in Pajaro was echoed by the District Court of the District of Columbia in the *Horne* case. (*Horne, supra*, 209 F. Supp. 3d 146.) In *Horne*, parents of a six year old child with severe emotional and behavior issues made several requests for an independent educational evaluation. Parents then made a written request for an independent education evaluation in May and later that month filed a request for due process. The school district failed to file to defend their evaluation until August 15 of 2015. The court stated that the three month delay violated the IDEA. Noting that the inquiry as to whether a delay was unnecessary must be addressed on a case-by-case basis,

the court emphasized that the district had a responsibility to defend the evaluation or pay for the independent assessment as soon as it was clear further efforts to resolve the dispute were futile. The Court declared that any significant delay without explanation was unnecessary. (*Id* at p. 155.) "The IDEA does not require a parent to do more than request an IEE. In fact, the law prohibits schools from requiring an explanation from Parents." (*Ibid*.) The *Horne* court determined that the district was required to pay for the independent evaluation on the grounds that it had failed to fund the assessment or file to defend district's without undue delay.

12. In withdrawing the request for a due process hearing, Templeton failed to file without undue delay in violation of 34 Code of Federal Regulations, part 300.502(b)(2) and Education Code, section 56329, subdivision (c). In delaying the funding of Student's requested independent educational evaluation for over four months, Templeton also violated those state and federal laws. There was no explanation for the sudden withdrawal of Templeton's case and no other explanation for the delay in finding or filing was offered.

District's 11th hour offer of payment

THE OFFER WAS EQUIVOCAL

13. Templeton withdrew its case defending the functional behavior assessment on the morning before the hearing on this matter was scheduled to begin (September 18, 2017.) Templeton then issued a letter to Student offering to pay "up to \$6,000" for Dr. Ball's assessment. Templeton contends that their letter offering to pay up to \$6,000 for Dr. Ball's assessment resulted in the issue raised by Student being moot and moved for dismissal of Student's case at 4:10 p.m. on the day before the hearing was to commence. However, the letter was an offer to negotiate, not notice of an unequivocal intent to pay Dr. Ball's invoice in full immediately.

14. Even if Templeton's offer to pay had been timely, it would not have been adequate. The offer from Templeton, sent to Parents and not to their attorney despite the

fact that Templeton was aware Parents were represented, did not unconditionally offer a specific amount of payment and did not include a check. As worded, it was an offer to negotiate, not an offer to pay for the assessment. The letter indicates that payment is contingent upon "review" of Dr. Ball's invoice. In its reference to Dr. Ball's assessment being of "the boys" the District implies it was not sure whether the amount charged was for only Student or also included his twin. Given the testimony from Ms. Flatos and Ms. Mello-Wisch raising the issue of their uncertainty regarding the amount District should have to pay for Student's independent assessment, the letter leaving these issues open cannot be considered a certain offer to pay. The letter did not state when payment would be made. There was no indication of how Parents would enforce the proposed payment. The offer required further discussion and negotiation. It was not an offer that Parents could simply accept with the expectation that no further issues would arise nor was it an actual payment. Based on such an offer, it would be inequitable to require Parents to give up their right to go to hearing.

THE OFFER WAS A LAST MINUTE ATTEMPT TO DEPRIVE PARENTS OF THE RIGHT TO
PROVE THE FUNCTIONAL BEHAVIOR ASSESSMENT WAS INAPPROPRIATE

15. The letter offering payment continued to assert that Ms. Foster's functional behavior assessment was an appropriate assessment. Both parties had asked for a ruling regarding the legal validity of the assessment. By September 18, 2017, the case had been on file for 115 days. Significant litigation efforts had been expended so that Parents could have an opportunity to prove that Ms. Foster's assessment did not meet legal standards and could not be relied upon for future decisions regarding Student's educational program. Student relied upon Templeton's representations that they were defending the assessment. Thus Student issued and then defended subpoenas *duces tecum* against Templeton's Motion to Quash and prepared for the consolidated hearing.

16. Templeton could have included an offer to remove the assessment from the file with its offer of payment had it wanted to resolve all of the issues remaining in the

case. It could have messengered a check or even stated a deadline for payment of an amount certain. Templeton took none of these actions. Instead, it sent a letter with a conditional offer to pay, directed to represented Parents instead of to their attorney, which continued to defend the legal validity of the contested assessment.

