

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2019090404

PARENT ON BEHALF OF STUDENT,

v.

SANTA MONICA-MALIBU UNIFIED SCHOOL DISTRICT.

DECISION

FEBRUARY 18, 2020

On September 11, 2019, Student filed his Due Process Complaint against Santa Monica-Malibu Unified School District, called Santa Monica-Malibu, with the Office of Administrative Hearings, called OAH. On September 23, 2019, Santa Monica-Malibu filed its response. On October 10, 2019, OAH granted a joint request for continuance. On November 21, 2019, OAH granted Santa Monica-Malibu's motion to dismiss Student's Issues 3, 4, 5 and 6, and Proposed Resolutions B, C, and D, for lack of jurisdiction.

Administrative Law Judge Deborah Myers-Cregar heard this matter in Van Nuys, California on December 3, 4, 5, 10, 11, 12, 17, 18, and 19, 2019. David W. German, and Omar Qureshi, Attorneys at Law, represented Student. Parents attended each day of hearing except December 19, 2019. Kristin M. Myers, Attorney at Law, represented Santa Monica-Malibu. Deanna Sinfield, Director of Special Education, Victoria Hurst, Program Coordinator, and Jim Watwood, Special Education Coordinator, attended alternating sessions on behalf of Santa Monica-Malibu.

At the parties' request, the matter was continued to January 15, 2020, for written closing briefs. Santa Monica-Malibu timely filed the 2017-2018 school calendar, which is admitted as Exhibit 36. The parties timely filed their closing briefs, the record was closed, and the matter was submitted on January 15, 2020.

ISSUES

1. Did Santa Monica-Malibu deny Student a free appropriate public education during the 2017-2018 school year and materially fail to implement Student's positive behavior support plan by improperly using corporal punishment and aversive behavioral interventions on Student, including the improper use of holds, arm twisting, restraints and harnesses on the bus; and improperly using hand sanitizer on open cuts on his hand?
2. Did Santa Monica-Malibu deny Student a free appropriate public education during the 2017-2018 school year when its personnel, classroom aides, teachers, and multiple administrators observed or learned of Student's aide's use of corporal punishment and aversive behavioral techniques, and failed to stop, intervene, prevent, and/or report such abuse?

JURISDICTION

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 et seq. (all references to the Code of Federal Regulations are to the 2006 version); Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the Individuals with Disabilities Education Act, referred to as the IDEA, are to ensure:

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

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 free appropriate public education, referred to as 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, and has the burden of proof by a preponderance of the evidence. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 57-58, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).)

Here, Student filed the Due Process Request and therefore has the burden to prove the allegations. The factual statements in this Decision constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

Student was nine years old and in fourth grade at the time of the hearing. He was eligible for special education under the categories of autism and speech and language impairment. He also had an intellectual disability. Student was non-verbal and communicated with signs, an Augmentative Alternative Communication device, and verbal approximations of sounds. He had a history of self-injurious behavior including banging his head and hitting himself; physical aggression toward others involving grabbing clothes, pulling hair; and biting; and non-compliant behavior including eloping.

Student lived within the geographic boundaries of Santa Monica-Malibu at all relevant times. Student attended Juan Cabrillo Elementary, in the life skills curriculum special day class, from kindergarten, the 2015-2016 school year through third grade, the 2018-2019 school year. Santa Monica-Malibu moved Student's placement to the Academy for Advancement of Children with Autism, a non-public school in Chatsworth, for the 2019 extended school year, and for fourth grade for the 2019-2020 school year. During the subject administrative hearing, Student successfully transitioned to accessing transportation on a school bus.

ISSUE 1: DID SANTA MONICA-MALIBU DENY STUDENT A FREE APPROPRIATE PUBLIC EDUCATION DURING THE 2017-2018 SCHOOL YEAR AND MATERIALLY FAIL TO IMPLEMENT STUDENT'S POSITIVE BEHAVIOR SUPPORT PLAN BY IMPROPERLY USING CORPORAL PUNISHMENT AND AVERSIVE BEHAVIORAL INTERVENTIONS ON STUDENT, INCLUDING THE IMPROPER USE OF HOLDS, ARM TWISTING, RESTRAINTS AND HARNESSSES ON THE BUS; AND IMPROPERLY USING HAND SANITIZER ON OPEN CUTS ON HIS HAND?

