BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: PARENTS ON BEHALF OF STUDENT, v. SAN DIEGO UNIFIED SCHOOL DISTRICT.	OAH Case No. 2017081305
SAN DIEGO UNIFIED SCHOOL DISTRICT, v. PARENTS ON BEHALF OF STUDENT.	OAH Case No. 2017090642

DECISION

Parents on behalf of Student filed a due process hearing request with the Office of Administrative Hearings on August 31, 2017, naming San Diego Unified School District. On September 19, 2017, District filed a due process hearing request with OAH, naming Student. On September 28, 2017, OAH consolidated these cases. On October 17, 2017, OAH granted Student's request to amend her complaint.[1] On November 2, 2017, OAH granted the parties' joint request to continue the consolidated matter.

Administrative Law Judge Paul H. Kamoroff heard the consolidated matter in San

[1] District filed its response to Student's amended complaint on October 24, 2017, which permitted the hearing to go forward. (*M.C. v. Antelope Valley Unified Sch. Dist.* (9th Cir.) 858 F.3d 1189, 1199-1200.)

Diego, California, on January 23, 24, 25, and 30, 2018, and February 1, 2018.

Megan M. Nunez, Attorney at Law, represented Student. Jennifer L. Varga, Attorney at Law, assisted Ms. Nunez during the first day of hearing. Student's mother and father attended the hearing. Student did not attend the hearing.

Jonathan P. Read, Attorney at Law, represented District. Jennifer Parks-Orozco, District's due process program manager, attended the hearing.

At the request of the parties, OAH continued this matter for closing briefs. The record closed on February 20, 2018, upon receipt of written closing briefs.

ISSUES[2]

STUDENT'S ISSUES:

1. Did District deny Student a free appropriate public education by preventing Parents from meaningfully participating in Student's education and denying Student educational opportunity in the 2016-2017 school year, when District's June 7, 2017 individualized education program failed to:

   a. Present a sufficiently clear and specific FAPE offer to enable Parents to give informed consent to the IEP;

   b. Include a "Services" page to indicate when each service began and ended;

   c. Include an "Offer of FAPE" page that described the percentage of time Student would spend in general education and special education, the

[2] At the beginning of the hearing, Student withdrew, without prejudice, issues pertaining to the 2017 extended school year. The remaining 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.)

classroom placement, or the school of attendance;

d. Include goals to address Student's needs; and

e. Include a behavior intervention plan, although the IEP refers to one.

2. Did District deny Student a FAPE during the 2017-2018 school year, up until the date Student filed her amended request for due process on October 17, 2017, thereby depriving her of educational benefit, by failing to:

a. Implement any part of Student's June 2017 IEP, when Student arrived on the first day of school on August 28, 2017;

b, Implement Student's transition plan during the 2017-2018 school year;

c. Implement Student's June 2017 IEP, when Student returned to school on August 29, 2017;

d. Implement the June 2017 IEP during the 2017-2018 school year;

e. Implement or offer a one-to-one aide during the 2017-2018 school year;

f. Develop a behavior intervention plan; and

g. Convene an IEP team meeting during the 2017-2018 school year.

3. Did District deny Student a FAPE, up to October 17, 2017, because it prevented Parents from meaningfully participating in Student's IEP process, by:

a. Unilaterally removing the offer for a one-on-one aide;

b. Failing to implement the June 7, 2017, IEP;

c. Failing to implement the June 7, 2017 transition plan;

d. Failing to convene an IEP team meeting to discuss Parents' concerns during the 2017-2018 school year;

e. Failing to present a sufficiently clear and specific offer of FAPE, by providing conflicting offers of FAPE in the June 7, 2017 IEP team meeting, in District's September 7, 2017 prior written notice, and in District's September 19, 2017 due process hearing request; and

g. Failing to develop a behavior intervention plan, despite indicating the need for one in the June 7, 2017 IEP team meeting.

DISTRICT'S ISSUE:

4. Did District's IEP offer of June 7, 2017, constitute a FAPE in the least restrictive environment?

For her issues, Student requests reimbursement for placement at a non-public school and related transportation costs. For its issue, District requests an order that it may implement the June 2017 IEP, absent parental consent, should Parents wish to avail Student of special education at a public school.

SUMMARY OF DECISION

Parents and District entered into a settlement agreement that waived all claims for the 2016-2017 school year. Amongst other terms, District agreed to hold an IEP team meeting in June 2017, to make Student a new FAPE offer for the 2017-2018 school year. District held the June 2017 IEP team meeting, and Parents consented to the IEP. However, on the first day of the 2017-2018 school year, District was unfamiliar with Student and unable to implement her IEP. District failed to correct this problem and Parents unilaterally placed Student at a nonpublic school.

Student asserts that a waiver exception in the agreement, for the June 2017 IEP, permits her to raise claims for the 2016-2017 school year. In addition, Student complains that District failed to implement the IEP, thereby denying her a FAPE.

District avers that claims relating to the 2016-2017 school year were waived by the agreement. Additionally, District argues that it was not obligated to implement the June 2017 IEP, because Parents revoked their IEP consent by placing Student at a nonpublic school.

This Decision holds that the agreement waived Student's claims for the 2016-2017 school year; the waiver exception for the June 2017 IEP attached to the next school year, not the preceding school year. The Decision also holds that Parents' act of placing Student at a nonpublic school did not revoke their consent to the IEP. It was necessary for Parents to place Student at the nonpublic school because of District's failure to implement her IEP. District's failure to implement the IEP, and to ensure that the IEP was available to Student should she return to the public school, denied Student a FAPE. Finally, District's request for an order that it may implement the June 2017 IEP, should Parents wish to avail Student of special education at a public school, is moot because Parents consented to the IEP.

FACTUAL FINDINGS

THE STUDENT

1. Student was a seven-year-old girl whose parents resided within District's boundaries during the applicable time frame. She received special education under the eligibility category intellectual disability, due to Phelan McDermid syndrome.

2. Phelan McDermid syndrome, sometimes called 22q13 deletion syndrome, is a rare genetic disorder caused by the loss of a small piece of chromosome 22. Common characteristics of the disorder are intellectual disability; delayed or absent speech; symptoms similar to autism spectrum disorder; low muscle tone; motor delays; and epilepsy. As a result of her disability, Student had delays in cognition, language, motor development, hypotonia, hearing loss, behavior, and emotional dysregulation. Each aspect of Student's education was significantly impacted by her disability.

THE 2015-2016 SCHOOL YEAR

3. During the 2015-2016 school year, Student attended kindergarten in the

Chula Vista Elementary School District. Chula Vista offered Student special education under the eligibility categories other health impairment and speech and language impairment. Parents consented to Chula Vista's IEP offer.

4. In October 2015, Parents enrolled Student at The Community School of San Diego, a nonpublic school certified by the California Department of Education. The Community School, also called Pioneer School, was a small, structured, moderate-to-severe special day school. Most students were placed there by a public school, through that student's IEP. The elementary school had approximately 20 students, with a one-to-one or one-to-two ratio of teaching staff per student. For Student, the Community School also provided an individual aide and a behavior intervention plan, due to safety, behavior, and emotional problems that Student demonstrated while at school.

