

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA  
IN THE MATTER OF  
PARENT ON BEHALF OF STUDENT  
v.  
LONG BEACH UNIFIED SCHOOL DISTRICT.  
OAH CASE NUMBER 2018081089

DECISION

Parent on behalf of Student filed a due process hearing request with the Office of Administrative Hearings, State of California, on August 27, 2018, naming Long Beach Unified School District. OAH granted Student's request to amend the complaint on April 5, 2019. OAH continued the matter for good cause on May 20, 2019.

Administrative Law Judge Paul H. Kamoroff heard this matter in Long Beach, California, on July 30 and 31, and August 1, 9, and 13, 2019.

Attorneys Jenny Chau and Diana M. Maltz represented Student. Student's Mother and Father attended the hearing each day. Student did not attend the hearing. Attorney Debra K. Ferdman represented Long Beach Unified School District. Briana Graham-Ramos, special education administrator, attended the hearing each day on Long Beach's behalf.

At the parties' request, a continuance to September 9, 2019, was granted to file written closing briefs. The briefs were timely filed, the record closed, and the matter submitted for decision.

ISSUES

The issues set forth below have been clarified consistent with *J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443. The issues do not include those withdrawn by Student at the commencement of the due process hearing. No

substantive changes have been made to the remaining issues.

1. Did Long Beach deny Student a free appropriate public education, referred to as a FAPE, during the 2016-2017 school year, by failing to:
  - a. Address Student's behaviors prior to May 30, 2017; and
  - b. Appropriately address Student's behavioral needs?
2. Did Long Beach deny Student a FAPE in the February 29, 2017 individualized education program, referred to as an IEP, by failing to offer Student appropriate:
  - a. Behavior intervention services; and
  - b. Goals in the areas of (i) attention, (ii) behavior, (iii) toileting, and (iv) social-emotional?
3. Did Long Beach deny Student a FAPE in the February 21, 2018 IEP, by failing to offer Student appropriate:
  - a. Behavior intervention services;
  - b. Goals in the areas of (i) social-emotional and (ii) behavior?
4. Did Long Beach deny Student a FAPE in the June 12, 2018 IEP, by failing to offer Student:
  - a. A one-to-one behavioral aide; and
  - b. Appropriate behavior goals?
5. Did Long Beach deny Student a FAPE in the February 12, 2019 IEP, including the March 5 and 14, 2019 IEP amendments, up to the May 23, 2019 IEP amendment, by failing to offer Student appropriate:
  - a. Behavior services, including a one-to-one behavioral aide; and
  - b. Behavior goals?

## SUMMARY OF DECISION

Student had substantial autistic behaviors that disrupted his ability to access his

education. Long Beach failed to offer behavior services or goals that were necessary in light of Student's disability. This Decision holds that Long Beach denied Student a FAPE by failing to offer appropriate behavior services and goals.

## FACTUAL FINDINGS

### THE STUDENT

Student was an eight-year old boy who resided with his parents within Long Beach's boundaries. Student received special education and related services since he was two and a half years old, under the eligibility category of autism.

Autism is a developmental disorder characterized by difficulties in learning, social interaction and communication. Student demonstrated behaviors related to autism, including restricted and repetitive movement, limited eye contact, stereotypic movements, scripted speech, and self-stimulatory behavior. Student did not interact with peers. In particular, Student had significant difficulty with non-compliant, off-task, and self-stimulatory behaviors. He required constant individual assistance to start and complete any task.

As a result of his disability, Student demonstrated delayed academic, social and behavioral skills. Student's disability impacted his ability to learn and to access all aspects of his educational program, even while in a special day classroom.

### STUDENT'S EDUCATIONAL HISTORY

Long Beach provided Student special education and related services since he was three years old. Throughout his education, Long Beach placed Student in mild to moderate special day classes, first at Riley Elementary School, and later at Cubberley Elementary School. Each was a comprehensive public school. The special day classrooms were not disability specific. The classrooms had one teacher and two aides for 18 students.

Student's operative IEP for the 2016-2017 school year was dated March 2, 2016. Student was four years old and attending preschool when the IEP was developed. However, the IEP offer was for the following 2016-2017 school year, Kindergarten. The March 2, 2016 IEP predated the time-frame in dispute.

As part of the March 2016 IEP, Long Beach offered goals in the areas of language arts, mathematics, social-emotional, and speech and language. The IEP offered services for specialized academic instruction and speech and language. The IEP placed Student in a non-specific, mild to moderate, Kindergarten special day class.

The IEP stated that Student required individual instruction to progress in his education. However, the IEP failed to describe how Long Beach would provide Student individual instruction in a group special day class. The March 2016 IEP did not offer Student behavior services, individual instruction, or an aide.

Parents attended the March 2016 IEP team meeting and Long Beach provided them with a copy of their Special Education Procedural Rights. Parents were provided a written copy of the IEP and understood the offer. Parents consented to the IEP.

Student had behavior problems during Kindergarten. His classroom teacher Ms. Balbuena reported that Student's behaviors disrupted his ability to learn. In class, Student was off-task and non-compliant. He required multiple prompts and individual help to begin and complete any task. Student did not interact with others. He lacked social and adaptive skills. Student exhibited inattention and self-stimulatory behaviors throughout the school day. He required constant individual assistance.

Student only learned when provided individual instruction, which was not routinely provided in his classroom. While in a special day class for pupils with mild to moderate disabilities, Student had more behavior problems and required more assistance than other students. Despite these concerns, Long Beach did not amend the March 2016 IEP during the 2016-2017 school year.

## THE 2017 PSYCHO-EDUCATIONAL ASSESSMENT

In February 2017, school psychologist Ms. Kalter conducted a triennial psycho-educational assessment of Student. Ms. Kalter reviewed school records, interviewed Parents, Student, and the teacher, and used various standardized and non-standardized tests to assess Student. She also observed Student during school. Ms. Kalter did not testify during the hearing.

Ms. Kalter observed Student have substantial behavioral difficulty throughout the school day. In class, he needed repeated prompts to pay attention. Student displayed substantial and frequent autistic behaviors, including off-task and self-stimulatory behaviors.

Student's behaviors interfered with his ability to participate in the class and to learn. Even when seated next to the teacher, Student was inattentive and engaged in self-stimulatory and sensory seeking behavior. He required constant and multiple prompting by the teacher or aides to follow along with the class. Overall, Student did not participate during class. He was academically and behaviorally behind his disabled peers.

Cognitively, Student had scattered abilities from below average to low average. Yet, Student demonstrated his greatest deficits in behavior. For example, on an autism behavior rating scale, a non-standardized test used to assess autistic behaviors, Ms. Balbuena reported that Student's behaviors required "very substantial support." On another rating scale used to measure behaviors, the teacher rated Student at the lowest level, "Extremely Low," in the three behavior areas assessed, conceptual, social, and practical behaviors.

During her interview with the school psychologist, the classroom teacher was clear that her classroom lacked the behavioral support that Student required. Ms. Balbuena was unable to provide the constant re-direction and individualized instruction

that Student required. Ms. Balbuena did not implement applied behavior analysis or other strategies for addressing behaviors associated with autism and teaching students with severe behavioral challenges. Student's IEP did not provide behavior supervision or consultation services to assist the classroom teacher in addressing Student's behaviors so that he could focus and learn.

The school psychologist determined that Student's behaviors significantly impacted his educational performance. Ms. Kalter found that Student's IEP was insufficient. She recommended that Long Beach change Student's IEP to meet his behavioral challenges. Despite this recommendation, Long Beach did not modify Student's educational program to meet his behavior needs.

#### THE 2017 FUNCTIONAL BEHAVIOR ASSESSMENT

On May 30, 2017, Long Beach behavior specialist Linda Nguyen completed a functional behavior assessment of Student. For her assessment, Ms. Nguyen reviewed Student's records, interviewed his teacher, and observed him over four days in April 2017. Ms. Nguyen did not testify during the hearing.

In class, Student required the teacher to sit next to him to constantly verbally and physically prompt him to start and complete all work. When the teacher was not sitting next to him, and physically and verbally prompting him, Student lost focus. He did not respond to group instruction. As Ms. Balbuena or her aides could not always sit next to Student and prompt him, Student was frequently distracted and off-task.

Like Ms. Balbuena, Ms. Nguyen found that Student required more assistance than other students in the classroom, and more assistance than what his IEP provided. He required multiple directions to complete any task. Student engaged in self-stimulatory behaviors such as fiddling with objects, scripting, meaning repeating phrases, making noises, and touching himself or others throughout the school day, during which he was not engaged in learning.

During her interview with Ms. Nguyen, the classroom teacher reported that Student required an individual aide next to him throughout the day, as she and the two classroom aides could not provide Student with the level of attention he needed to remain focused and on-task. Student's educational program and classroom support was insufficient to meet his behavior needs. The classroom teacher also feared that Student's behaviors would be worse, with Student needing more support the next year, first grade, when the school day was longer and the classroom size larger.