Student contends Santa Monica-Malibu used aversive techniques to gain Student's behavioral compliance. Student contends the aide used unnecessary mechanical restraints on the bus, and applied hand sanitizer containing alcohol to his chapped hands in the classroom to cause him pain and change his behavior. Student contends these aversive techniques were administered over four months, were harmful, and caused Student's decline in his behavioral, communicative, and cognitive functions.

Santa Monica-Malibu contends that during the 2017-2018 school year, it offered Student a free and appropriate public education in the least restrictive environment. It contends Student did not establish he suffered from corporal punishment, improper holds, or restraints. Santa Monica-Malibu contends when it learned the aide was using aversive behavioral interventions, it took immediate and appropriate action to address the concern. It contends the aide used an aversive technique on only two occasions, which was not a material failure to implement Student's positive behavior support plan.

A FAPE means special education and related services that are available to an eligible child that meets state educational standards at no charge to the parent or

guardian. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) Parents and school personnel develop an individualized education program, referred to as an IEP, for an eligible student based upon state law and the IDEA. (20 U.S.C. §§ 1401(14), 1414(d)(1); and see Ed. Code, §§ 56031, 56032, 56341, 56345, subd. (a) and 56363 subd. (a); 34 C.F.R. § 300.501.)

In general, a child eligible for special education must be provided access to specialized instruction and related services which are individually designed to provide educational benefit through an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. (*Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201-204; *Endrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. ____ [137 S.Ct. 988, 1000].)

When a disabled child's behavior impedes the ability to learn, the IEP team shall consider the use of positive behavioral interventions, supports, and strategies to address the behavior. (20 U.S.C. §§ 1414(d)(3)(B)(i); Ed. Code, § 56341.1, subd. (b)(1).)

A disabled child's education is more effective when positive behavioral interventions and supports are provided to address the child's learning and behavioral needs. (20 U.S.C. § 1400(c)(5)(F); Ed. Code, § 56520, subd. (a)(3).)

Students who exhibit serious behavioral challenges shall receive appropriate and timely assessments and positive supports and interventions. (20 U.S.C. §§ 1400 et seq., Ed. Code, § 56520, subd. (b)(1).) Behavioral supports and strategies must be used and administered in a manner that allows for physical freedom and social interaction, respects a student's dignity and personal privacy, and ensures a student's placement in the least restrictive environment. (Ed. Code, § 56520, subd. (b)(3).)

Public and non-public schools must “provide an appropriate and meaningful educational program in a safe and healthy environment for all children regardless of possible physical, mental, or emotionally disabling conditions.” Some disabled children have significant behavioral challenges that adversely impact their ability to learn. (Ed Code, §§ 56520 (a)(1) & (2), 56521.)

There were three behavior support plans in effect during August 2017 through January 2018:

- March 1, 2017 positive behavior support plan and behavior support report, included in the March 3, 2017 IEP;
- October 2, 2017 updated positive behavior support plan, included in the IEP of the same date; and
- December 11, 2017 updated positive behavior support plan, included in the IEP of the same date.

Student did not claim these positive behavior support plans were not appropriate. Student alleges Santa Monica-Monica failed to materially implement his positive behavior support plans with fidelity. Student alleges that when his behavioral aide used aversive techniques to gain behavioral compliance, causing him pain, this material failure to implement denied him a FAPE.