THE 2016-2017 SCHOOL YEAR

5. In July 2016, Student relocated to military housing in District. Student was six years old and beginning the first grade. District conducted triennial assessments and convened an annual IEP team meeting on November 30, 2016. Parents and their advocate attended the IEP team meeting, along with staff from Hancock Elementary School, Student's home school. District offered Student placement in a moderate-to-severe special day class at Hancock Elementary School, along with various goals, accommodations, and related services. The IEP included a behavior intervention plan which identified various behaviors that impeded Student's learning, including elopement; tantrum episodes; noncompliance; and inappropriate grabbing of other students. The IEP indicated that Student's next annual IEP team meeting would be held by November 30, 2017.

6. Parents did not consent to the November 2016 IEP, primarily because it failed to offer Student an individual aide. Student regularly eloped from class and school

grounds, frequently tantrummed, was unable to self-advocate, had difficulty communicating, could not self-toilet, was easily fatigued, and quickly overheated, which created medical and safety concerns. For those reasons, Parents would not consent to an IEP offer that failed to include an individual aide for Student.

7. On January 10, 2017, Parents filed a due process complaint against District in OAH case number 2017010571, alleging that District denied Student a FAPE during the 2016-2017 school year.

8. On April 6, 2017, the parties reached an agreement to settle OAH case number 2017010571. The settlement agreement provided reimbursement for the Community School, including transportation, through the end of the 2016-2017 school year. The agreement also provided that District would conduct a new functional behavior analysis, and consider an independent evaluation by Robert Gray, Ph.D. Finally, the agreement required District to convene an IEP team meeting by June 9, 2017, to offer Student a FAPE for the 2017-2018 school year. The agreement waived all claims raised in OAH case number 2017010571, but included a waiver exception for claims arising from the June 2017 IEP.

Miller Elementary School

9. Prior to the June 2017 IEP, District transferred its moderate-to-severe special day class from Hancock Elementary to Miller Elementary School. In May 2017, in preparation for the June IEP, Stacey Jones, the principal of Miller, provided Parents and Dr. Gray a tour of Miller. As the school principal, it was normal for Ms. Jones to be an active participant in the implementation of pupils' IEPs at Miller, and she held herself out as an appropriate person for Parents to contact regarding placement there.

THE JUNE 7, 2017 IEP

10. In accord with the agreement, District convened an IEP team meeting for

Student on June 7, 2017. Student was seven years old and finishing the first grade. Mother and Father attended, along with their advocate. District participants included a mix of staff from Hancock and Miller, including Miller principal Ms. Jones; Hancock principal Nona Richard; Brandy Lopez, school nurse; school psychologists Jonathan Hager and Justin Villa; Josh Hermsmeir, adapted physical therapist; Tune Chittadara, speech and language pathologist; Miriam Luttbeg, board certified behavior analysist; and education specialists Vanessa Valdez, Debra Warner and Lisa McFaul. In addition, Community School director Jim Liener, program specialist Cynthia Fajardo, and teacher Kelly Bayes, attended the meeting. Dr. Gray participated by telephone.

11. During the meeting, the IEP team provided Parents a copy of their procedural safeguards; considered Parents' concerns; reviewed District's functional behavior analysis; reviewed Dr. Gray's independent neuro-psychological evaluation; and attempted to offer Student a FAPE for the 2017-2018 school year.

12. The June 2017 IEP team considered Parents' concerns, supported by Dr. Gray's evaluation, that Student required an individual aide while at school. District agreed with those concerns, and the IEP team offered Student an individual aide for 28.3 hours per week, described as a supplemental support service. In addition, the aide would receive two weeks of training from District's behavior resource team at the beginning of the 2017-2018 school year.

13. Next, the team reviewed District's functional behavior analysis. District selected credentialed school psychologist Mr. Villa and District's applied behavior analysis supervisor Ms. Luttbeg to conduct the functional behavior analysis. The assessors collected data over eight days in April and May 2017. Mr. Villa and Ms. Luttbeg compiled the data in a written report, dated June 7, 2017. District's assessors observed Student in multiple settings throughout the school day. They reviewed District's 2016 psychoeducational report, Student's prior behavior interventions, school

records, and outside reports, and interviewed teachers and staff. The District assessors also collected information using the Questions About Behavioral Function, an inventory provided to Student's nonpublic school teacher.

14. Ms. Villa and Ms. Luttbeg's behavior report identified problem behaviors, including elopement, inappropriate grabbing, noncompliance, and tantrums. The assessors meticulously collected data regarding the frequency, duration, and intensity of those behaviors. The report considered the effectiveness of past interventions and environmental factors. Given this information, Mr. Villa and Ms. Luttbeg hypothesized that the function of Student's behavior was to access preferred items and to obtain adult attention. Finally, the report included various recommendations to remediate, or control, the problem behaviors. Recommendations included a daily visual schedule, positive reinforcement, staff review of behavior expectations; instruction and activities provided at a quick pace; teaching of coping skills; staff warnings when transitions were approaching; a variety of choices offered to Student throughout the school day; and instructional control, such as presenting tasks in a "first___, then ___" manner.

15. Mr. Villa and Ms. Luttbeg each participated during the June 7, 2017 IEP team meeting. They shared the results of their report with Parents, their advocate, Dr. Gray, and the rest of the IEP team. Parents and their advocate were able to timely review the behavior assessment, and actively participated in the IEP team discussion regarding the report.

16. The IEP team agreed to update Student's November 2016 behavior intervention plan, based upon the new data provided by Mr. Villa and Ms. Luttbeg. Student's problem behaviors remained the same, but the frequency, intensity and duration of the behaviors had changed. Consequently, District developed a behavior intervention plan dated June 7, 2017.

17. The June 7, 2017 behavior intervention plan identified the behaviors that

impeded Student's learning, including elopement, tantrums, noncompliance, and inappropriate grabbing. These behaviors impeded Student's learning by taking time away from her instruction and the instruction of others. The plan denoted the frequency, intensity and duration of the problem behaviors, along with environmental factors and predictors for behaviors. It described necessary changes to instruction and supports, such as providing Student extended physical response time, and choices, when transitioning between tasks. The plan identified the function of Student's behaviors, which included escape, attention, and task avoidance; and listed functionally equivalent replacement behaviors. The plan carefully listed teaching strategies and necessary curriculum to teach the functionally equivalent replacement behaviors, and recommended effective reinforcement strategies. Finally, the plan identified District staff that would be responsible for implementing the behavior intervention plan, including Student's individual aide. During the hearing, Student failed to present any evidence which impeached the appropriateness of the June 7, 2017 behavior intervention plan.