As part of her assessment, Ms. Nguyen identified various antecedents, or causes, for Student's problem behaviors. She recommended that Student be provided a behavior intervention plan to address Student's distractibility and need for constant re-direction. Accordingly, Ms. Nguyen drafted a behavior intervention plan for Student, dated May 30, 2017. As part of the behavior intervention plan, she recommended a behavior goal, teaching strategies, reactive strategies, and the consistent use of behavior interventions.

Despite Ms. Nguyen's recommendations, Long Beach did not implement a behavior intervention plan for Student during the time frame in dispute.

#### THE 2017 TRIENNIAL IEP TEAM MEETING

Long Beach began a multi-part IEP team meeting for Student on February 28, 2017. The team met again on March 21, May 30, September 26, and October 9, 2017. The purpose of the meeting was a triennial review of Student's educational needs. The IEP offer was for the 2017-2018 school year, first grade.

All necessary IEP team members attended, including Parents. Ms. Kalter shared her psycho-educational report during the February 28 and March 21, 2017 meetings. Ms. Nguyen shared the functional behavior assessment during the May 30, 2017 meeting. Long Beach appropriately ensured Parents' attendance at each meeting and offered them a copy of procedural rights.

The IEP document described that Student “exhibit[ed] significant symptoms of autism” and “[t]hese behaviors are significantly impacting his academics.” Consistent with this description, Ms. Nguyen discussed her assessment and the need for a behavior intervention plan. However, Long Beach did not offer her proposed behavior intervention plan. To the contrary, the IEP document stated that Student did not have a behavior intervention plan, and none was included with the IEP.

The IEP team offered Student 11 goals total, including in writing, math, physical education, occupational therapy, three in speech and language, and one each in social-emotional and behavior.

The speech and language goals included expressive, receptive and pragmatic language goals. The pragmatic language goal sought to increase Student’s ability to socialize. It called for Student to express appropriate greetings at the beginning and ending of sessions to peers and staff.

The social-emotional goal called for Student to play parallel with peers. The goal was repeated from the March 2016 IEP.

The behavior goal was for Student to independently complete tasks, 80 percent of the time. Student had off task behaviors, including staring away from instruction, fiddling with objects, and making verbal noises. The goal intended to reduce the off task behavior. The IEP was unclear which Long Beach staff was responsible for implementing or tracking progress on the goal.

For services, Long Beach offered Student daily group specialized academic instruction in a special day class; weekly individual and group speech and language; weekly occupational therapy; and weekly adapted physical education.

The IEP offered various accommodations, including individual instruction, a visual schedule, use of a timer, and a token economy. However, the IEP failed to describe who would provide the individual instruction, or how that could be implemented in a group

special day class. And these accommodations were not implemented, as called for by the IEP.

In light of Student's need for individual instruction and behavior intervention, Parents requested an individual behavior aide. Long Beach denied the request. The IEP did not offer behavior services or behavior staff to assist with Student's educational program.

The IEP team acknowledged Student's behaviors and considered moving Student to a moderate-to-severe special day class because of the behavior problems. Nonetheless, Long Beach offered the same educational program in the same non-specific mild to moderate special day class, despite the current program's lack of supports to address the behavior problems interfering with Student's access to the curriculum.

Parents did not consent to the IEP when it was completed. Parents believed the IEP, without an aide, was insufficient to meet Student's behavior needs.

In a prior written notice letter dated October 23, 2017, Long Beach again denied Parents' request for an aide.

By letter on November 1, 2017, Parents consented to full implementation of the IEP. But, Parents did not agree the IEP offered Student a FAPE.

During hearing, Mother reasonably testified that she briefly delayed consenting to the IEP, because she did not understand how Long Beach could remediate Student's behaviors without designated staff, behavior services, or the collection of behavior data. Long Beach failed to present evidence that diminished Mother's testimony. For example, evidence showed that Student had behavior problems in the classroom. Yet, Long Beach failed to present data or testimony from anyone who had implemented behavior interventions for Student.

## PARENTS' REQUEST FOR AN INDEPENDENT EDUCATIONAL EVALUATION

By letter on November 15, 2017, Parents disagreed with Long Beach's functional behavior assessment and requested an independent functional behavior assessment.

In response, Long Beach agreed to fund independent educational evaluations in both psycho-education and functional behavior.

## DR. WICKETT'S FUNCTIONAL BEHAVIOR ASSESSMENT

Parents selected Dr. Corinne Wickett, Ph.D., BCBA, to conduct the independent functional behavior assessment.

Dr. Wickett had a bachelor of science in psychology, master of science in counseling with an emphasis in applied behavior analysis, and Doctorate in psychology. She conducted numerous behavior assessments for non-public agencies and a school district, and for her clinic, Wickett Behavior Solutions. Dr. Wickett was qualified to conduct a functional behavior assessment and to testify as an expert based on her education, training and experience. During hearing, Dr. Wickett persuasively testified in support of behavior services for Student.

For her assessment, Dr. Wickett reviewed school records, interviewed Mother and Student's teacher, used parent and teacher rating scales, and observed Student in various domains at school over four days in April and May 2018. Dr. Wickett collected data during her observations and completed a written report on May 31, 2018.

During Dr. Wickett's observation, the classroom teacher needed to sit directly next to Student and physically direct him, hand over hand, to start and complete tasks. If Student was "motored" through a tasks, he could complete tasks 81 percent of the time. However, without direct assistance, including during group and small group instruction, Student completed tasks zero percent of the time.

Student did not participate or respond to group instruction. During rug time,

which required group participation, Student did not interact at all. Instead, he engaged in self stimulatory behaviors such as looking down at the carpet, humming, clapping, leaning over to the side, laughing, and putting his hand over his mouth. Student interacted with peers zero percent of the time.

Dr. Wickett did not see the two aides assigned to Student's classrooms during her four days of observation. Nor did anyone use a token economy or visual schedule in the classroom, as called for in Student's IEP. Long Beach did not use any research based interventions for behavior or autism to support Student in the classroom.

Rather, the teacher was overwhelmed in her attempts to individually teach Student while simultaneously teaching the rest of the classroom of students with disabilities.

Dr. Wickett identified various problem behaviors including off-task, self-stimulatory, and non-compliant behavior. She recorded baselines for the problem behaviors, and identified the functions of the behaviors. She developed a behavior intervention plan designed to remediate the problem behaviors, including strategies, positive programming, reinforcement procedures, reactive strategies, and three behavior goals.

Dr. Wickett recorded her assessment and behavior intervention plan in a written report dated May 31, 2018. Dr. Wickett personally shared her report, behavior intervention plan, and service recommendations with Long Beach during an IEP team meeting on June 12, 2018. However, Long Beach failed to change Student's IEP as a result of Dr. Wickett's recommendations.

## THE 2018 ANNUAL IEP

Long Beach began Student's annual IEP team meeting on February 21, 2018. The meeting was reconvened on March 21, and March 26, and completed on June 12, 2018. Student was finishing first grade at Cubberley Elementary School. The IEP offer was for

the 2018-2019 school year, second grade.

Parents attended each meeting, along with all necessary IEP team members. Long Beach offered Parents a copy of their procedural rights.

Like past IEPs, the 2018 IEP reported that Student exhibited "significant symptoms of Autism" and "[t]hese behaviors are significantly impacting his academics." Like past IEPs, the 2018 IEP stated that Student did not have a behavior intervention plan, and none was included with the IEP.

The IEP team reviewed goals and services during the March 21 and 26, 2018 IEP team meetings. With substantial prompting and redirection, Student met the math goal that was repeated from the last two annual IEPs, a physical education goal, and two occupational therapy goals. Student did not meet goals in writing, social-emotional, speech and language, physical education, or behavior. Student met just 30 percent of his social emotional goal. He met 50 percent of his behavior goal for task completion.

The team offered 12 new goals in writing, math, social-emotional, speech and language, physical education, occupational therapy, and a behavior goal. The goals were similar to past goals, but reduced in difficulty. For example, the behavior goal for task completion was identical to the last behavior goal, but added visual cues and five prompts.

To meet the goals, Long Beach offered Student a similar educational program to the one it previously provided Student. The offer included daily specialized academic instruction, weekly individual speech and language therapy, adapted physical education twice weekly, and weekly occupational therapy. Long Beach did not offer behavior services.

The 2018 IEP again offered Student placement in a non-specific mild to moderate special day class.

Dr. Wickett shared her functional behavior assessment, behavior intervention

plan, proposed goals, and service recommendations, with the IEP team on June 12, 2018. She recommended a behavior intervention plan, an individual behavior aide, and supervision by an experienced behavior specialist.