MATERIALITY STANDARD FOR FAILURE TO IMPLEMENT STUDENT’S IEP

To provide a FAPE, special education and related services must be provided in conformity with the pupil’s appropriately developed IEP. Only material failures to implement the IEP are a violation of the IDEA. A “material failure” occurs when the difference between the services required in a student’s IEP and the services actually

provided goes beyond just a “minor discrepancy.” A student is not required to suffer demonstrable educational harm to prevail. The student’s educational progress, or lack of it, is probative of whether there is more than just a “minor shortfall” in the services provided. (*Van Duyn v. Baker School Dist.* (9th Cir. 2007) 502 F. 3d 811, 822 (*Van Duyn*); 20 U.S.C. §§ 1401(9)(D), 1414(d), 1415(f)(3)(E)(i).)

Under *Van Duyn v. Baker School Dist.*, supra, 502 F. 3d 811, 822, the standard for determining whether there is a material failure to implement Student’s IEP is to compare the behavior support services required by Student’s IEP with the behavior support services actually provided to Student.

THE TARGETS AND METHODS OF STUDENT’S 2017 POSITIVE BEHAVIOR SUPPORT PLANS

Elizabeth Sciutto was Santa Monica-Malibu’s Board Certified Behavior Analyst who helped develop Student’s IEPs for October and December 2017. She provided consultation, coaching, training, and modeling to his aide. She explained the purpose of a behavior support plan is to identify categories of problem behaviors, the antecedents that trigger the behavior, and the consequences that result from the behavior, which are maintained over time. A behavior support plan hypothesizes the function of a behavior, and develops a socially acceptable replacement behavior that serves the same function as the maladaptive behavior. The behavior support plan identifies the replacement behavior to teach the student, reinforcement strategies staff should use to reward a student’s appropriate use of the replacement behavior, and the appropriate way for staff to respond in the event a problem behavior continues.

According to Ms. Sciutto, applied behavioral analysis standards dictate that punishment and aversive techniques be administered only as a crisis intervention

measure intended to reduce unpredictable behavior. Punishment and aversive techniques tend to have detrimental effects over time, are less effective, and can cause harm to a student. Ms. Sciutto did not include any aversive behavioral techniques in the plan she developed for Student because that would be a punishment, which is less effective and causes harm to a child over time. If an aide uses a behavioral strategy that is not provided for in the behavior support plan, then the aide is not using techniques endorsed under the applied behavior analysis approach to behavior modification.

According to Ms. Sciutto, if a student does not have a crisis intervention plan, then an aide can only use holds or restraints if the student with a high risk level experiences a crisis. Individuals with crisis prevention and intervention training can use holds and restraints in these rare circumstances. A student is in crisis when they exhibit major assaultive behavior, self-injurious behavior, major destruction to property, or other serious maladaptive behavior, such as eloping from the campus. Ms. Sciutto explained that according to applied behavioral analysis protocols, crisis prevention intervention trained staff may use a "team transport hold" in which staff place their hands on a student's arm, shoulder, or back to escort the student, but not to carry the student. If there is no crisis intervention plan, or the plan does not call for the use of restraints or holds, then school staff must complete a behavioral emergency report to be circulated to school administrators and parents, to discuss further steps. (Ed. Code, § 56521.1.)

Ms. Sciutto explained that a five-point harness used on a bus is referred to as a mechanical restraint. Although the harness meets the technical definition of a restraint, it is not considered to be a restraint if it is used by trained staff to keep a student safe from a seizure risk, or another safety use while transported on the bus. If the five-point harness is used to restrain a student but its use is not included in the behavior support

plan, and there was a lack of other safety measures, then a behavioral emergency report should be written up each time it is used.

Student's 2017 positive behavior support plans did not provide for the use of a harness on the bus. Ms. Sciutto did not believe that the use of a five-point harness on a bus was a significant intervention. However, Ms. Sciutto believed that if an aide used a harness simply to make the bus ride easier, then that would be a misuse of the harness. Restraints and holds are not a substitute for using applied behavior analysis strategies.

Ms. Elizabeth Schwandt is a Board Certified Behavior Analyst who consulted and worked privately with Student. She similarly opined that while students can learn to improve behavior with aversive techniques, that the progress made is temporary. Aversive techniques create unintended consequences, can cause harm to the student, should only be used with great training and care, and only be used if the aim is to remove a risk of harm to the child, such as removing a self-injurious behavior. Aversive techniques can cause disruption in learning and memory, lead to a generalized fear of the person using the techniques, and cause increased aggression and escape related behavior.