18. The IEP team next considered a plan to transition Student from the Community School to Miller. Both the public school and nonpublic school team members were present during this discussion, and the IEP team offered Student a thoughtful transition plan. The plan included, amongst other items, that Student would visit Miller and meet the school staff before the school year began; a para-educator would accompany Student throughout the school day and across all settings; peers would slowly introduce themselves to Student, when she was at ease; the moderate-to-severe special day classroom would have a calm, separate area where Student could self-regulate when she appeared anxious or upset; and, within five days of beginning at Miller, staff would develop educational materials specifically for Student. As part of the transition plan, Student's individual aide would receive intensive behavior training at the start of the school year.

19. At the conclusion of the meeting, District provided Parents a copy of the IEP, and Parents indicated they would consider the offer. The written IEP that was provided to Parents failed to include a copy of the June 7, 2017 behavior intervention plan. For this reason, Student complained that District failed to develop the plan. However, the IEP incorporated by reference the updated behavior intervention plan; the IEP team discussed the plan; and District submitted a copy of that behavior intervention plan during the hearing.

20. Following the IEP team meeting, on June 15, 2017, Hancock principal Ms. Richard emailed Parents regarding whether they had made a decision to accept the IEP. Parents responded that day, stating they were still considering the IEP offer.

PARENTS' FIRST CONSENT TO THE IEP

21. On July 3, 2017, Parents emailed Miller principal Ms. Jones their consent for District to implement the June 7, 2017 IEP. Parents also agreed to take Student to Miller for the 2017 extended school year program. Attached to the email was the consent page of the IEP, signed by Parents on June 29, 2017. Parents consented to the implementation of the IEP, not to the appropriateness of the IEP, as Parents were still concerned about Student's health and safety at Miller. Nonetheless, Parents wanted to provide Miller staff an opportunity to work with Student.

PARENTS' FIRST ATTEMPT TO PLACE STUDENT AT MILLER

22. On July 25, 2017, Parents attempted to place Student at Miller for the extended school year program, only to find that Miller was closed for construction over the summer. Unbeknownst to Parents, District had moved the extended school year school program to a different site. Later that day, Parents emailed Ms. Jones, informing her that Student was unable to access the extended school year program, but that

Parents still intended to send Student to Miller in August, for the 2017-2018 school year.

23. Ms. Jones did not respond to Parents' emails. During hearing, Ms. Jones testified that she retired from District at the end of June 2017, and that she no longer had access to her work email after June 30, 2017. She did not share this information with Parents before, during, or after the June 7, 2017 IEP team meeting, or indicate to them that they should contact someone else regarding Miller. The emails Parents sent were to Ms. Jones' school email address, yet that address did not forward her emails to another recipient, or send a response to let the sender know that Ms. Jones had not received the emails.

THE 2017-2018 SCHOOL YEAR

Parents' Second Attempt to Place Student at Miller

24. Believing that Ms. Jones, and therefore District, had received their consent to the IEP, Parents attempted to place Student at Miller on the first day of school, August 28, 2017. Parents brought Student to school early for her first day, but District was unfamiliar with Student or her IEP. There was no staff or classroom assignment available for Student. Distressed, Student began to tantrum and scream. Parents eventually ran into Ms. Jones, who was volunteering at Miller to help transition in the new school principal. Parents informed Ms. Jones that they had consented to the June 2017 IEP, and were at Miller to begin that IEP. Ms. Jones informed Parents that Student could not begin Miller that day, because they had not completed the school's enrollment packet. Parents took Student home, completed the enrollment packet, and returned the completed packet to Miller staff later that day.

PARENTS' THIRD ATTEMPT TO PLACE STUDENT AT MILLER

25. Parents again attempted to place Student at Miller on August 29, 2017, the

second day of the school year. Parents again arrived early. Student had difficulty with transitions, and again screamed and tantrummed. The family was eventually met by the new school principal, Jennifer O'Connor. Ms. O'Connor was unfamiliar with Student and attempted to place her in a kindergarten classroom, but was blocked by the classroom teacher, Ms. McFaul. Ms. McFaul had attended the June IEP, and knew that, because Student was seven years old, she should be placed in a second grade classroom. While Ms. O'Connor was trying to determine where to place Student, Parents pointed out that, per her IEP, Student required an individual aide. Miller did not have an aide available for Student, and Ms. O'Connor suggested that Parents take Student home; she would call Parents by 2:00 p.m. that day, to update them on Student's placement. Ms. O'Connor did not call Parents that day, or anytime through the hearing.

26. On the evening of August 29, 2017, Parents sent an email to Ms. O'Connor, wherein they described the June 7, 2017 IEP; their consent to implementation of that IEP; the emails to Ms. Jones; their rebuffed attempts to place Student at Miller during the extended school year and the regular school year; and Student's need for an individual aide due to health and safety reasons. Yet, Miller staff was unprepared to implement her IEP. In particular, Miller did not have an aide for Student. Until the June IEP could be fully implemented, Parents did not feel it was safe to place Student at Miller. Consequently, Parents informed Ms. O'Connor that they intended to place Student at a nonpublic school and seek reimbursement for that placement.

27. Following Student's attempts to attend Miller, District staff, including Ms. Luttbeg, Ms. O'Connor, Mr. Hager, Ms. Richard, Mr. Villa, Ms. Parks-Orozco, and Student's case manager Steve Burton, began discussing how to implement Student's IEP at Miller. In late August and early September 2017, various emails between these individuals described District's need to familiarize staff with Student and her IEP. Despite these emails, District was unable to coordinate or implement Student's IEP. After several

email exchanges, on September 12, 2017, Mr. Burton emailed the others, stating that he still had "no info [*sic*] about what is going on or what to expect for [Student's] IEP or placement." Parents were not included in these email exchanges and, with the exception of a September 7, 2017 letter from Ms. O'Connor, Parents were not contacted in any manner by District staff.

28. On September 5, 2017, Parents re-enrolled Student at the Community School, where she remained through the hearing.

29. On September 7, 2017, Ms. O'Connor sent Parents a letter that described District's FAPE offer and denied Parents' request for nonpublic school reimbursement. In her description of District's FAPE offer, Ms. O'Connor omitted the aide service, along with the aide's training. During hearing, Ms. O'Connor testified that the omission of the aide and aide training was unintentional. The letter's description of the FAPE offer, just five bullet pointed sentences, was not an IEP offer or attempt to amend the IEP offer. Rather, the letter was sent in response to Parents' request for reimbursement for nonpublic school placement, to deny that request and to provide them a copy of their Notice of Procedural Safeguards. However, Ms. O'Connor's failure to contact Parents as promised on August 29, 2017, or anytime thereafter, to assure them that Miller could implement Student's IEP; District's unpreparedness to receive Student; and the September letter which described District's FAPE offer but omitted the aide, all reasonably contributed to Parents' belief that District was unwilling, or unable, to implement the June 2017 IEP, in particular the aide service offered in the IEP.