For Dr. Wickett, it was important that the behavior intervention plan did not exist in a vacuum, but implemented by a trained behavior aide, with routine data collection and supervision by an experienced behaviorist. Student demonstrated substantial autistic behaviors that had not been reduced in the non-specific special day class. Student required research based behavior intervention for autism. Specifically, applied behavior analysis, a research based methodology that focused on improving certain behaviors, was necessary to reduce Student's autistic like behaviors.

Parents agreed with Dr. Wickett's recommendations. They requested behavior intervention services for Student, including an individual behavior aide.

Long Beach denied Parents' requests and Dr. Wickett's recommendations.

Long Beach's behavior supervisor Ms. Nguyen attended the June 12, 2018 IEP team meeting when Dr. Wickett shared her report and service recommendations. During the meeting, Ms. Nguyen agreed that Student required a behavior intervention plan. But, she opposed adding behavior services until after her May 30, 2017 behavior intervention plan was implemented. Ms. Nguyen did not testify during the hearing and it was unclear what she intended by this recommendation. Parents had consented to implementation of all parts of the 2017 IEP, since November 1, 2017, but Ms. Nguyen's May 30, 2017 behavior intervention plan was never adopted and included in Student's IEP. And there was no offer in the 2018 IEP for the behavior intervention plan. Rather, like the 2017 IEP, the 2018 IEP failed to include a behavior intervention plan or to describe who would be responsible for implementing a behavior plan.

Student's problem behaviors had not been addressed over the past school year. He still required individual instruction and assistance to start and complete any task. He

still demonstrated substantial autistic behaviors that significantly impacted his education. He was off-task, non-compliant, and overwhelmed with self-stimulatory behavior. Yet, Long Beach failed to offer any behavior services in the 2018 IEP.

On June 25, 2018, Parents consented for Long Beach to fully implement the IEP. Parents did not agree that the IEP offered Student a FAPE. At various times throughout the school year, and during the IEP team meetings, Parents requested behavior services, including an individual aide, for Student. Long Beach repeatedly denied the requests.

#### DR. SIMUN'S PSYCHO-EDUCATIONAL ASSESSMENT

Parents selected Ann Simun, Psy.D., to conduct an independent psycho-educational assessment. She assessed Student over several days in December 2018, and completed a written report on January 25, 2019.

Dr. Simun had a bachelor of arts in psychology, master of science in school psychology, and Doctorate in neuropsychology. Dr. Simun was a school psychologist for 10 years, was nationally board certified, conducted numerous psychoeducational and neuropsychological assessments, and attended hundreds of IEP team meetings. Dr. Simun was qualified to conduct a psychoeducational assessment and to testify as an expert based on her education, training and experience. During hearing, Dr. Simun persuasively testified in support of behavior services for Student. Long Beach failed to call any witness to challenge Dr. Simun's qualifications, assessment or testimony. For those reasons, great weight was given to her testimony.

Dr. Simun comprehensively assessed Student. She reviewed school records, conducted interviews, observed Student in a clinic and at school, and formally assessed Student using standardized and non-standardized tests.

At the time of Dr. Simun's assessment, Student was seven years old and in the second grade at Cubberley Elementary School. He attended a non-specific, second and third grade mixed special day class, taught by one teacher and two aides.

The classroom was taught by Nancy Wynne. Ms. Wynne reported that Student required constant adult assistance to perform tasks, to stop autistic behaviors like vocal stimming, and to access the curriculum, even with modifications.

Student lacked the communication skills to answer academic questions. He required constant prompting to perform academic tasks that had been modified for Student to a Kindergarten level. He required individual support throughout the school day.

During classroom observations, Student did not respond to prompts without food or other reward. He did not interact with peers. He did not respond or appropriately respond to teacher questions or instructions. The classroom did not use a visual schedule or token economy, as called for by Student's IEP.

The classroom lacked behavior interventions and research based methodologies for teaching students with behavior problems or autism.

During recess, Student did not verbalize or interact with others. He engaged in repetitive play and was unsupported by staff.

During testing and observations, Student had significant difficulty attending to tasks, exhibited nearly constant stimming, and had difficulty understanding directions.

Cognitive testing revealed scattered scores, from very delayed to average skills. Various standardized testing showed that Student had significant impairments in speech, language, visual motor, fine motor, and sensory processing skills.

Dr. Simun evaluated Student's attention using multiple methods, including observations, standardized testing, and rating scales. Results showed that Student's attention was impaired. Student could not complete any work independently and required frequent and repeated prompts to stay on task.

Student was constantly off task unless he received individual support. He did not initiate or complete any task independently, and required constant and repeated

prompting. School staff often motored Student through tasks, meaning the aide or teacher did the task for Student using hand over hand movements. When an aide or teacher did not work individually with Student, he did not respond, participate or learn. Assessment results showed that Student did not progress behaviorally in his educational program.

Dr. Simun used standardized testing to assess Student's academic progress. She compared scores she obtained in December 2018, to scores obtained from the same test administered by Long Beach in February 2017. A comparison of the tests showed that Student significantly declined in reading skills, dropping from average to low average in 2017, to impaired in 2018. Math showed no growth and continued to be severely impaired. Spelling continued to be impaired with skills at a beginning Kindergarten level. Testing results showed that Student did not progress academically in his educational program.

Dr. Simun concluded that Student's behaviors impeded his ability to benefit from his education. She opined that Long Beach's failure to provide consistent or adequate behavioral support resulted in Student's inability to learn, socialize, or progress. Similar to Ms. Kalter in 2017, and Dr. Wickett in 2018, Dr. Simun found that Student's educational program was insufficient to meet his educational needs, particularly his behavioral needs.

Dr. Simun recommended that Student be provided an individual behavior aide, supervised by a board certified behavior analyst. Dr. Simun also believed that Student required research based behavior intervention services developed to address autistic behaviors. As a psychologist and behavior expert, it was important to Dr. Simun that a behavior intervention plan be implemented by trained behaviorists and supervised by a behavioral specialist. It was not appropriate for the classroom teacher to be solely responsible for implementing Student's behavior plan and services.

For example, Student required a systematic token economy to remediate his behaviors, which required constant, individual attention. That level of individual support was not possible for the classroom teacher and two classroom aides.

Dr. Simun included her findings and recommendations in a written report dated January 25, 2019. She shared her report with Long Beach during an IEP team meeting held on March 5, 2019. However, Long Beach failed to modify Student's educational program as a result of Dr. Simun's report or recommendations.

### THE MARCH 5, 2019 IEP

Long Beach began Student's next annual IEP team meeting on March 5, 2019. Student was 8 years old and in the second grade.

Parents attended the IEP team meeting with their attorney. All necessary Long Beach staff attended, including classroom teacher Ms. Wynne and a school behavior intervention specialist, Ms. Yamamoto. Dr. Simun attended and reviewed her report with the IEP team.

Dr. Simun and the classroom teacher agreed that Student was severely impaired in attention. He could only sustain attention for 30-60 seconds. Student required multiple prompts and constant individual assistance to complete all tasks. He played alone and was sometimes non-responsive to prompting.

Student's speech was unintelligible. In receptive language, Student was between two and four years of age. In expressive language, Student was below two years old. Ms. Wynne reported that Student's functional language was severely impaired. He had no spontaneous language and normally echoed what the teacher said.

The IEP document again stated that Student exhibited significant autism behaviors that substantially impacted his academics. During the meeting, Dr. Simun questioned why Long Beach was not using a behavior plan for Student and explained the benefits of a behavior plan. The team, including Ms. Wynne, acknowledged that a

behavior plan was not being used for Student. There was no question that Ms. Nguyen's May 30, 2017 behavior intervention plan had not been included in Student's IEP or implemented. Despite the clear need for behavior support, Long Beach continued to deny Student a behavior plan.

The IEP team reviewed Student's progress towards past goals. With substantial prompts and individual assistance, Student met 8 of 11 goals. During hearing, Dr. Simun was critical of the IEP goals. She described that Long Beach had decreased the difficulty of goals each year, while increasing the amount of prompts permitted to achieve the goals. Some goals permitted unlimited prompts and redirection. In addition, teacher and staff motored Student through tasks, meaning he could only meet goals with individual, physical assistance. Consequently, Dr. Simun persuasively opined that the goals were not a reliable indicator of Student's abilities as he was not able to independently complete the tasks called for in the goals.

In addition, Dr. Simun pointed out that standardized and non-standardized testing showed that student was decreasing in his educational skills each year. That testing was a less subjective and more reliable indicator of Student's abilities than the reports of progress on his goals.

School members of the IEP team also reported that the classroom support was insufficient to meet Student's unique needs. For example, Ms. Wynne stated that she needed help in the classroom for Student. She was "completely exhausted" by trying to individually teach Student while teaching the rest of the class. The classroom teacher again made clear that Student required an individual behavior aide, because Student's behaviors caused him to be distracted and off task, and unable to benefit from instruction. However, the teacher's plea for help was ignored by Long Beach, which again failed to offer an aide or behavior services.