17. Templeton could have issued a settlement offer at any point in the litigation giving Parents 10 days to accept. Had that been done, and had Parents failed to obtain relief more favorable than the settlement offer provided, Student's attorney fees would have been circumscribed. (20 U.S.C. 1415 (i)(3)(D).) However, this procedural option was not employed.

18. Maneuvers such as those employed by Templeton in this case frustrate the purpose of the Individuals with Disabilities in Employment Act (IDEA). Federal regulations and case law require school districts to expeditiously choose to either request a hearing to prove their assessment was appropriate or fully fund the independent evaluation. (34 C.F.R. § 300.502(b)(2); *Horne, supra*, 209 F. Supp. 3d at p. 155; *Pajaro Valley, supra*, 2006 WL 3734289 at p. 3.) Overlooking the type of last-minute tactics employed in this case would encourage delays in funding independent assessments and allow districts to put students in the position of having to fully prepare for hearing with no consequence or recompense for an 11-hour withdrawal of their case.

19. Therefore, in addition to its obligation to fund the assessment due to undue delay in the filing and funding of Student's independent evaluation, Templeton is also obligated to fund the independent educational evaluation conducted by Dr. Ball because its conditional, last minute offer of payment did not constitute a valid offer to fund the independent evaluation.

PROCEDURAL ISSUES

20. In *Rowley*, the Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. (*Rowley, supra*, 458 U.S. at pp. 205-206.)

However, a procedural error does not automatically require a finding that a FAPE was denied. A procedural violation results in 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. (20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a); Ed. Code, § 56505, subds. (f)(2) & (j); *W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484 (Target Range), superseded on other grounds by statute, ["...procedural inadequacies that result in the loss of educational opportunity, [citation], or seriously infringe the parents' opportunity to participate in the IEP formulation process, [citations], clearly result in the denial of a FAPE."]; *Doug. C.*, *supra*, 720 F.3d 1038, 1043; *L.M. v. Capistrano Unified School Dist.* (9th Cir. 2009) 556 F.3d 900, 910 (L.M.) [rejecting a structural defect approach and finding a procedural violation may be harmless unless it results in a loss of educational opportunity or significantly restricted parental participation].)

21. In this case, Parents returned the signed assessment plan on November 2, 2016. The IEP team meeting to discuss the assessment was February 1, 2017. That meeting was not concluded until March 8, 2017. Templeton's two week winter break was not counted per state law as it exceeded five days. However, the IEP team meeting to discuss the assessment was not completed until March 8, 2017. Templeton asserts that Parents agreed to delay the IEP meeting. However Templeton did not show that the delay in holding the IEP team meeting until February 1, 2017 was reasonable nor did they show that the more than one month delay in completing the meeting was reasonable. Templeton was not required to hold the meeting on the 60th day. They could have convened on any day within the range from November 2, 2016 to January 18, 2017 to accommodate schedules. Alternatively, they could have tried to schedule the meeting very near the deadline. Neither of these occurred. Instead, long delays ensued between meetings. Given the severity of Student's behaviors, these IEP team meetings should have

been completed within the statutory timelines and were not. The delay in completing the assessment and the discussions thereon, significantly impeded Parents ability to participate in the development of the IEP as envisioned by the IDEA, that is, within 60 days. Discussions by the IEP team regarding the conclusions of the assessor and her recommendations for Student should have been concluded by the deadline dictated by state and federal law. Furthermore, the delay resulted in Student being deprived of educational benefit because he was denied a behavior plan based on a behavior assessment, and strategies developed by the IEP team to address behaviors impacting his ability to access his education, for more than an additional seven weeks beyond the date the assessment should have been completed. These impacts of the failure to meet the required deadline resulted in a denial of FAPE. Therefore, for this reason as well, Student is awarded reimbursement for Dr. Bell's assessment.