Ms. Schwandt reviewed Student's educational and behavioral records. She reviewed his 2017 positive behavior support plan. Student had typical behaviors for a child with autism, an intellectual disability, and a speech and language impairment. All three 2017 positive behavior support plans had straight forward classroom strategies. The interventions to be used when Student's behaviors escalated were giving praise, reinforcing good behavior, and calming strategies.

STUDENT'S MARCH 3, 2017 POSITIVE BEHAVIOR SUPPORT PLAN

On March 3, 2017, Student's IEP team developed a new IEP and a new positive behavior support plan to address his aggressive and self-injurious behavior, which interfered with his learning, posed a danger to himself or others, disrupted instruction, and reduced the amount of time he spent on a task. It provided for the application of scientifically based applied behavior analysis intervention techniques to target an unwanted behavior and replace it with a desired behavior, using positive modalities such as encouraging requests, providing choices, and earning tokens for completing a task. There were no holds, restraints, or aversive behavioral techniques or corporal punishment provided for in this positive behavior support plan. Student did not have a crisis intervention plan.

Student's March 3, 2017 IEP addressed his behavioral challenges and provided him with placement in the life skills class for 83 percent of his school day. His IEP provided services and supports including the consultation of a behavior intervention specialist for 120 minutes per month to implement his positive behavior support plan. His IEP provided him a behavioral aide six hours per day, on the bus, in the classroom, and across all settings to help prevent his self-injurious and aggressive behavior. His behavior aide would implement his positive behavior support plan, collect data, assist with developing his plan and social skills, and support Student to follow classroom routines and rules, and maintain on task behaviors. The behavior intervention specialist would implement the procedures in his behavior support plan, modify one or more interventions if necessary, create new procedures when necessary, and collect data and analyze it.

Student's positive behavior support plan used evidence-based procedures to address his need to request access to tangible items, and his escape and elopement behavior. It used differential reinforcement of alternative behavior, functional communication response, combined with choices, stimulus fading in, and use of multiple schedules of reinforcement to create the setting for Student to request a break from tasks. His aide would place a "work first" picture card on the table, and then tell Student to work first, before a break. The aide would give Student picture cards with two preferred activities, and Student could choose one after he completed his task. The aide would provide Student with "errorless learning," a method of teaching procedures designed so the learner does not make mistakes, using discrete trial training to teach him the targeted IEP goals. Staff would praise Student for each correct response and give him a token. Staff would encourage Student to ask for a break. Staff would use a behavior log and graphs to monitor Student's progress.

Student's positive behavior support plan provided him instructions, guidance, choices, breaks, and tokens. If he became aggressive to avoid a task, staff would block his aggression with a hand-over-hand prompt. Staff would direct him to complete a task, and withhold his access to breaks, praise and tokens until the task was completed. If he became self-injurious to avoid a task, staff would block his actions, remove the activity, and guide Student to ask for more time for a break before transitioning back to the educational activity.

Student's level of behavioral function was summarized in a March 1, 2017 Behavioral Learning through Instructional Support Services progress report. Student demonstrated improvement. His target behavior was his self-injurious and aggressive behavior. His positive replacement behavior was compliance with instructions, and

functional communication using signs or his communication device to request breaks or a tangible item. Student met his compliance goal of paying attention to the teacher without maladaptive behavior for 11 minutes, with two prompts, 80 percent of the time. He partially met his goal for following classroom routines. Student engaged in self-injurious behavior, banging his head into a hard surface and hitting himself. He reduced his self-injurious behavior, and there were no incidents in the two months since January 9, 2017. This was an improvement since fall 2016, when Student had less than one episode per week. Student's identified aggressive behavior included grabbing someone's clothes, pulling hair, and biting a body part. Student had significantly reduced his aggressive behavior, and there were no incidents since January 11, 2017. This was a marked improvement since fall 2016, when Student showed aggression twice a week, and since June 2016, when Student showed aggression three to five times a day.