Similarly, Long Beach denied Dr. Simun's and Parents' requests for a behavior

plan and individual aide. No material changes were made to Student's IEP.

### THE MARCH 14, 2019 IEP

Long Beach held another IEP team meeting for Student on March 14, 2019. Parents attended, with their attorney and Dr. Simun. All necessary IEP team members attended for Long Beach.

Student's behaviors had grown worse. His self-stimming had become more frequent and violent. For example, he now repeatedly punched himself in his leg.

In response, Long Beach offered another functional behavior assessment, by a Long Beach selected assessor. Long Beach also offered an augmentative or alternative communication assessment. Parents consented to both assessments.

During the meeting, Parents again requested behavior services. Long Beach again denied the request, despite the evidence of Student's need for immediate behavior intervention, and the delay in waiting for completion of another behavior assessment. No changes to Student's placement or related services were made during the IEP team meeting.

### MS. LAU'S FUNCTIONAL BEHAVIOR ASSESSMENT

Long Beach selected Nickie Lau to conduct a functional behavior assessment for Student. Ms. Lau was not a school employee. She was a Board Certified Behavior Analyst and the regional clinical director of Autism Behavior Consultants, a nonpublic agency. Autism Behavior Consultants was a private agency certified by the California Department of Education to assess and deliver behavior services to students with autism.

Ms. Lau was an experienced and competent assessor who credibly testified during the hearing. She was called as a direct witness by both Student and Long Beach. No evidence was submitted that challenged her qualifications, assessment, or testimony. For these reasons, great weight was given to her testimony.

As part of her assessment, Ms. Lau reviewed Student's school records, interviewed Parents, teacher and school staff, informally assessed Student using rating scales, and observed Student at school over three days in May 2019. She found that Student had serious behaviors which disrupted his ability to benefit from his educational program.

For example, Ms. Lau found that Student had a serious problem with vocal stereotypy. Vocal stereotypy was an autism related behavior in which vocalizations are out of context, repetitive, incomprehensible, or non-language sounds. Ms. Lau hypothesized the function of Student's vocal stereotypy included sensory stimulation, inattention, and escape of non-preferred tasks.

In addition, per a behavior rating scale, Ms. Wynne rated Student as non-social 100 percent of the time.

During interviews, the teacher reported that Student wholly lacked independence on tasks and routines. He required modified work, even for the special day class. Student lacked functional speech. Student was overwrought with stimming behavior. And he frequently and violently pounded his knuckles on his thighs and other objects.

Similar to Dr. Wickett and Dr. Simun, Ms. Lau observed Student demonstrate a high level of off-task, non-compliant and self-stimulatory behaviors in the classroom. Similarly, she also observed there were seldom or consistent consequences to his behavior. For example, there was no behavior intervention plan in place, or any behavior strategies. The teacher and classroom staff did not use research based interventions for behavior or autism.

During hearing, Ms. Lau unequivocally testified that Student's educational program was inappropriate to meet his behavior needs. In sum, Student's IEP lacked sufficient behavioral support to meet his unique needs.

Ms. Lau proposed behavior interventions that were identical to those

recommended by Dr. Wickett and Dr. Simun. Each expert recommended a behavior intervention plan, an individual behavior aide, and supervisions by a behavior specialist.

In particular, Ms. Lau recommended research based autism interventions including discrete trial therapy, four behavior goals, and teaching in an “isolated setting (e.g. in a 1:1 teaching setting).” She clarified that Student required applied behavior analysis throughout each school day by a trained, individual behavior aide, routinely supervised by an experienced behavior supervisor, such as a Board Certified Behavior Analyst, or someone working on that certification.

As a careful therapist, Ms. Lau emphasized that it was important for Student to receive research based therapy to decrease his autistic behaviors like vocal stereotypy and self-stimming. Student’s autism related behaviors impeded his ability to access his education, even in a special day class with a modified curriculum. Unless Student learned to control those behaviors, he would be unable to focus on learning academic and social skills, and generalizing those skills into a group setting.

Long Beach adopted Ms. Lau’s recommendations in an IEP dated May 23, 2019.

#### THE MAY 23, 2019 IEP

On May 23, 2019, Long Beach convened an IEP team meeting for Student. Parents attended with their attorney, along with all necessary IEP team members. Ms. Lau attended and reviewed her functional behavior assessment and recommendations.

Following Ms. Lau’s’ recommendations, Long Beach offered Student behavior services. For the 2019-2020 school year, Long Beach offered Student an individual behavior aide for the entire school day, with 80 hours per year of supervision by an experienced behavior specialist. Long Beach also offered a behavior intervention plan, which Ms. Lau developed using Long Beach’s letterhead.

During hearing, Long Beach administrator Ms. Graham-Ramos testified that Long Beach’s decision to adopt Ms. Lau’s recommendation for behavior services was not

based on any change in Student's behaviors. Student had always demonstrated non-compliant, off-task, and self-stimulatory behaviors. Rather, the decision to offer behavior services was based solely on the fact that Long Beach had selected Ms. Lau for the functional behavior assessment. In sum, Long Beach had rejected Dr. Wickett and Dr. Simun's recommendations because Parents had selected those assessors.

Parents consented to implementation of the May 23, 2019 IEP. During hearing, Student withdrew any issues following this IEP.

### STUDENT'S WITNESSES

Student called Dr. Simun, Dr. Wickett, and Parents, to testify. Student and Long Beach jointly called Ms. Lau as a witness. Each witness called by Student had personal knowledge regarding Student and his unique needs.

Dr. Simun, Dr. Wickett, and Ms. Lau each reviewed Student's records. Each met and interviewed Student and his teachers. Each observed Student in the classroom. Each expert witness directly assessed Student. Dr. Simun, Dr. Wickett, and Ms. Lau were experienced experts in the area of testimony they provided. Each was knowledgeable regarding Student's educational program and disability.

Dr. Simun, Dr. Wickett, and Ms. Lau's testimony was in alignment with each other's, and consistent with school records and teacher's comments. Each was deliberative during testimony, yet unequivocal in their description that Student's educational program lacked sufficient behavior support.

Dr. Simun, Dr. Wickett, and Ms. Lau each independently arrived at the same conclusion. Student required research based autism behavior interventions, provided by an individual behavior aide and supervised by an experienced behaviorist. Student's autism related behaviors interfered with his ability to learn for some time, and the behaviors would not be ameliorated without direct behavior interventions. Student's experts were persuasive and Long Beach failed to impugn the credibility of these

witnesses.

Student's unaddressed behaviors impacted his ability to learn in the classroom for some time. For this reason, Dr. Simun recommended that, as a remedy, Student be provided compensatory education. She opined that Student should receive compensatory behavior services to make up for behavior services that should have been provided since Student was in Kindergarten. Dr. Simun was also concerned that Student's behaviors had deprived him of academic learning. For this reason, she also recommended compensatory academic services.

The traditional school year for Long Beach consisted of 38 weeks. Dr. Simun reasonably testified that Student required compensatory education for each week that Long Beach failed to provide appropriate services. Dr. Simun was persuasive and Long Beach failed to present any evidence that diminished her credibility or recommendations.

Parents were diligent advocates for Student. They cooperated with Long Beach. They attended multiple IEP team meetings each year. Parents consented to each assessment proposed by Long Beach and made Student available for each assessment.

Parents requested behavior services for Student several times each year. Each time, Long Beach denied their requests. Overall, Parents' testimony supported that Student required the behavior services recommended by Dr. Simun, Dr. Wickett, and Ms. Lau.

However, Parents' testimony did not support their claim that Long Beach failed to appropriately address Student's toileting problems. Mother testified that toileting problems normally occurred after school. Student had experienced just two toileting accidents at school. This small problem did not warrant a goal or service in that area.

#### LONG BEACH'S WITNESSES

In addition to Ms. Lau, Long Beach called two witnesses. Long Beach called Briana

Graham-Ramos and Dennis Sweningson.

Ms. Graham-Ramos was an experienced school administrator. She was responsible for overseeing 20 school sites within Long Beach. However, Ms. Graham-Ramos was not a special education teacher, therapist, psychologist or behavior specialist. She was not certified to teach special education or qualified to assess Student. Ms. Graham-Ramos lacked the experience or training to credibly review Student's assessments or educational data that pertained to this matter.

Moreover, Ms. Briana Graham-Ramos was not directly familiar with Student. She had never taught, assessed, or provided Student services of any sort. She attended some of his IEP team meetings, but her participation was limited to taking meeting notes. Nor had she interviewed Parents, Student, or his teachers regarding Student's needs.

Ms. Graham-Ramos had occasionally observed classrooms Student was in, but not for the purpose of observing Student. She recalled that he needed frequent prompts and more redirection than other students. Outside of this recollection, Ms. Graham-Ramos admitted that she had no independent knowledge of Student. She did not know what was implemented in the classroom. And she was unfamiliar with the training and experience of the classroom teachers and aides.