APPROPRIATENESS OF FUNCTIONAL BEHAVIORAL ASSESSMENT

The Assessment Process

22. In addition to failing to file to defend the behavior assessment or to fund an independent assessment without undue delay, and the procedural failures, which alone provide the basis for the award of the payment of the IEE, the functional behavior assessment and the report failed to meet the substantive standards of state and federal law. It was not comprehensive and the analysis employed was not thorough, accurate or reliable. (Timothy O. v. Paso Robles Unified School Dist. (9th Cir. 2016) 822 F.3d 1105, 1121, cert. denied (Apr. 17, 2017, No. 16-672) S.Ct. ; [2017 WL 1366731] (Timothy O.); Ed. Code § 56320 subd. (b)(2) and (f).)

23. The purpose of a special education assessment is to identify a student's unique and individualized needs. The IDEA and California state law require that a school district assess a student in all areas of a suspected disability. (20 U.S.C. § 1414(b)(3)(B); See 34 C.F.R. § 300.304(c)(4) and Ed. Code, § 56320, subd. (f) [child must be assessed in all

areas related to the suspected disability].) Children who may be eligible for special education “must be evaluated and assessed for all suspected disabilities so that the school district can begin the process of determining what special education and related services will address the child's individual needs.” (Timothy O., *supra*, 822 F.3d. at p.1110.)

24. Given the importance of assessments, the IDEA and accompanying regulations set forth an extensive set of procedural safeguards to ensure that evaluations achieve “a complete result that can be reliably used to create an appropriate and individualized educational plan tailored to the needs of the child.” (Timothy O., *supra*, 822 F.3d. at p.1110.) A district must, therefore, ensure that the evaluation is sufficiently comprehensive to identify all of the child’s needs for special education and related services, whether or not commonly linked to the identified disability category. (34 C.F.R. § 300.304(c)(6); Letter to Baus (2015 OSEP) 65 IDELR 81 [right to request an independent evaluation in an area district failed to assess].) A school district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent. (20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304(b)(1); see also Ed. Code, § 56320, subd. (b)(10).)

25. The applicable standards for evaluating functional behavior assessments are detailed in the United States Code, title 20, section 1414(b); and Education code sections 56320 and 56327. Specifically, a functional behavior assessment must not be racially or culturally biased or biased on the basis of gender. The testing must be administered in a language and form most likely to yield accurate information regarding what the pupil knows or what (s)he can do academically; the tests or assessment methods selected must be used for purposes for which the assessment or measure is valid and reliable. The assessment must be administered by trained, qualified, knowledgeable personnel in accordance with the manufacturer’s instructions and protocols. The tests must be tailored to assess the specific area of educational need being evaluated as

opposed to use of a single, general test such as an intelligence test. No single measure should be relied on for any assessment, tests must be administered in accordance with any instructions provided by the producer of the assessment and the child must be assessed in all areas related to the suspected disability. (20 U.S.C. 1414(b); Ed. Code, § 56320.) Neither the data analysis nor the report met these standards.

DATA ANALYSIS

26. The analysis of the A-B-C data collection sheets that formed the basis for Ms. Foster's conclusions and recommendations, failed to properly define antecedents, behaviors and the functions of behaviors. No evidence was provided explaining how those who recorded the information were trained or the methods by which information was recorded. Ms. Foster did not interview staff or faculty members who recorded the behavior incidents. Therefore, she did not gather information to clarify the information she was analyzing. As a result, the analysis of the data failed to demonstrate that it was based on measures that were valid or reliable.

27. Although Ms. Foster coded the data, no testimony or other evidence demonstrated any consistent methodology used to determine the coding to be used. Several questions about the data were not addressed. For instance, the A-B-C data sheets included entries that were not single behaviors. Instead, narratives of a series of events or a comment by a teacher about Student's "dysregulated" conduct were found throughout the data sheets. Despite this, these "behaviors" seemed to be counted as single instances. Antecedents were also described as Student being "unable to regulate self all day." Sometimes, the antecedent noted is labeled, "unsure." Ultimately, Ms. Foster did not address the questions raised by the data. Nor did she describe the individual behaviors she counted or analyze antecedents in her report at all.