30. On September 19, 2017, District filed its complaint for due process. The basis of District's complaint was to obtain a judicial order that it may implement the June 7, 2017 IEP, absent parental consent, should Parents wish to avail Student of special education at a public school. Until that time, Parents were unaware that District believed it did not have their consent to implement the IEP.

PARENTS' SECOND CONSENT TO THE IEP

31. On September 20, 2017, in response to District's complaint, Parents hand delivered a signed copy of the IEP's consent page to staff at Miller, who date-stamped their receipt of the document. This version of Parents' consent was to the IEP offer, without the prior qualification that Parents' were consenting only to implementation of the offer. During hearing, evidence overwhelmingly established that District received Parents' unequivocal, written consent to the June 7, 2017 IEP. District made no attempt to contact Parents following its receipt of the signed IEP.

32. District witnesses, including Ms. O'Connor and Ms. Parks-Orozco, mistakenly believed that Parents' conduct of unilaterally placing Student at the Community School acted as a revocation of their consent to the June 2017 IEP. Rather, evidence showed that Parents had consented to the IEP twice, and were awaiting a response from District that Miller was able to implement the IEP; specifically, the aide service. While awaiting verification that District could implement the IEP, Parents placed Student at the Community School. However, District failed to provide Parents that verification.

DISTRICT'S ATTEMPT TO IMPLEMENT THE JUNE 2017 IEP

33. On January 23, 2018, the first day of hearing for this matter, District's attorney verbally told Student's attorney that Miller was now able to implement the June 2017 IEP, including the aide service. This was the first time District had conveyed this information to Parents.

DISTRICT'S WITNESSES

34. District called several witnesses during hearing, including Ms. Jones; Mr. Hager; Mr. Villa; Ms. Parks-Orozco; Ms. Richard; Ms. Chittadara; Ms. McFaul; Ms.

O'Connor; Ms. Luttbeg; Laura Brodfuehrer; and Magen Brown. Each witness was a highly educated and caring individual. However, a summation of their testimony was that District staff had mistakenly believed that either someone else had taken responsibility for addressing Student's IEP, or that District was not obligated to implement Student's IEP, because Parents had unilaterally placed her at the Community School. Some witnesses, including Mr. Hager and Ms. O'Connor, were confused regarding which IEP should be implemented if Student returned to school; witnesses postulated that the Chula Vista IEP should be implemented.

35. District's witnesses, including Ms. Jones and Ms. O'Connor, confirmed that Parents had attempted to place Student at Miller at the beginning of the school year, and that Miller was unprepared to receive Student. Witnesses, including Ms. O'Connor and Ms. Parks-Orozco, confirmed that District staff had failed to contact Parents to explain that Miller was capable of implementing the June 2017 IEP.

STUDENT'S WITNESSES

36. Amongst other witnesses, Student called Mr. Liener to testify during the hearing. As the Community School's director and one of Student's teachers, Mr. Liener was directly familiar with Student. He provided uncontroverted testimony that Student had received an educational benefit while attending the Community School, including that Student had improved academically, emotionally, and behaviorally. The Community School employed full time board certified behavior analysts, occupational therapists, and speech and language pathologists, in addition to the individual and small group teaching instruction it provided to each pupil. The school had developed an IEP and behavior plan unique to Student's needs, and provided her an individual aide. Each week, students were integrated with a local private school where they interacted with typically developing peers. At the time of the hearing, Student was the only privately

placed student, as students were normally placed at the Community School by local educational agencies; half of the Community School's student population was placed there by District.

37. Dr. Gray also testified during the hearing on behalf of Student. Dr. Gray was a licensed psychologist and a board certified clinical neuropsychologist who practiced at Advanced Neurobehavioral Health of Southern California in Mission Viejo, California. In April and May 2017, Dr. Gray conducted a pediatric neuropsychological evaluation of Student. As part of the evaluation, Dr. Gray reviewed school and medical records, interviewed Parents and teachers, observed Student at school, and performed informal and formal testing. Overall, Student presented with symptoms commonly observed with other individuals with Phelan McDermid syndrome. For Student, her disability was characterized by longstanding deficits in expressive and receptive language; learning; memory; motor skills; attention; executive functioning; reasoning skills; social skills; safety skill development; adaptive functioning; noncompliance and behavioral dysregulation; anxiety; and moderate intellectual disability. In light of her disability, Student required intensive intervention and individual support in a highly structured program.

38. During hearing, Dr. Gray was especially concerned by Student's difficulty with transitions. Even moderate transitions caused Student to become anxious and distressed; and she acted out by screaming and engaging in aggressive tantrums. In sum, Student should not be transitioned to Miller late in the school year, even if District was now able to provide her an aide; and any placement change should be preceded by the implementation of a comprehensive transition plan. Dr. Gray's testimony was persuasive, and District failed to present any witness or evidence which contradicted that testimony.

39. Mother also testified during the hearing. Parents were solely responsible

for paying for the Community School, and transporting Student there, during the 2017-2018 school year. Mother presented evidence that Student regularly attended the Community School from September 5, 2017, through January 18, 2018; and testified that Student was still attending the Community School through the hearing. Similar to Dr. Gray, Mother persuasively testified that transitioning Student to Miller at this point in the school year would be detrimental to her education and well-being.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA[3]

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 et seq. (2006)[4]; 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

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

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

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).)

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* (March 22, 2017) 580 U.S. __ [137 S.Ct. 988] (*Endrew F.*).) The Ninth Circuit affirmed that its FAPE standard comports with *Endrew F.* (*E.F. v. Newport Mesa Unified School Dist.* (9th Cir. Feb. 14, 2018, No. 15-56452) ___ Fed.Appx. ___, 2018 WL 847744.)

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, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) By this standard, Student had the burden of proof for her issues, and District had the burden of proof for its issue.

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.

ISSUES 1(A),(B),(C),(D), AND (E): THE 2016-2017 SCHOOL YEAR

8. Student alleges that District denied her a FAPE during the 2016-2017 school year, based upon several grounds.

9. Parents have the right to present a complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." (20 U.S.C. § 1415(b)(6); Ed. Code, § 56501, subd. (a).) OAH has jurisdiction to hear due process claims arising under the Individuals with Disabilities Education Act. (*Wyner v. Manhattan Beach Unified Sch. Dist.* (9th Cir. 2000) 223 F.3d 1026, 1028-1029 (*Wyner*).)

10. This limited jurisdiction does not include jurisdiction over claims alleging a school district's failure to comply with a settlement agreement. (*Wyner, supra,* 223 F.3d at p. 1030.) In *Wyner*, during the course of a due process hearing the parties reached a settlement agreement in which the district agreed to provide certain services. The hearing officer ordered the parties to abide by the terms of the agreement. Two years

later, the student initiated another due process hearing, and raised, inter alia, six issues as to the school district's alleged failure to comply with the earlier settlement agreement. The California Special Education Hearing Office, OAH's predecessor in hearing IDEA due process cases, found that the issues pertaining to compliance with the earlier order were beyond its jurisdiction. This ruling was upheld on appeal. The *Wyner* court held that "the proper avenue to enforce SEHO orders" was the California Department of Education's compliance complaint procedure (Cal. Code Regs., tit. 5, § 4600, et. seq.), and that "a subsequent due process hearing was not available to address . . . alleged noncompliance with the settlement agreement and SEHO order in a prior due process hearing." (*Wyner, supra*, 223 F.3d at p. 1030.)