STUDENT'S OCTOBER 2, 2017 POSITIVE BEHAVIOR SUPPORT PLAN

On October 2, 2017, the IEP team developed a new positive behavior support plan, which identified new behaviors of non-compliance, and scratching and biting himself and others. It provided for the application of scientifically based applied behavior analysis intervention techniques to target an unwanted behavior and replace it with a desired behavior, using positive modalities such as encouraging requests, providing choices, and earning tokens for completing a task. There were no holds, restraints, or aversive behavioral techniques provided for in this positive behavior support plan. Student did not have an emergency intervention plan.

Student's positive behavior support plan used evidence-based procedures to address his need to request access to tangible items, and his escape and elopement

behavior. It used differential reinforcement of alternative behavior, functional communication response, combined with choices, stimulus fading in, and use of multiple schedules of reinforcement to create the setting for Student to request a break from tasks. Staff would use a behavior log and graphs to monitor Student's progress.

Student's positive behavior support plan added new strategies. Staff would prime Student for a transition using his visual schedule. Staff would reinforce Student every 10 seconds. Staff would encourage Student to use sensory strategies such as hopping, getting squeezes while walking, and holding a 'koosh' ball. If needed, staff could provide Student access to a preferred toy for one to five minutes when he successfully transitioned to the next location on his picture schedule. Staff would provide Student a task and use errorless learning to teach Student his IEP goal. Staff would praise Student for every correct response and intermittently give him tokens for correct responses. Staff would encourage Student to make requests.

If Student became aggressive or self-injurious, the aide was to block his actions and minimize attention given. Staff was to present the augmentative alternative communication device and prompt Student to request what he wanted. He would be prompted to re-engage in the task, and when he re-engaged, he would be praised and earn tokens.

If Student became non-compliant during a transition, Staff would remove his preferred activity. Staff would hand Student his augmentative alternative communication device and prompt him to ask for what he wanted. Physical prompts would be used only as a last resort, and only if the safety of Student and others was at

risk and he did not respond to less restrictive interventions. If Student did not transition, staff would bring his school work to him. Student would be provided with choices of items or activities throughout the day. Any request Student made for an item or activity would be reinforced.

Ms. Sciutto summarized Student's level of behavioral functioning for September 2017 in the October 2, 2017 progress report. Student independently transitioned to another task 78 percent of the time. Student did not have any self-injurious behavior during the month of September, but he acted aggressively approximately once every four hours. His maladaptive behaviors were decreasing to nearly zero. He was making progress toward transitioning independently to tasks, increasing compliant behavior in the classroom during a teacher-led activity, and he had limited progress in using his communication device to ask for something. However, he was not independent because he was could not request a desired item or activity.

STUDENT'S DECEMBER 13, 2017 POSITIVE BEHAVIOR SUPPORT PLAN

On December 11, and 18, 2017, Student's IEP team developed a new positive behavior support plan. Like the others, it provided for the application of scientifically based applied behavior analysis intervention techniques to target an unwanted behavior and replace it with a desired behavior, using positive modalities such as encouraging requests, providing choices, and earning tokens for completing a task. Again, there were no holds, restraints, or aversive behavioral techniques provided for in this positive behavior support plan. Student did not have a crisis intervention plan.

Student's level of behavioral function was summarized in this plan, showing a new pattern of variability and spikes in behavioral events. He rarely engaged in

self-injurious behavior, but did so nine times between October 2, 2017, and December 13, 2017. Four of those instances occurred on November 30, 2017, and three occurred on December 1, 2017.

There was a spike in Student's aggression. Between September 6, 2017, and December 13, 2017, Student's episodes of physical aggression increased and occurred 71 percent of the time he was in school, equal to seven times or less per school day. On difficult days, Student became aggressive between 10 and 50 times per day.

There was a spike in Student's non-compliance. Between September 6, 2017, and December 13, 2017, Student's episodes of non-compliance increased to 78 percent of the time, equal to five times or less per school day. On difficult days, Student became non-compliant between 10 and 50 times per school day.