28. Ms. Foster did not clearly identify the functions of behavior she determined were influencing Student's behavior. While Ms. Foster was convincing in her assertion that

the potential list of functions of behavior could be expanded with validity, as no rule exists limiting the definition of a function of behavior, she failed to clearly identify or define the functions she determined were influencing factors. She mentioned "suspected" functions of behavior that are not supported by the data on which she bases her analysis. Similarly, some of the codes noted on her working copies of the A-B-C data sheets have question marks after them indicating a lack of confidence in her assessment and include codes that are not explained. Ms. Foster's conclusions regarding the data are incomplete or vague in many instances; for example, opining that the undefined behaviors have multi-faceted functions but failing to explain that theory. Overall, the information and analysis described constituted an inadequate footing on which to base her theories. Absent a more solid foundation, her theories regarding Student's conduct and the basis therefore are not reliable and are invalid thus failing to meet the standards of a proper assessment. (Ed. Code §56320 (b)(2).) A functional behavior assessment that fails to provide sufficient data to reliably determine the function of a student's serious behaviors does not constitute an appropriate evaluation. Cobb County School Dist. v. D.B. (N.D.Ga. Sept. 28, 2015, No. 1:14-CV-02794-RWS) 2015 WL 5691136.)

LACK OF COMPREHENSIVE EVALUATION

29. Another concern raised by the functional behavior assessment is that Ms. Foster testified that it was limited to only the behaviors of elopement and physical aggression despite the fact that additional behaviors were impeding Student's ability to access his education.⁸ Ms. Foster explained that these were Parents' priorities for Student when the behavior assessment and behavior intervention plan were done. However, not only were the terms not well defined, in limiting the assessment to only the behaviors to

⁸ As behaviors were never defined, the undersigned ALJ relies on Ms. Foster's testimony as to how she assessed Student.

be targeted by the behavior plan, the functional behavior assessment fails to provide a comprehensive assessment of Student in all areas related to the suspected disability. (Timothy O., *supra*, 822 F.3d. at p.1110; Ed. Code § 56320, subdivision (f).)

30. The functional behavior assessment was the opportunity to conduct a broad assessment of Student's behaviors so that they could be considered individually and as a whole. Templeton was required to conduct a comprehensive assessment of Student's behaviors. The IEP team could then have discussed whether it was appropriate to focus the behavior plan on only one or two target behaviors. This is where the concurrence of the behavior plan and assessment results in the failure of the assessment. The juxtaposition of the timing itself would not have rendered the assessment or report invalid. An emergency behavior plan being completed ahead of the conclusion of work on the assessment was not necessarily an impediment to the completion of an appropriate functional behavior assessment. In this case, however, it resulted in choices being made limiting which aspects of Student's behavior would be assessed, resulting in an inadequate functional behavior assessment. (*Ibid.*)

31. Limiting the report to the behaviors being focused on in the behavior intervention plan resulted in important behaviors not being identified or discussed, despite the fact that other behaviors were also impeding Student's ability to access his education. Evidence showed that Student struggled with verbal aggression, defiance, an inability to sit still long enough to complete a lesson, and destruction of other's property among others. A legally adequate functional behavior assessment would have identified the range of behaviors that needed to be addressed even if the ultimate recommendation was that an appropriate behavior plan would only target a subset of the most intrusive conduct to start. (*Ibid.*)

INADEQUATE OBSERVATIONS AND INTERVIEWS

32. The observations and interviews conducted for purposes of completing the

report were too limited. While the assessor did observe Student, her observations of him were limited to two: one, one-hour observation of Student on December 5, 2016, during a writing and reading lesson; and one roughly 40 minute observation of him on December 12, 2016. After the December 12, 2016 observation, Ms. Foster decided that the information gathered on December 5, 2016, was irrelevant.