11. In *Pedraza v. Alameda Unified Sch. Dist.* (N.D. Cal. 2007, No. C 05-04977 VRW) 2007 WL 949603, the District Court held that OAH has jurisdiction to adjudicate claims alleging denial of a free appropriate public education as a result of a violation of a mediated settlement agreement, as opposed to "merely a breach" of the mediated settlement agreement that should be addressed by the California Department of Education's compliance complaint procedure.

12. In issue one, Student raises five claims against District, each arising from the June 7, 2017 IEP. The claims include: 1) District failed to present a sufficiently clear and specific FAPE offer to enable Parents to give informed consent to the June 2017 IEP; 2) District failed to include a "Services" page to indicate when each service began and ended; 3) District failed to include an "Offer of FAPE" page that described the percentage of time Student would spend in general education and special education, the classroom placement, or the school of attendance; 4) District failed to include goals to address Student's needs; and 5) District failed to include a behavior intervention plan, although the IEP refers to one. To remedy these violations, Student requests reimbursement for placement at the Community School, and related transportation

costs. Each claim relates solely to the 2016-2017 school year.

13. However, during hearing, District submitted a fully executed settlement agreement, dated April 6, 2017, which released all claims against District through the end of the 2016-2017 school year. Student acknowledged that the parties entered a final settlement that resolved all claims against District for OAH case number 2017010571; including claims for the 2016-2017 school year. The agreement required District to pay reimbursement for the Community School, with transportation, through the end of the 2016-2017 school year; the same remedy requested in the present matter.

14. Student does not contend that District breached the agreement, or that District denied Student a FAPE because it breached the agreement. Rather, Student contends that issue one was not waived by the settlement agreement because those claims stemmed from the June 7, 2017 IEP, which was excluded from the waiver.

15. The settlement agreement carved out a waiver exception for the June 2017 IEP, however, that waiver exception permitted Student to raise claims that impacted Student's education following that IEP; e.g. the 2017 extended school year and 2017-2018 school year. The waiver exception did not permit Student to re-litigate claims that arose prior to the June 2017 IEP, as those claims were known at the time the agreement was executed; and included as part of the 2016-2017 school year waiver. Moreover, it is not equitable to order the same remedy that was already provided by the agreement; Student mistakenly requests that District pay for the Community School a second time for the 2016-2017 school year.

16. Pursuant to the authority discussed above, OAH does not have jurisdiction to entertain issue one, and its sub-claims, because the plain language of the settlement agreement, and the terms included therein, resolved those claims through the end of the 2016-2017 school year. The waiver exception for the June 2017 IEP does not apply

to the 2016-2017 school year. Rather, any claims arising from the June 2017 IEP relate to a period of time following the 2016-2017 school year. For those reasons, Student's issue one is dismissed.

ISSUES 2(G) AND 3(D): DISTRICT'S FAILURE TO HOLD AN IEP TEAM MEETING DURING THE 2017-2018 SCHOOL YEAR, UP TO OCTOBER 17, 2017

17. Student complains that she was denied a FAPE, because District failed to timely hold an IEP team meeting during the 2017-2018 school year, up to October 17, 2017, the date Student filed her amended complaint.

18. An IEP team must "review" the child's IEP periodically, but not less frequently than annually," to determine whether his goals are met and to make appropriate revisions to his IEP. (20 U.S.C. §1414(d)(4)(A); 34 C.F.R. § 300.324(b)(1)(i); Ed. Code, § 56380, subd. (a)(1).)

19. District convened Student's last annual IEP team meeting on November 30, 2016. Consequently, District was required to hold Student's next annual IEP by November 30, 2017. In addition, District held an IEP team meeting for Student on June 7, 2017, to review Student's present needs, recent assessments, and consider Parents' concerns. Parents, their advocate, and Parents' expert Dr. Gray, actively participated in the IEP team meeting, and the development of Student's educational program for the 2017-2018 school year. With input from Parents and their expert, District added an aide service, training for that aide, updated Student's behavior plan, and developed a transition plan to ease Student's move from the Community School to Miller. While District did not review Student's goals, that was not required until the November 2017, annual IEP team meeting. (20 U.S.C. § 1414(d)(1)(A)(i)(II); 34 C.F.R. § 300.320(a)(2)(i); Ed. Code, § 56345, subd. (a)(2).)

20. On July 3, 2017, Parents consented to the June 7, 2017 IEP. Parents did not

request an IEP team meeting between the first day of school, August 28, 2017, and October 17, 2017, nor did Student's teacher or school staff. Consequently, there was no duty for District to hold an IEP team meeting until November 30, 2017.

21. Although evidence established that District failed to implement the June 2017 IEP, as discussed herein, District's failure to implement the IEP does not establish that Student required another IEP team meeting during that limited time frame to receive a FAPE. Rather, she required material implementation of the agreed upon IEP.

22. Based on the foregoing, Student failed to meet her burden of showing by a preponderance of evidence that she was denied educational rights or that Parents' opportunity to participate in Student's IEP process was significantly impeded because District failed to hold an IEP team meeting from August 28, 2017, through October 17, 2018.

ISSUES 2(A), (B), (C), (D), (E), AND 3(B), AND (C): DISTRICT'S FAILURE TO IMPLEMENT THE JUNE 7, 2017 IEP

23. Student complains that District failed to implement any part of the June 7, 2017 IEP. In particular, Student alleges that District failed to implement the IEP on August 28, 2017, Student's first day of school, August 29, 2017, Student's second day of school, or at any point through October 17, 2017. Student's issue includes District's failure to implement the transition plan and individual aide service.

Material Failure to Deliver Services in Conformance with IEP Obligations

24. To provide a FAPE, a school district must deliver special education and related services "in conformity with" a student's IEP. (20 U.S.C. § 1401(9).) In *Van Duyn v. Baker School Dist*. 5J (9th Cir. 2007) 481 F.3d 770, the Ninth Circuit held that failure to deliver related services promised in an IEP is a denial of FAPE if the failure is "material"; meaning that "the services a school provides to a disabled child fall significantly short of

the services required by the child's IEP." (*Id.* at p. 780.) The court further held that in such a case "the materiality standard does not require that the child suffer demonstrable educational harm in order to prevail." (*Ibid.*) The court found that a district's provision of only five hours of math tutoring out of a promised 10 hours was a material failure to provide services in conformance with the student's IEP. (*Id.* at p. 781; see also *Sumter County School Dist. 17 v. Heffernan* (4th Cir. 2011) 642 F.3d 478, 481, 485-486 [failure to provide more than 7.5 to 10 hours weekly of applied behavior analysis, out of a promised 15 hours a week, was material failure].)