Consequently, Ms. Graham-Ramos lacked personal knowledge of Student that was necessary to provide credible percipient testimony. For these reasons, little weight was given to her testimony.

Ms. Graham-Ramos attempted to show that Student had done well at school without behavior services. She primarily relied upon Student's progress on goals to support this theory. However, Ms. Graham-Ramos lacked any personal knowledge regarding the goals. She had not developed or implemented any goal. She could not credibly comment regarding the appropriateness of the goals. She did not know whether Student actually met the goals, or how they were met. Ms. Graham-Ramos'

knowledge of the goals was limited to reading through the IEPs during the hearing.

Dr. Simun more persuasively established that Student required substantial assistance to complete any task, thereby diminishing the reports of progress on the goals.

Lastly, Long Beach called Dennis Sweningson. Mr. Sweningson was an experienced behavior intervention manager for Long Beach. He was not identified as a witness for this matter and was called to rebut the testimony of Dr. Wickett.

Mr. Sweningson lacked any independent knowledge of Student. He had never met, interviewed, observed, or assessed Student. He had not interviewed Parents, teachers, or any staff regarding Student.

Although a behavior supervisor at Long Beach, Mr. Sweningson did not supervise school staff during their testing or observations of Student. Mr. Sweningson did not attend Student's IEP team meetings or discuss Student with anyone who had. He was not familiar with Student's IEPs, including who attended the IEP team meetings, what was discussed during those meetings, or what was offered in the IEPs. He did not know what was implemented in Student's classroom. He was not familiar with Student's teachers, aides, or service providers, or their experience or training. Mr. Sweningson was not familiar with Student, his unique needs, or his educational program.

Mr. Sweningson reviewed some of Student's records just prior to the hearing, in preparation for his testimony. On this basis, Mr. Sweningson attempted to rebut the validity of Dr. Wickett's assessment and testimony. Mr. Sweningson was not persuasive.

For example, Mr. Sweningson criticized the behavior goals recommended by Dr. Wickett because they lacked baseline data. However, Dr. Wickett carefully included baseline data for the goals earlier in her report, which was overlooked by Mr. Sweningson.

Mr. Sweningson also complained that Dr. Wickett's report lacked service

recommendations. He opined that Long Beach was therefore not informed that Student required behavior services. However, Dr. Wickett more persuasively testified that she waited to review her report with the IEP team before providing her service recommendations. In particular, Dr. Wickett wanted to confirm that Long Beach was offering the same mild to moderate special day class before recommending the level of behavior support needed for Student. When it was clear the IEP team was offering the same classroom, Dr. Wickett recommended behavior services, including a behavior intervention plan, individual aide, and behavior supervision. She provided those recommendations to Long Beach during the June 12, 2018 IEP team meeting, which are reflected in the IEP document. However, Mr. Sweningson was unaware of that fact.

Interestingly, Mr. Sweningson did not attempt to rebut Dr. Simun or Ms. Lau's assessments or testimony. Dr. Simun and Ms. Lau's testimony was similar to Dr. Wickett's, with almost identical recommendations. It therefore did not make sense to rebut only Dr. Wickett's testimony. Nor did Mr. Sweningson attempt to rebut evidence from Ms. Kalter, Ms. Balbuena, or Ms. Wynne, which also showed the school's program was insufficient to meet Student's behavioral needs.

Mr. Sweningson was not a careful witness. Without a basis of knowledge, he testified in support of an educational program that had already been deemed insufficient by the May 2019 IEP team. He made service recommendations for a student he was unfamiliar with. Given his lack of familiarity with Student and his inability to refute Dr. Wickett's testimony, little weight was given to Mr. Sweningson's testimony.

Long Beach failed to call school employees who had personal knowledge of Student's educational program.

For example, Ms. Balbuena taught Student during kindergarten and first grade. She had personal insight to Student's academic performance and behavior in the classroom on a daily basis. However, Long Beach did not call her as a witness. Similarly,

Long Beach did not call Student's second grade teacher, Ms. Wynne, or any teacher or aide to testify. Likewise, Long Beach failed to present testimony from any school employee who had assessed or delivered services to Student. Long Beach's failure to call any school witness who had personal knowledge of Student harmed its ability to contradict the testimony of Student's witnesses.

## LEGAL CONCLUSIONS

### INTRODUCTION – USE OF LEGAL CONCEPTS THROUGHOUT THE DECISION

In this discussion, unless otherwise indicated, this introduction's legal citations are incorporated into each issue's conclusion. All references to the Code of Federal Regulations are to the 2006 version.

### LEGAL FRAMEWORK UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations. (20 U.S.C. §1400 et. seq.; 34 C.F.R. § 300.1 (2006) et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The Individuals with Disabilities Education Act is often referred to as the "IDEA." The main purposes of the IDEA are:

1. to ensure that all children with disabilities have available to them a free appropriate public education 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).)

A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "Special

education” is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) “Related services” are transportation and other developmental, corrective or supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).)

In general, an IEP is a written statement that is developed by parents and school personnel using the IDEA’s procedures. The IEP describes the child’s present levels of performance, needs, and academic and functional goals related to those needs. It also provides a statement of the special education; related services, which include transportation and other supportive services; and program modifications and accommodations that will be provided for the child to work towards the stated goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14) and (26), 1414(d)(1)(A); Ed. Code, §§ 56031, 56032, 56345, subd. (a) and 56363 subd. (a); 34 C.F.R. §§ 300.17, 300.34, 300.39 Cal. Code Regs., tit. 5, § 3001, subd. (p).)

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 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.)

In *Endrew F. v. Douglas County School Dist.* (2017) 580 U.S. \_\_\_\_ [137 S.Ct. 988, 1000] (*Endrew F.*), the Supreme Court held that a child's "educational program must be appropriately ambitious in light of his circumstances." "Every child should have a chance to meet challenging objectives." (*Ibid.*) *Endrew F.* explained that "this standard is markedly more demanding than the 'merely more than de minimis' test... The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." (*Id.* at pp. 1000-1001.) The Court noted that "any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal." (*Id.* at p.999.) However, the Supreme Court did not define a new FAPE standard in *Endrew F.* The Court acknowledged that Congress had not materially changed the statutory definition of a FAPE since *Rowley* was decided and so declined to change the definition itself. The Ninth Circuit affirmed that its FAPE standard comports with *Endrew F.* (*E.F. v. Newport Mesa Unified School Dist.* (9th Cir. 2018) 726 Fed.Appx. 535.)

The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, assessment, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. §1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Generally, a party is limited to filing a request for due process two years from the date the person knew or should have known of the facts which form the basis for the request for a due process hearing.

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] (*Schaffer*); see 20 U.S.C. §1415(i)(2)(C)(iii).) Here, Student requested

the hearing, and therefore had the burden of proof on the issues.

#### ISSUES 1(A) AND (B): THE 2016-2017 SCHOOL YEAR

Student complains that Long Beach denied him a FAPE by failing to address his behavioral needs during the 2016-2017 school year. The IEP in place during the 2016-2017 school year was dated March 2, 2016.

The statute of limitations for special education due process claims requires a party to file a request for a due process hearing within two years from the date the party knew or had reason to know of the facts underlying the basis for the request. (Ed. Code, § 56505, subd. (l); 20 U.S.C. § 1415(f)(3)(c).) The statute does not apply to claims filed by a parent, where the parent was prevented from requesting the due process hearing due to either of the following: (1) specific misrepresentations by the local educational agency that it had solved the problem forming the basis of the due process hearing request; or (2) the withholding of information by the local educational agency from the parent that as required to be provided to the parent. (Ed. Code, § 56505(l); 20 U.S.C. § 1415(f)(3)(d).)

Here, the IEP in effect for Student during the 2016-2017 school year was dated March 2, 2016, which was more than two years prior to the filing of Student's complaint on August 27, 2018. Student's issue was limited to an allegation that the IEP failed to appropriately address his behavioral needs.

The next IEP in effect for Student was for the 2017-2018 school year. That annual IEP was developed on February 28, 2017, March 21, 2017, May 30, 2017, September 26, 2017, and completed on October 9, 2017. That IEP was not offered or in place until the commencement of the 2017-2018 school year. There were no amendments to the March 2, 2016 IEP, that took effect during the 2016-2017 school year. Consequently, the March 2, 2016 IEP was the operative IEP for Issue 1.

Student filed his complaint on August 27, 2018. Student failed to assert that the statutory time-frame for this matter exceeded two years based upon Parents'

knowledge of underlying facts. To the contrary, evidence established that Parents attended the March 2, 2016 IEP team meeting and were provided a copy of Special Education Procedural Rights by Long Beach. Parents were provided a written copy of the IEP and understood the offer. Parents were aware of the educational goings on inside and outside of the classroom when the March 2, 2016 IEP was developed. Parents therefore knew, or reasonably should have known, of the facts underlying their claim when the March 2, 2016 IEP was offered. (*M.M. & E.M. v. Lafayette School Dist.* N.D.Cal., Feb. 7, 2012 Nos. CV 09– 4624, 10–04223 SI) 2012 WL 398773, p.18, aff'd by *M.M. v. Lafayette School Dist.* (9th Cir. 2014) 767 F. 3d 842.)