33. The December 5, 2016 observation consisted of a one-hour session in the classroom. The observation is not analyzed in the report thus no detailed information is provided regarding the class being observed or other environmental information. Although the "minute by minute" observation notes are set out, the methodology of collecting the notes is not identified. Moreover, the notes are not *verbatim*. While *verbatim* notes are not required, several sections of the renditions of Ms. Foster's observations include only cryptic references to the exchanges between Student and the adults around him. Coupled with the incomplete information, the lack of analysis renders them of limited use. For example, the notes indicate that, in the course of an hour, Student required redirection at least 19 times, although the reader only derives that information by counting the number of apparent redirections because no explanation or analysis is provided. There could have been additional instances of redirection however, the observation notes were not clear. Without the detail or an analysis, the information does not accurately relate information about Student's level of functioning. The notes also do not explain comments from his aide such as "This is the last time. They both began reading together"; or "I won't start like that again. He was toast." The lack of analysis coupled with the absence of staff interviews in the assessment result in an inadequate explanation of the observation information provided. As the information was not analyzed, the IEP team had no way of knowing how these factors contributed to Student's learning ability or how they impacted his learning environment and, thus, could not discuss possible adjustments that might have helped Student.

34. Ms. Foster's second observation during the December 12, 2016 incident in

which Student was running around the campus unchecked for over an hour, formed the primary basis for her conclusions regarding Student's behavior. Her opinions of Student were so impacted by that observation that she decided no further observation was required and analysis of the December 5, 2016 observation was irrelevant. This was a serious error of judgement as it resulted in her assessment being unreasonably limited. In failing to consider her observations of Student in the classroom, she missed the opportunity to contrast his conduct and evaluate the circumstances of the classroom conduct for clues about how to help Student learn.

35. Although the assessor testified that following the December 12, 2016 event she needed no further observation because she then knew what the focus of her behavior plan should be, Ms. Foster failed to discuss how frequently similar behaviors occurred, the sources of information for the data regarding the frequency of similarly serious behaviors and why she believed it was such representative behavior that observing it confirmed the universe of Student's behavior issues such that Student's other behaviors did not have to be explored. Ms. Foster testified that she did not review documents prior to her observations. Therefore, she would not have had any data confirming the frequency of behaviors similar to the December 12, 2016 incident other than anecdotal information. Finally, she should not have simply accepted that the December 12, 2016 incident framed the parameters of an assessment that was supposed to provide a comprehensive review of Student's conduct and how it could be systematically modified.

36. If the functional behavior assessment report indicated that Student regularly behaved in the manner described on December 12, 2016, basing her assessment of Student's needs on that observation would have been justifiable. However, the report does not say that the incident of December 12, 2016, was representative of Student's daily conduct. Deciding not to conduct at least one additional observation of Student after such an unusual incident coupled with failing to analyze the December 5, 2016 observations resulted in a lack of thoroughness in connection with this assessment. There was a lack of

objective information on which to evaluate a comparison of the conduct on the two dates and a lack of comparative analysis of Ms. Foster's observations. As no other testing was conducted by the assessor, her analysis of the behavior observations she conducted in conjunction with the behavior observation data she was provided was critical information. Given limitations of the data from both Ms. Foster's observations and the A-B-C data sheets, the assessor has failed to demonstrate that her data analysis and the conclusions that flowed from it were accurate or reliable in violation of state and federal law. (20 U.S.C. §1414(b); Ed.Code, § 56320 subd. (b)(2).)

37. Finally, analogizing the December 12, 2016 incident of running unchecked on the playground to the mass-shooting incidents at Columbine or Sandy Hook indicates a lack of thoughtfully considered judgment on the part of the assessor and impacts the weight given to her testimony and the behavior assessment as a whole, calling into question the adequacy of her training and knowledge in the field. (Ed. Code 56320(b)(3).) No evidence was presented regarding how Ms. Foster concluded Student's behavior was so dangerous as to compare it to those national school tragedies. However, the conclusion is contradicted by the decision made by Mother and Ms. Flatos to allow it to go on for an extended period of time so Ms. Foster could observe it.

38. More importantly, while Student exhibited disobedient behavior on December 12, 2016, at no time did he hurt himself or anyone else so the analogy fails in that respect alone. Also missing from the analysis of Student's conduct on December 12, 2016, was any examination of the close connection of the twin relationship and how that may have impacted the escalation of Student's behaviors; the impact of the decision to allow Student to continue to run unchecked on the playground without adhering to school rules so Ms. Foster could observe him doing so; or any discussion of whether his behaviors escalated and/or changed from the outset of the incident to its termination. The report failed to provide a complete, reliable basis for the conclusions stated in violation of state law. (Ed. Code, § 56320 (b)(2).)