School Districts Must Have an IEP in Effect at the Beginning of the School Year

25. A school district must have an IEP in effect for each child with exceptional needs at the beginning of each school year. (20 U.S.C. § 1414(d)(2)(A); 34 C.F.R. § 300.323(a); Ed. Code, § 56344, subd. (b).)

Transition Services

26. A school district is required to provide a student who transitions from a private school program to a public school program with services to help the student transition between programs if the student requires transition services to receive a FAPE. (*R.E.B. v. State of Hawaii Dept. of Educ.* (9th Cir. 2017) 870 F.3d 1025, 1027-1028.)

27. Student met her burden of proof for this issue. There is no dispute that District failed to implement Student's IEP. On three occasions, July 25, August 28, and August 29, 2017, Parents attempted to place Student at Miller, in accordance with the June 7, 2017 IEP. Each time, Parents attempts were rebuffed. Staff at Miller was not familiar with Student or her IEP, and were not able to implement the IEP. District witnesses, including Ms. Jones and Ms. O'Connor, conclusively testified that District did not have an IEP in effect for Student at the beginning of the school year.

28. On August 29, 2017, Miller principal Ms. O'Connor assured Parents that District's inability to implement the IEP would be quickly corrected, and that she would call Parents by 2:00 p.m. that day. It was reasonable for Parents to rely upon Ms. O'Connor's statement, and to wait for District to contact them to confirm that Student's IEP, including the aide service, would be implemented. That contact never materialized. Ms. O'Connor did not call Parents by 2:00 p.m. that day as promised, or ever, to confirm that Miller was able to provide Student's IEP. Nor did anyone else from District ever contact Parents for that purpose.

29. District staff, including Ms. Luttbeg; Ms. O'Connor; Mr. Hager; Ms. Richard;, Mr. Villa; Ms. Parks-Orozco; and Student's case manager Mr. Burton, discussed amongst themselves how to implement Student's IEP at Miller. In late August and early September 2017, various emails between these individuals described District's need to familiarize staff with Student and her IEP. However, despite these emails, District was unable to coordinate or implement Student's IEP. Parents were not included in these emails or contacted by District staff.

30. In particular, District made no attempt to implement Student's transition plan. During hearing, evidence overwhelmingly showed that Student required a transition plan to ease her move from the Community School to Miller. During the June 2017 IEP team meeting, staff from District and the Community school, along with Parents and their expert, agreed that Student required a transition plan and worked cooperatively to develop that plan. On this basis, the IEP team offered Student a thoughtful plan that would help her successfully transition to the public school.

31. Per the transition plan, staff at Miller was required to have Student visit Miller and become acquainted with staff and her placement before the school year began; a para-educator would accompany Student throughout the school day and across all settings; peers would slowly introduce themselves to Student; the moderate-

to-severe special day classroom would have a calm, separate area where Student could self-regulate when she appeared anxious or upset, and; within five days of beginning at Miller, staff would develop educational materials for Student. In addition, Student's individual aide would receive intensive behavior training during the first two weeks of the school year by District's behavior specialists. However, District failed to implement, or attempt to implement, any part of the transition plan. Miller did not have an individual aide, or paraeducator, available for Student, nor was a behavior specialist identified who would train the aide. District did not become acquainted with Student before school began, or after the school year began. Nor did school staff try to acquaint Student with the school placement. District staff did not develop educational materials for Student; nor did District identify a moderate-to-severe special day classroom for Student at Miller, including one that had a calm, separate area for Student to self-regulate. To the contrary, the school principal was unsure where to place Student and mistakenly attempted to place her in a kindergarten classroom, despite Student being in the second grade. As a result, Student was anxious and tantrummed when she went to Miller, and Parents were placed in the untenable position of not knowing whether District could safely educate their daughter in conformity with her IEP.

32. District attempted to excuse these failings by pointing out that the first week at any school is often hectic and confusing. Yet, that does not explain why District made no attempt to correct its failure to implement Student's IEP following the first week of school. Staff at Miller continued to be unfamiliar with Student as the school year progressed, and made no attempt to inform Parents that the school was later able to accommodate Student and her IEP. For example, by September 12, 2017, Student's case carrier Mr. Burton was still unfamiliar with Student and her IEP. During the hearing, District witnesses were unsure which IEP should be implemented, and postulated that District should implement Chula Vista's 2015 IEP, even though Parents had consented to

District's June 2017 IEP. School psychologist Mr. Hager was also unsure which behavior intervention plan should be implemented. None of District's witnesses acknowledged that Student's transition plan required tasks before the school year began, and during the first weeks of school. Finally, it was not until the first day of hearing, January 23, 2018, when District informed Parents that an aide was available for Student at Miller.

33. District primarily argues that Parents' conduct of unilaterally placing Student at the Community School acted as a revocation to District's IEP. It was therefore not obligated to implement, or attempt to implement, Student's IEP. As discussed more fully herein, District failed to provide any legal authority that supports this argument. It is also contrary to the facts of this matter. For example, Parents attempted to comply with the June 2017 IEP, but were unable to do so by no fault of their own; District was unprepared to provide the IEP. District assured Parents it would contact them when Miller was able to provide the IEP, yet never did so.

34. Parents consented to implementation of the IEP in writing on July 3, 2017, and again, in person, on August 28, 2017. On August 29, 2017, by email, Parents succinctly described their consent to the June 2017 IEP, attempts to comply with the IEP, and the significance of the IEP aide service in light of Student's needs. For safety reasons, it was not tenable to place Student at Miller until the IEP aide service was available; Parents would therefore place Student at a nonpublic school. Parents' email did not revoke consent to the IEP. Rather, it was a coherent plea for District to fully implement the IEP.

35. On September 20, 2017, Parents again consented to the June 2017 IEP, in writing and without qualification, so that there was no question of their consent. At no time did Parents, verbally or in writing, revoke their consent to the IEP. And, at no time during the time frame at issue, did District inform Parents that it was able to implement the IEP. For those reasons, District's misunderstanding that Parents revoked their

consent to the IEP is not supported by facts or law.

36. District's failure to have an IEP in effect for Student at the beginning of the school year, including its failure to implement any part of the June 2017 IEP, was material, and denied Student the ability to access her education. A preponderance of the evidence therefore shows that District denied Student a FAPE for the 2017-2018 school year.

ISSUES 2(F) AND 3(G): THE BEHAVIOR INTERVENTION PLAN

37. Student alleges that she was denied a FAPE because District failed to develop a behavior intervention plan at the June 7, 2017 IEP.

Obligation to Address Behavioral Needs

38. When a special education student's behavior impedes the child's learning or that of others, a district must consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i); 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).)