Student also failed to assert that an exception to the two-year statute of limitations existed for this matter. (*K.P. v. Salinas Union High School Dist.* (N.D.Cal. Apr. 8, 2016, Case No. 5:08-cv-03076-HRL) 2016 WL 1394377, \*\*10-11, preventing student from challenging IEP outside of the two-year statute of limitation as no exception shown.)

As such, Student's claims are limited to those that arose on or after August 27, 2016. Consequently, the March 2, 2016 IEP is barred from Student's issues because it predates the statute of limitations.

Portions of the 2016-2017 school year occurred within the two-year statute of limitations. However, a parent may not bring a due process claim challenging the appropriateness of an IEP that was created outside the statute of limitations except for an implementation issue, although the IEP document was in effect within the statute of limitations. Special education law does not recognize the doctrine of continuing violations as an exception to the two-year statute of limitations. Student did not allege that Long Beach failed to implement the March 2, 2016 IEP. Student is therefore barred from challenging Long Beach's offer of FAPE during the 2016-2017 school year. (*J.L. v. Ambridge Area School Dist.* (W.D.Pa.2008) 622 F.Supp.2d 257, 268-269; *Moyer v. Long*

*Beach Unified School Dist.* (C.D.Cal. Jan 24, 2013, No. CV 09–04430 MMM (AJWx) 2013 WL 271686, fn. 71, \*7.)

Based upon the foregoing, Student’s Issue 1 is barred by the statute of limitations.

ISSUES 2(A), 3(A), 4(A), AND 5(A): LONG BEACH’S FAILURE TO ADDRESS STUDENT’S BEHAVIOR NEEDS DURING THE 2017-2018 AND 2018-2019 SCHOOL YEARS

Student complains that Long Beach denied him a FAPE by failing to address his behavior needs during the 2017-2018, and 2018-2019 school years. Student complains that Long Beach failed to provide behavior services.

In the case of a child whose behavior impedes his or her learning or that of others, the IEP team must consider, when appropriate, “strategies, including positive behavioral interventions, strategies, and supports to address that behavior.” (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i); Ed. Code, § 56341.1, subd. (b)(1).) The failure to develop a behavior intervention plan when a child needs one can result in a denial of FAPE. (*R.K. v. New York City Dep’t of Educ.* (E.D.N.Y. March 28, 2011, No. 09-CV–4478 (KAM)(RLM).) 2011 WL 1131522, aff’d, (2d Cir. 2012) 694 F.3d 167.)

Related services include academic, therapeutic, behavioral, or other services as may be required to assist a child in benefiting from special education. (20 U.S.C. § 1401(26)(A); Ed. Code, § 56363, subd. (a); *Irving Independent School Dist. v. Tatro* (1984) 468 U.S. 883, 891 [104 S.Ct. 3371, 82 L.Ed.2d. 664]; *Union School Dist. v. Smith*, (9th Cir. 1994) 15 F.3d 1519, 1527.) Related services shall be provided “when the instruction and services are necessary for the pupil to benefit educationally from his or her instructional program.” (Ed. Code, § 56363, subd. (a).)

## THE 2017-2018 SCHOOL YEAR

The IEP in place for the 2017-2018 school year was held February 28, March 21, May 30, September 26, and completed October 9, 2017.

A preponderance of evidence showed that Long Beach had notice of Student's behavior problems throughout the 2017-2018 school year, and failed to adequately address them in his educational program. For example:

In February 2017, school psychologist Ms. Kalter assessed Student and determined that his behaviors significantly impacted his educational performance. She reported that Student's IEP was insufficient to meet Student's behavior needs. She recommended that Long Beach modify Student's educational program to address his behavioral challenges. Yet, Long Beach failed to provide any behavior services, despite Ms. Kalter's findings.

Similarly, in spring 2017, Student's classroom teacher Mrs. Balbuena reported that Student had significant behavioral difficulty in the classroom and that he required additional support. Student did not interact with others, lacked social and adaptive skills, had low academic abilities, and was inattentive. Student only learned when provided individual instruction, which was not possible without an individual aide in the classroom. Ms. Balbuena reported that Student had more behavior problems and required more assistance than other students in the special day classroom. Ms. Balbuena made clear that Student required additional behavioral supports to access his education. Yet, Long Beach did not offer an aide or behavior services, despite the classroom teacher's requests for help.

In May 2017, Long Beach behavior specialist Ms. Nguyen completed a functional behavior assessment of Student. She found that Student only learned when provided individual instruction and constant prompting. Student engaged in autistic behaviors including off-task, non-compliant and self-stimulatory behaviors throughout the school

day. Accordingly, Ms. Nguyen recommended that Student be provided a behavior intervention plan, a behavior goal, teaching strategies, reactive strategies, and the consistent use of behavior interventions. Parents routinely requested behavior services, including a behavior aide, for Student, in response to Ms. Balbuena's concerns and the assessor's recommendations. Despite this information, Long Beach failed to offer Student any behavior intervention services.

Moreover, the annual IEP, like his past IEP, stated that Student "exhibit[ed] significant symptoms of autism" and "[t]hese behaviors are significantly impacting his academics." In addition, the IEP document stated that Student required individual instruction to meet his unique needs. Yet, Long Beach, over the series of IEP team meetings, failed to offer the use of a behavior intervention plan or other strategies to address those behaviors. For the reasons stated above, Student's behaviors were severe enough to warrant a behavior intervention plan and behavior services in addition to existing classroom supports, and such a plan was recommended by Ms. Nguyen. However, the IEP failed to offer behavior services, individual instruction, an aide, or any additional behavioral supports.

In sum, the school psychologist, school behavior specialist, classroom teacher, IEP document, and Parents, all notified Long Beach that Student's required behavior intervention services in light of his disability, to supplement insufficient existing classroom supports.

Yet, Long Beach did not offer or implement a behavior intervention plan, behavior services, individual instruction, or an aide, in Student's 2017-2018 IEP.

Based upon the foregoing, Long Beach was obligated to provide behavior services during the 2017-2018 school year. Long Beach failed to do so, and denied Student a FAPE on that basis.

## THE 2018-2019 SCHOOL YEAR

Student's problem behaviors did not decrease during the 2017-2018 school year. Long Beach had notice of those problems when it developed the IEP offer for the 2018-2019 school year. For example:

In May 2018, Dr. Wickett assessed Student and found that Student required individual instruction with frequent prompting to learn. The classroom teacher had to sit next to Student, and directly touch him for him to engage in individual instruction. During group instruction, including small group instruction, Student completed tasks zero percent of the time. It was normal for Student to not participate or respond to any teacher instruction. Instead, he engaged almost constantly in autistic behaviors, including self-stimulatory behaviors.

The teacher was frequently without any aides to teach Student and a classroom of up to 18 disabled students. She was overwhelmed in her attempts to individually teach Student while simultaneously teaching the rest of the classroom. The classroom did not use a behavior intervention plan, or any research based interventions for behavior or autism. The existing classroom supports were insufficient to meet Student's behavioral needs, and without adequate behavioral support, Student could not access the curriculum and learn.

Dr. Wickett identified various problem behaviors including off-task, self-stimulatory, and non-compliance behavior. Student's behaviors impeded his ability to benefit from classroom instruction.

Accordingly, Dr. Wickett recommended a behavior intervention plan, behavior goals, an individual behavior aide, and supervision by a behavior specialist. She reported her findings to Long Beach during the June 12, 2018 IEP team meeting.

Dr. Wickett persuasively testified during the hearing in support of those same recommendations. Long Beach failed to present any credible evidence to impugn her

qualifications or to rebut her testimony. Long Beach witness Mr. Sweningson attempted to impeach Dr. Wickett's assessment and rebut her testimony. However, he was not familiar with Student or his educational program. And his testimony was inconsistent with a preponderance of evidence submitted for this matter. Mr. Sweningson was therefore not a reliable witness and little weight was given to his testimony.

In addition, Student's annual IEP team meeting, held on February 21, March 21, March 26, and June 12, 2018, repeated that Student exhibited "significant symptoms of Autism" and "[t]hese behaviors are significantly impacting his academics." At that time, Student still required individual instruction and multiple prompts to complete any task. There was no decrease to the substantial autistic behaviors that significantly impacted his education.

Parents continued to request behavior interventions. Ms. Nguyen again stated that Student required a behavior intervention plan. The second grade classroom teacher, Nancy Wynne, reported that Student required additional behavior support in the classroom. His autistic behaviors, like vocal stimming, distracted from and disrupted his education. He required constant prompting to perform academic tasks that had been modified for Student to a Kindergarten level. Ms. Wynne was overwhelmed and made clear that Student required an individual aide to access his education.