The Functional behavior assessment report

39. Following completion of the functional behavior assessment, a report must be developed that meets the federal and state standards. The report must be in writing and include a determination of whether the pupil needs special education and related services; the basis for making that determination; the relevant behaviors noted in observation of the pupil in an appropriate setting; the relationship of that behavior to the pupil's academic and social functioning; the educationally relevant health, developmental and medical findings, if any; and a determination concerning the effects of environmental, cultural or economic disadvantage where appropriate. (Ed. Code § 56327.) Many of these elements were missing from Ms. Foster's report.

40. No information was provided in the behavior assessment report identifying the protocols used to assess Student's behavior and testimony on the subject of the method employed was vague. Absent identification of the evaluation methodologies used, it is impossible to determine whether the assessment followed appropriate protocols or avoided bias on the basis of gender, culture or race. (Ed. Code § 56320(a).) While the assessor stated that she "coded" the A-B-C data sheets to create the table in her report analyzing the data, she did not state how she identified the behavior categories or the criteria she applied to identify functions of behavior. Although 18 "behaviors" were noted, it was unclear how that number was determined as the A-B-C data sheets did not plainly identify each individual behavior recorded. The assessor did not describe what constituted a behavior or how she categorized items on the sheets that did not meet her definitions of a behavior.

41. The report only superficially assesses Student's behaviors and the functions thereof, failing to assess all of the behaviors negatively impacting Student's access to education and the interruptions being caused by Student to others in the class. Instead, the report shifts to a focus on training for staff and faculty and suggesting various means of addressing behavioral problems and causes that have not yet been thoroughly defined.

The report fails to discuss Student's relevant health, development or other pertinent medical findings. Furthermore, the report fails to consider the impact of Student's environmental or cultural background. Details about Student's adoption and attention deficit hyperactivity disorder as well as his medication history would have been important to consider in evaluating Student's behavior and the possible means of modifying conduct that was impeding not only his ability to access his education but his fellow students. Not all of the documents considered were listed in the report, leaving the reader with incomplete information as to the basis of the conclusions reached or whether Ms. Foster was in possession of important facts. The report fails to include all of the elements required. (Ed. Code, § 56320, subds. (e) and (g).)

REMEDY

1. Templeton's failure to defend its functional behavior assessment or fund the independent assessment without undue delay results in liability for payment of Dr. Ball's May 21, 2017 independent functional behavior assessment. No documentary evidence was submitted demonstrating the amount of Dr. Ball's bill. However, Dr. Ball testified that he charged Parents \$6,000.00 for the work he did to develop his assessment for Student. Ms. Flatos' testimony that Mother told her that the \$6,000 was the amount for both Student and his brother, is hearsay. Given the strained relationship between Mother and Ms. Flatos, a Templeton employee who testified to being a "former friend" of Mother's, absent corroborating evidence, this hearsay will not be used as the sole basis for finding that fact is true. (5 Cal Code Regs., §3082(b).) This evidence is found not to be the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs. (Govt. Code, §11513, subd. (c).)

2. Ms. Foster's functional behavior assessment did not meet procedural or legal standards. Both the failure to provide a legally adequate functional behavior assessment and the failure to timely hold the IEP team meeting also result in Templeton's

liability for payment of Dr. Ball's charges for his May 21, 2017 independent functional behavior assessment.

ORDER

1. Templeton's January 16, 2017 functional behavior assessment was not legally compliant and shall not be the basis for any educational decision regarding Student.

2. Templeton shall reimburse Parents for the cost of Dr. Ball's independent behavior assessment of Student within 30 days of receipt of the assessment invoice and proof of payment. If Parent's have not yet paid for the assessment, Templeton shall pay Dr. Ball directly within 30 days of receipt of the assessment invoice.

3. Templeton shall schedule an IEP team meeting to discuss Dr. Ball's assessment, within 60 days of a request to do so by Parents and Templeton shall pay Dr. Ball his customary hourly rate for attending the IEP team meeting, including travel time

PREVAILING PARTY

Pursuant to Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Student prevailed on the only issue heard and decided.

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 11, 2017

/s/

PENELOPE S. PAHL

Administrative Law Judge

Office of Administrative Hearings