39. Here, District assessed Student's behavior within the meaning of the IDEA. Credentialed school psychologist Mr. Villa and District's applied behavior analysist supervisor Ms. Luttbeg collected data over eight days in April and May 2017. Mr. Villa and Ms. Luttbeg compiled that data in a written report, dated June 7, 2017. District's

assessors observed Student in multiple settings throughout the school day. They reviewed District's 2016 psychoeducational report, Student's prior behavior interventions, school records, and outside reports, and interviewed teachers and staff. The District assessors also collected information using the Questions About Behavioral Function, an inventory provided to Student's nonpublic school teacher.

40. Ms. Villa and Ms. Luttbeg's behavior report identified problem behaviors, including elopement, inappropriate grabbing, noncompliance, and tantrums. The assessors meticulously collected data regarding the frequency, duration, and intensity of those behaviors. The report considered the effectiveness of past interventions and environmental factors. Given this information, Mr. Villa and Ms. Luttbeg hypothesized that the function of Student's behavior was to access preferred items and to obtain adult attention. Finally, the report included various recommendations to remediate, or control, the problem behaviors.

41. Mr. Villa and Ms. Luttbeg each attended the June 7, 2017 IEP team meeting. They shared their findings and report with Parents, their advocate, Dr. Gray, and the rest of the IEP team. Parents and their advocate were able to timely review the behavior assessment, and actively participated in the IEP team discussion regarding that report.

42. The June 2017 IEP team agreed to update Student's November 2016 behavior intervention plan. Student's problem behaviors remained the same, but the frequency, intensity and duration of the behaviors had changed. Consequently, District developed a behavior intervention plan dated June 7, 2017. While the June 7, 2017 IEP that was provided to Parents failed to include a copy of the updated plan, the IEP incorporated by reference the new plan, and District submitted a copy of the June 7, 2017 behavior intervention plan during the hearing.

43. The June 7, 2017 behavior intervention plan identified the behaviors that

impeded Student's learning, including elopement, tantrums, noncompliance, and inappropriate grabbing; which impeded Student's learning by taking time away from her instruction and the instruction of others. The 2017 behavior plan delineated the frequency, intensity and duration of the problem behaviors, along with environmental factors and predictors for behaviors. The behavior plan described necessary changes to instruction and supports, such as providing Student extended physical response time, and choices, when transitioning between tasks. The plan identified the function of Student's behaviors, which included escape, attention, and task avoidance; and listed functionally equivalent replacement behaviors. The plan carefully listed teaching strategies and necessary curriculum to teach the functionally equivalent replacement behaviors, and denoted effective reinforcement strategies. Finally, the plan identified District staff that would be responsible for implementing the behavior intervention plan, including Student's individual aide.

44. During the hearing, Student failed to present any evidence which impeached the appropriateness of June 7, 2017 behavior intervention plan. Consequently, based upon the foregoing, Student failed to meet her burden of persuasion that she was denied a FAPE because District failed to develop a behavior intervention plan.

ISSUES 3(A) AND (E): DISTRICT'S UNILATERAL REMOVAL OF THE AIDE SERVICE

45. Student alleges that District unilaterally removed the aide service from Student's IEP, by omitting the aide service from a prior written notice letter and from its due process complaint.

Necessity of Clear and Coherent IEP Offer

46. "[T]he informed involvement of parents" is central to the IEP process. (*Winkelman v.Parma City School Dist.* (2007) 550 U.S. 516, 524 [127 S.Ct. 1994].

Protection of parental participation is "[a]mong the most important procedural safeguards" in the Act. (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 882 (*Amanda J.*).)

47. To obtain the informed consent of parents, the IEP must be clear and easy to understand. For example, in *Union School Dist. v. Smith* (1994) 15 F.3d 1519, cert. denied, 513 U.S. 965 the Ninth Circuit held that a district is required by the IDEA to make a clear written IEP offer that parents can understand.

Parents' Right to Participate in the Educational Decision-Making Process

48. Federal and State law require that parents of a child with a disability must 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 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.) "Among the most important procedural safeguards are those that protect the parents' right to be involved in the development of their child's educational plan." (*Amanda J., supra,* 267 F.3d at pp. 892-895; see also *Drobnicki ex rel. Drobnicki v. Poway Unified School Dist.* (9th Cir. 2009) 358 Fed.Appx. 788, 789.)

49. Here, District offered Student an individual aide service in the June 7, 2017 IEP. District offered the aide, described as a supplemental service, for 28.3 hours weekly. In addition, the IEP states that the aide would be trained by District's behavior specialist during the first two weeks of school. Parents, their advocate, and expert, participated in the formulation of the June 7, 2017 IEP. In particular, Parents requested an individual aide during this meeting, and District adopted Parents' request. In significant part, Parents consented to the June 2017 IEP, because it offered Student an individual aide.

During hearing, Mother confirmed that District's aide offer was clear, and that Parents understood the offer.

50. Student argues that District unilaterally removed the aide service when Ms. O'Connor sent Parents a letter on September 7, 2017, because she failed to describe the aide service. In the letter, Ms. O'Connor's description of the June 7, 2017 FAPE offer was brief, five bullet pointed sentences, and omitted the aide service. During hearing, Ms. O'Conner persuasively testified that the omission of the aide service in this letter was an oversight. Rather, the letter was sent in response to Parents' request for reimbursement for nonpublic school placement, to deny that request and to provide them a copy of their Notice of Procedural Safeguards. In sum, Parents misconstrued Ms. O'Connor's letter as an IEP offer.

51. On September 19, 2017, District filed its complaint for due process, where it described the June 2017 IEP offer, and again omitted the aide service.

52. While District's omission of the aide service in the September 7, 2017 letter, and September 19, 2017 complaint, may be confusing to Parents, Student's issue fails because neither document was an IEP. Student failed to present any law that supports, and none could be found, that District was required to provide a clear and coherent FAPE offer in the letter or complaint.

53. Consequently, Student failed to prove by a preponderance of evidence that she was denied a FAPE because District unilaterally removed her aide service.

ISSUE 4: DISTRICT'S ABILITY TO IMPLEMENT THE JUNE 7, 2017 IEP

54. District requests an order from OAH that the June 7, 2017 IEP constituted a FAPE in the least restrictive environment, so that it may implement that IEP, absent Parent consent, should Parents wish to avail Student of special education at a public school. OAH declines to decide this issue because it is moot.

Mootness of a Controversy

55. Mootness describes the doctrine under which courts decline to hear a claim because it fails to present an existing controversy. (*Wilson v. Los Angeles County Civil Service Comm.* (1952) 112 Cal.App. 2d 450, 453.)

56. Here, Parents consented to the June 7, 2017 IEP on July 3, 2017. While Parents qualified their consent by agreeing only to the implementation of the IEP, not that it provided a FAPE, there was no part of the IEP that District was not permitted to implement. District witness Ms. Jones testified that she did not receive Parents' consent, because she retired on June 30, 2017, and no longer had access to her work email. However, Parents again informed District, in person, on August 28, and 29, 2017, of their consent to the IEP.

57. On September 20, 2017, Parents again provided written consent to the June 2017 IEP, this time to implementation of the IEP and to the FAPE offer. District stamped its receipt of the IEP's signed consent page, and evidence overwhelmingly showed that District was in possession of Parents' written consent by that time.