Yet, despite clear evidence that existing classroom supports were insufficient, Long Beach rejected those valid requests. The 2018 IEP did not offer a behavior intervention plan, and none was included with the IEP. The IEP failed to designate staff to support Student's behavior. And the IEP failed to offer any behavior intervention services.

Student did not progress behaviorally following the 2018 IEP. Dr. Simun assessed Student in December 2018 and found that his behaviors continued to significantly disrupt his education. Student's educational program lacked any research-based

behavior or autism interventions, including a behavior intervention plan, visual schedule or token economy. As a result, Student was constantly off task and did not initiate or complete any task independently. Staff motored Student through tasks, but he was unable to perform academic tasks, or achieve his goals, independently.

Standardized academic testing showed that Student had regressed academically, and failed to make meaningful educational progress. Dr. Simun credibly opined that Student would not progress academically until his behavior problems were remediated. Dr. Simun reported her findings to Long Beach at the March 5, 2019 IEP team meeting.

During hearing, Dr. Simun provided uncontroverted testimony that Student's educational program was not appropriate to meet his behavior needs. Dr. Wickett, Ms. Lau, and Parents provided similar testimony. This testimony was also consistent with reports from Ms. Kalter, Ms. Balbuena, and Ms. Wynne.

Yet, Long Beach failed to change Student's IEP to include behavior services. Long Beach continued to ignore Ms. Wynne's requests for help, and ignored the March 2019 IEP document's statement that Student exhibited significant autism behaviors that substantially impacted his academics. As of March 5, 2019, Long Beach failed to offer Student a behavior intervention plan, behavior services, or to designate behavioral staff to support Student's IEP.

On March 14, 2019, the IEP team reported that Student's behaviors had grown worse. His self-stimming had become more frequent and violent. He now repeatedly punched himself in his leg. In response, Long Beach offered another functional behavior assessment, by a Long Beach selected assessor, and an augmentative or alternative communication assessment. Parents consented to both assessments and requested behavior services. Long Beach again denied the request and no changes were made to Student's IEP.

Long Beach did not offer Student behavior intervention services until May 23,

2019. That offer followed Ms. Lau's functional behavior assessment, where she found that Student's educational program was inappropriate to meet his behavior needs. She recommended a behavior intervention plan, an individual behavior aide throughout the school day, and close supervision by a behavior specialist. These recommendations were identical to those provided by Dr. Wickett and Dr. Simun. Long Beach offered those services for Student's 2019-2020 school year.

Long Beach did not offer Student behavior services because his needs had substantially changed. For years, Student's problem behaviors impeded his access to education. As described by Ms. Graham-Ramos, Long Beach rejected earlier requests for behavior interventions by Dr. Wickett and Dr. Simun, because Long Beach had not selected those assessors. Dr. Simun and Dr. Wickett were qualified assessors and their findings were consistent with school records, including IEPs, school records, and reports from the classroom teachers. Long Beach's rejection of earlier requests for behavior services was unreasonable and prevented Student from receiving necessary services.

Given the foregoing, evidence overwhelmingly showed that Long Beach denied Student a FAPE during the 2018-2019 school year by failing to offer appropriate behavior services.

#### LONG BEACH'S DEFENSES

In its closing brief, Long Beach primarily raised two defenses. Long Beach first contends that Student's IEPs addressed his behavior problems by providing a behavior intervention plan. Secondly, Long Beach contends that it was not obligated to provide Student behavior services because the existing classroom supports and accommodations were sufficient to ensure that Student progressed, as evidenced by Student making progress on his goals.

## The Behavior Intervention Plan

Long Beach contends that it met Student's behavior needs by providing a behavior intervention plan. Long Beach points to the May 30, 2017 behavior intervention plan, to support its argument. Long Beach asserts that it could not implement the behavior intervention plan until November 1, 2017, when Parents consented to the IEP.

However, there are significant problems with Long Beach's argument.

First, evidence demonstrated that the May 30, 2017 behavior intervention plan was not adopted or offered in any of Student's IEPs. For example, the annual IEP held on February 28, March 21, May 30, September 26, and October 9, 2017, stated on its face that Student did not have a behavior intervention plan. And no behavior plan was included with the IEP.

Similarly, Students annual IEPs in 2018, and March 2019, also described that Student did not have a behavior intervention plan, and none was included with the IEPs.

Second, evidence demonstrated that Long Beach did not implement a behavior intervention plan during the time frame in dispute. For example, the IEPs failed to designate any school staff to implement a behavior intervention plan, or any behavior interventions. In fact, the March 2019 IEP meeting notes stated that Long Beach was not implementing a behavior intervention plan for Student. And Long Beach rejected Parent's request for a behavior plan at that time.

In its closing brief, Long Beach asserts that Ms. Graham-Ramos and Mr. Sweningson testified that the behavior intervention plan was "capable of and in fact implemented by school staff." However, during hearing, Ms. Graham-Ramos and Mr. Sweningson did not know if Long Beach implemented a behavior intervention plan. Neither witness had assessed or directly observed Student, or consulted with staff who had. Ms. Graham-Ramos and Mr. Sweningson lacked any independent knowledge

regarding Student' classroom and were incapable of testifying regarding the implementation of the behavior intervention plan.

In contrast, Dr. Wickett, Dr. Simun, and Ms. Lau each independently observed Student in his classroom following Parents' November 1, 2017 IEP consent. Dr. Wickett, Dr. Simun, and Ms. Lau each testified that school staff was not using a behavior intervention plan. In fact, Long Beach was not using any research based behavior supports or strategies for Student.

Notably, Long Beach failed to submit any evidence during hearing which demonstrated that a behavior intervention plan was in place for Student. Long Beach failed to submit documentary evidence to show the plan was implemented, such as the collection of behavioral data. More importantly, Long Beach failed to present any witness who implemented a behavior intervention plan to contradict Student's witnesses.

Consequently, Long Beach's first argument was not supported by a preponderance of evidence.

#### Student's Classroom Support and Progress

Long Beach's second argument was that Student did not require behavior services because existing classroom supports and accommodations were sufficient to ensure that Student progressed. Long Beach primarily points to Student's progress on IEP goals as evidence of overall progress.

In particular, Long Beach contends that it appropriately addressed Student's behavior needs by having a task completion goal, providing instruction in small group and individually, and providing accommodations, including a token economy system, a timer, and the use of visual schedules.

The primary problem with Long Beach's contention is that it was not supported by the evidence presented at hearing. For example, not a single witness observed Long

Beach provide Student a token economy system, timer, or visual schedule in class. To the contrary, Dr. Wickett, Dr. Simun, and Ms. Lau each independently observed that classroom staff was not implementing any behavior accommodations, including a visual schedule or token economy.

During hearing, Ms. Graham-Ramos testified that Student met some of his IEP goals. However, Ms. Graham Ramos did not have personal knowledge regarding Student or his goals. She did not develop or implement any of the goals or classroom supports. Consequently, she was unable to credibly testify regarding the appropriateness of Student's goals or classroom supports.

Moreover, a preponderance of evidence did not demonstrate the effectiveness of classroom supports or consistent progress towards goals. For example, the March 2018 IEP revealed that, even with substantial prompting and redirection, Student did not meet annual goals in writing, social-emotional, speech and language, physical education, or behavior. Student met just 30 percent of his social emotional goal and 50 percent of his behavior goal.

Long Beach argues that those goals were not consented to until November 1, 2017, which accounts for the lack of progress towards the goals. However, the goals were similar to or identical to the prior IEP goals, which would have been worked on under stay put until Parents' November 1, 2017 consent.

Dr. Simun persuasively testified that Student's goals were frequently repeated and reduced in difficulty each year. Goals permitted multiple or unlimited prompts, which reduced the ability to track progress towards a goal. Significantly, teacher and staff motored Student through tasks. Consequently, progress towards goals was not a reliable indicator of Student's progress. Student required substantial assistance to meet any goal, thereby diminishing the validity of the goals.

Assessments by qualified assessors, including Dr. Simun, Dr. Wickett, and Ms. Lau,

more reliably demonstrated that Student did not progress academically or behaviorally in his educational program. IEPs also showed a lack of progress. For example, Student's behaviors grew worse each year, with the March 2019 IEP reporting an increase of self-stimulatory behaviors. Similarly, a comparison of academic tests from February 2017 and December 2018, showed that Student significantly declined in reading skills, and continued to be severely impaired in math and spelling. Uncontroverted evidence showed that Student did not progress academically.

Consequently, a preponderance of evidence failed to support Long Beach's argument that Student did not require behavior supports because existing classroom supports and accommodations were sufficient to ensure his progress in the classroom.

In sum, a preponderance of evidence demonstrated that Student had behavior problems that impeded his learning during the 2017-2018 and 2018-2019 school years. Long Beach denied Student a FAPE by failing to appropriately address those behaviors.

#### ISSUES 2(B)(I), 2(B)(II), 2(B)(III), 2(B)(IV), 3(B)(I), 3(B)(II), 4(B) AND 5(B): THE GOALS

Student alleges that Long Beach denied him a FAPE by failing to offer appropriate goals. In particular, Student asserts that he required goals in the areas of attention, behavior, toileting, and social emotional.

The IEP must contain a statement of measurable annual goals designed to: (1) meet the student's needs that result from his disability to enable the student to be involved in and progress in the general curriculum; and (2) meet each of the child's other educational needs that result from his disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); 34 C.F.R. § 300.320(a)(2); Ed. Code, § 56345, subd. (a)(2).) The IEP team develops measurable annual goals that address the student's areas of need and which the student has a reasonable chance of attaining within a year. (Ed. Code § 56344; Letter to Butler (OSERS Mar. 25, 1988) 213 IDELR 118; U.S. Dept. of Educ., Notice of Interpretation, Appendix A

to 34 C.F.R., part 300, 64 Fed. Reg. 12,406, 12,471 (1999 regulations).) The purpose of goals is to assist the IEP team in determining whether the student is making progress in an area of need. As such, the IEP must also contain a statement of how the student's goals will be measured and when the parent will receive periodic reports on the student's progress towards his goals. (20 U.S.C. §1414(d)(1)(A)(i)(III); 34 C.F.R. § 300.320(a)(3); Ed. Code, § 56345, subd. (a)(3).) The IEP must show a direct relationship between the present levels of performance, the goals, and the offered educational services. (Cal. Code Regs., tit. 5, § 3040, subd. (b).)

#### THE SOCIAL-EMOTIONAL AND TOILETING GOALS

In issues 2(b)(iii) and (iv) Student complains Long Beach denied him a FAPE by failing to offer goals in the areas of social-emotional and toileting in the February 29, 2017 IEP. In Issue 3(b)(i), Student complains that Long Beach denied him a FAPE by failing to offer appropriate goals in the area of social-emotional in the February 21, 2018 IEP.

In the area of social-emotional, Student did not assert that Student required goals for emotional difficulty. Rather, during hearing, Student argued that Long Beach failed to offer sufficient social-emotional goals to address his deficits in functional communication. In his closing brief, Student argued that the social-emotional goal was inappropriate because it was repeated.

Long Beach contends that it offered Student goals in the areas of speech and language and social-emotional. Long Beach asserts that the goals, as a whole, addressed Student's social-emotional needs, including in functional communication. Long Beach also contends that Student did not require a toileting goal.

During hearing, neither Student or Long Beach presented testimony from a speech and language pathologist.

Student's February 2017 IEP had several speech and language goals and one

social emotional goal. The social-emotional goal sought for Student to play parallel with peers.

The speech and language goals included a pragmatic language goal to increase Students' ability to socialize.

In February 2018, Long Beach offered various speech and language goals and a similar social-emotional goal for the next school year.

Student argues that the social-emotional goal was inappropriate because it was repeated and, ostensibly, because it failed to address Student's functional communication needs. However, Student failed to submit evidence that the social-emotional goal itself was inappropriate. Rather, Dr. Simun opined that the lack of behavior services prevented Student from meeting his goals, not that the goals were inappropriate.

Student failed to present evidence that he required goals for emotional difficulty. And he failed to show that the pragmatic language goal failed to address Student's social needs.

Moreover, there is validity to Long Beach's argument that functional communication falls under the umbrella of speech and language. Student failed to present evidence from a speech and language therapist to show that the speech and language goals were insufficient to meet Student's functional communication needs. In sum, Student failed to meet his burden of proof for this claim.

Similarly, Student failed to meet his burden of showing that he required a toileting goal.

For example, Student's experts Dr. Simun and Dr. Wickett did not testify that Student required goals in the areas toileting. And their assessments did not recommend a goal for toileting.

Mother testified that toileting was an area of concern for Student. However, a

preponderance of evidence showed that toileting was only a minor problem for Student. The October 9, 2017 IEP reported that Student had two toileting accidents at school. This was consistent with Mother's testimony that Student had approximately two accidents at school. This level of toileting accidents at school did not rise to the level that required a goal.

Consequently, Student failed to prove by a preponderance of evidence that he was denied a FAPE because Long Beach failed to offer goals in the areas of social-emotional and toileting in the February 29, 2017 IEP, and social-emotional in the February 21, 2018 IEP.

#### ATTENTION AND BEHAVIOR GOALS

In Issues 2(b)(i) and (ii), Student complains that Long Beach failed to offer appropriate goals in the area of attention and behavior in the February 29, 2017 IEP. In Issue 3(b)(ii), he asserts that Long Beach failed to offer appropriate behavior goals in the February 21, 2018 IEP.

As found herein, behavior, including attention, was an area of educational need for Student. Consequently, Long Beach was obligated to offer behavior goals to meet Student's unique needs.

Student's February 2017 and February 2018 IEPs each included a behavior goal. The goal was based upon Ms. Kalter's functional behavior assessment. The goal was for Student to independently complete tasks, 80 percent of the time. Student had off task behaviors, including staring away from instruction, fiddling with objects, and making verbal noises. The goal was intended to reduce the off task behaviors.

In his closing brief, Student agrees the behavior goal for task completion was appropriate. Rather, Student argues that he required additional behavior goals. In particular, Student required goals to address problems with non-compliance, inattention, and self-stimulatory behaviors.

During hearing, Dr. Simun and Dr. Wickett persuasively testified in support of this argument. One goal for behavior was insufficient to address Student's autistic behaviors and remediate his behavior problems. Those problems directly and substantially impacted Student's education. Student's experts credibly opined that, without goals and services for all of Student's behavior problems, he would continue to regress educationally. Long Beach failed to present any persuasive evidence to contradict Student's experts.

There is no question that problem behaviors, including non-compliant, inattentive, and self-stimulatory behaviors impeded Student's education during the years in dispute. Student therefore required goals in those areas in light of his disability. Consequently, Long Beach's failure to provide Student appropriate behavior goals denied him a FAPE during the 2017-2018 and 2018-2019 school years.

## REMEDIES

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

School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Id.* at p. 1496.) This authority extends

to hearing officers. (*Forest Grove Sch. Dist. v. T.A.* (2009) 557 U.S. 230, 243-244, fn. 11;129 S.Ct. 2484.) These are equitable remedies that courts and hearing officers may employ to craft "appropriate relief" for a party. (*Puyallup. supra*, at p. 1496.) A compensatory education award need not provide "day-for-day compensation." (Id. at p. 1497.) An award compensating for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid v. District of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be fact-specific. (Ibid.)

Hour-for-hour relief for a FAPE denial is not required by law. (*Puyallup, supra*, at p. 1497.) Neither is it prohibited, and at a minimum it can form a beginning basis for calculating relief, in the absence of a better measure.

Here, Long Beach denied Student a FAPE during the 2017-2018 and 2018-2019 school years by failing to offer appropriate behavior services and behavior goals. It is therefore equitable to provide Student compensatory education as a remedy as Student established that he failed to make meaningful progress due to Long Beach's denial of FAPE. During hearing, Dr. Simun credibly testified that Student's behaviors disrupted his ability to learn in the classroom. As a remedy, she recommended both behavior and academic services. Long Beach's 2017-2018 and 2018-2019 school years each had 38 weeks of instruction. Accordingly, Long Beach shall provide Student 152 hours of compensatory education services. This amount represents 38 hours of compensatory behavior services and 38 hours of compensatory specialized academic instruction services for the 2017-2018 school year; and 38 hours of compensatory behavior services and 38 hours of compensatory specialized academic instruction services for the 2018-2019 school year. Parents shall select a non-public agency to provide the services.

## ORDER

1. Within 30 days of Parents informing Long Beach of the nonpublic agency they selected to provide compensatory behavior services, Long Beach shall

contract with the non-public agency to provide 76 hours of compensatory behavior services, including direct and supervision services. Student shall have until December 31, 2021, to use these compensatory services.

2. Within 30 days of Parents informing Long Beach of the nonpublic agency they selected to provide compensatory specialized academic instruction services, Long Beach shall contract with the nonpublic agency to provide 76 hours of compensatory specialized academic instruction services. Student shall have until December 31, 2021, to use these compensatory services.
3. Student's remaining requests for relief are denied.

## PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Student prevailed on Issues 2(a), 2(b)(i) and 2(b)(ii); Issue 3(a) and 3(b)(ii); Issue 4(a) and 4(b); and Issue 5(a) and 5(b). Long Beach prevailed on Issues 1(a) and 1(b); 2(b)(iii) and 2(b)(iv), and 3(b)(i).

## 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: September 27, 2019

/s/

Paul H. Kamoroff

Administrative Law Judge

Office of Administrative Hearings