58. Parents attempted to comply with the IEP on July 25, August 28, and August 29, 2017, but were unable to do so because of District's inability to implement the IEP. Parents reasonably relied on Ms. O'Connor's statement that District would inform them when it was able to perform the IEP, but that information never materialized.

59. Given the foregoing, District erred in its argument that Parents' conduct of placing Student at the Community constructively revoked their consent to the IEP. Rather, that conduct was reasonable and necessary in light of District's inability to provide Student's IEP. The cases cited by District in its closing brief to support its argument that Parents' constructively revoked their consent to the IEP, are easily distinguishable from the present matter. Unlike the present matter, each case cited

involved a parent that interfered with the provision of special education or related services. For example, in *In Re: Student with a Disability* (Iowa SE 2014) 116 LRP 36824 (*In Re: Student*), the parent withdrew the student from an IEP in effect, to home school him. The court found that parent's unilateral withdrawal of student from his special education program constituted a rejection of the IEP. That case is dissimilar from the present matter because, here, District failed to have an IEP in effect for Student. Unlike *In Re: Student*, District was not providing Student special education and related services when Parents placed her at the Community School, because District was unprepared to deliver those services.

60. Similarly, in *R. A. v. West Contra Costa Unified School District* (9th Cir. 2017) 696 Fed.Appx 171, it was parent's conduct of restricting the school district's ability to assess student that interfered with student's special education program. The present matter is distinguishable because, here, it was not Parents' conduct that interfered with Student's special education program. Rather, it was District's inability to provide the IEP that prevented Student from accessing special education and related services. Parents' placement of Student at the Community School was necessary to provide Student an educational program, in light of District's inaction.

61. Consequently, Parents consented to the June 7, 2017 IEP, and did not revoke that consent. Therefore, District does not require an OAH order to implement that IEP, should Parents wish to avail Student of special education at a public school. District already has that lawful ability, based upon Parents' consent to the IEP. Therefore, there is no controversy regarding Districts right to implement the June 7, 2017 IEP. Hence, District's remedy request is moot.

Declaratory Judgments

62. Given that District's remedy request is moot, District's sole issue calls for a

purely declaratory judgement that the June 7, 2017 IEP offered Student a FAPE in the least restrictive environment.

63. OAH does not issue purely declaratory judgements when there is no issue in controversy. Special education due process hearings are limited to an examination of the time frame pleaded in the complaint and as established by the evidence at the hearing, and expressly do not include declaratory decisions about how the IDEA would apply hypothetically. (Gov. Code, § 11465.10-11465.60; Cal. Code Regs., tit. 5, § 3089; see also *Princeton University v. Schmid* (1982) 455 U.S. 100, 102 [102 S.Ct. 867, 70 L. Ed. 2d 855] ["courts do not sit to decide hypothetical issues or to give advisory opinions"]; *Stonehouse Homes v. City of Sierra Madre* (2008) 167 Cal.App.4th 531, 539-542 [court deemed the matter not ripe for adjudication because it was asked to speculate on hypothetical situations and there was no showing of imminent and significant hardship].)

64. At present, District is entitled to implement the June 7, 2017 IEP, in its entirety, absent an order from OAH, if Student returns to public school, because Parents consented to the IEP. As discussed herein, District's assertion that Parent's revoked consent to the IEP is erroneous as it was District's inability to implement Student's IEP that caused Parents to place Student at the Community School so she would not lose any educational benefit by sitting at home, waiting for District's contact that never materialized. Any contention that Parents may revoke their consent at some future date is speculative of a hypothetical situation. Moreover, this Decision does not preclude District from filing a later complaint if that situation arises. Consequently, District's issue is hypothetical and District failed to show an imminent or significant hardship if it does not receive the order it requests.

65. Based upon the foregoing, District's issue four is dismissed because it is moot.

REMEDIES

66. Administrative Law Judges have broad latitude to fashion equitable remedies appropriate for the denial of a FAPE. (*School Comm. of Burlington v. Department of Educ.* (1985) 471 U.S. 359, 370 [85 L.Ed.2d 385] (*Burlington*); *Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*).)

67. Appropriate equitable relief, including compensatory education, can be awarded in a due process hearing. (*Burlington*, *supra*, 471 U.S. at p. 374; *Puyallup, supra,* 31 F.3d at p. 1496).) The right to compensatory education does not create an obligation to automatically provide day-for-day or session-for-session replacement for the opportunities missed. (*Park, ex rel. Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033 (citing *Puyallup, supra.,* 31 F.3d at p. 1496).) An award to compensate for past violations must rely on an individualized analysis, just as an IEP focuses on the individual student's needs. (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.) The award must 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." (*Ibid.*)

68. Here, District denied Student a FAPE by failing to have an IEP in effect at the beginning of the 2017-2018 school year. District materially failed to implement a special education program that conformed with the June 7, 2017 IEP. As a result, Student was unable to access special education and related services that she required to attend school. Due to District's conduct, and failure to timely correct that conduct, it was necessary for Parents to place Student at a non-public school, the Community School, for the 2017-2018 school year.

69. The Community School is certified as a nonpublic school by the California Department of Education, and regularly contracts with District to provide students placement and special education. Mr. Liener and Dr. Gray persuasively testified that

Student benefited from her placement at the Community School. In addition, Dr. Gray provided persuasive and uncontroverted testimony that, in light of Student's disability, it was inappropriate to transfer Student to a public school this late in the school year.

70. Given the foregoing, it is equitable to order that District reimburse Parents for Student's placement at the Community School for the 2017-2018 regular school year, with related transportation costs. Parents failed to present adequate evidence of tuition costs and payment during hearing for the regular school year. Parents shall therefore provide District evidence of tuition and payment to receive reimbursement.

ORDER

1. District shall reimburse Parents for one regular school year of tuition at the Community School. To receive that reimbursement, Parents shall provide District with written documentation of tuition costs and payment. Parents shall provide District that documentation by July 15, 2018; and District shall reimburse Parents within 60 calendar days of receiving that information. The award of reimbursement for tuition is a compensatory award and shall not constitute Student's stay put placement.

2. District shall reimburse Parents' transportation costs for Student's attendance at the Community School for one regular school year, one round trip per day, based upon the mileage reimbursement rate established by the United States' Internal Revenue Service. Parents shall provide District that documentation by July 15, 2018; and District shall reimburse Parents within 60 calendar days of receiving that information.

3. Student's additional claims for relief are denied.

4. District's claim for relief is denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and Decided. Student prevailed on issues 2(a), (b), (c), (d), and (e), and issues 3(b) and (c). District prevailed on issues 2(f) and (g), and issues 3(a), (d), (e), and (g). OAH dismissed issues 1(a), (b), (c), (d), and (e), and issue 4.

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 29, 2018

/s/

PAUL H. KAMOROFF

Administrative Law Judge

Office of Administrative Hearings