Student met and exceeded his goal for transitioning from preferred to non-preferred activities with three to four prompts. He made progress toward his safety goal. Student made progress toward identifying the emotions happy, sad, angry, tired, and hungry associated with the "feelings folder" in his communication device. He required adult prompting to use his visual schedule to follow class routines. Student made inconsistent progress toward maintaining compliance with a teacher-led activity for 15 minutes without engaging in maladaptive behavior.

The December 13, 2017 positive behavior support plan did not change any protocols, but added more behavioral consultation hours. The IEP team increased to 60 minutes a month the services of the behavior intervention specialist to consult with

the parents, teachers, and school and outside providers working with Student in school and in the home. The purpose was to promote consistency among the professionals and Parents using problem behavior intervention strategies.

BEHAVIOR SUPPORT THE AIDE PROVIDED FROM AUGUST 22, 2017 TO JANUARY 31, 2018

"Emergency interventions must only be used to control unpredictable, spontaneous behavior that poses clear and present danger of serious physical harm to [the disabled student] or others, and that cannot be immediately prevented by a response less restrictive than the temporary application of a techniques used to contain the behavior." (Ed Code, §56521.1, subd. (a).) Emergency interventions must not be used to substitute the disabled student's "systematic behavioral intervention plan that is designed to change, replace, modify or eliminate a targeted behavior." (Ed. Code, § 56521.1, subd. (b).)

Emergency interventions must not be used for longer than necessary to contain the behavior. If the prolonged use of emergency interventions is needed, then school staff shall involve the schoolsite administrator. (Ed. Code, §56521.1, subd. (c).) School staff may only use force which is reasonable and necessary under the circumstances. (Ed. Code, §56521.1, subd. (d)(3).)

When school staff uses emergency interventions on a disabled student, the parents must be notified within one schoolday, if appropriate, to prevent the emergency interventions from being used in lieu of "planned, systematic behavioral interventions." (Ed. Code, §56521.1, subd. (e).) "A behavioral emergency report shall immediately be

completed and maintained in the file of the [disabled student].” The behavioral emergency report shall include:

- the disabled student’s name and age;
- the setting and location of the occurrence;
- the name of staff and others involved;
- a description of the occurrence and the emergency intervention which was used, and a statement regarding the existence of the student’s systematic behavioral intervention plan; and
- details of injuries to the disabled student and/or others.

(Ed. Code, § 56521.1, subd. (e)(1)-(5.)

The behavioral emergency report must be forwarded immediately to a designated responsible administrator for review. When the disabled student has a positive behavioral intervention plan and a previously unseen behavior emerges or a previously designed intervention proves ineffective, the behavioral emergency report must be referred to the IEP team for a determination of whether the incident justifies a need to modify the positive behavioral intervention plan. (Ed. Code, § 56521.1, subds. (f), (h).)

Aversive behavioral interventions are negative consequences or stimuli used to change a student’s problematic and disruptive behavior that impedes his ability to access his education. (*Bryant v. New York State Educ. Dept.* (2d Cir. 2012) 692 F.3d 202, 207.)

A public or non-public, non-sectarian school shall not authorize, order, consent to, or pay for interventions designed or likely to cause physical pain. (Ed. Code, § 56521.2, subd. (a)(1).) Methods and procedures to eliminate a student's maladaptive behavior must not cause pain, trauma, or be deemed unacceptable under Education Code section 49001, defining and prohibiting corporal punishment. (Ed. Code, § 56520, subd. (a)(4).)

Education Code section 49001, subdivisions (a) and (b), define corporal punishment as the willful infliction of physical pain on a student, and prohibit a school employee or contractor from inflicting corporal punishment on a student. It is not considered corporal punishment when a school employee or contractor only uses an amount of force reasonable and necessary to "quell a disturbance threatening physical injury to persons or damage to property, for purposes of self-defense, or to obtain possession of weapons or other dangerous objects which the student controls."

INCIDENTS OF IMPROPER USE OF HOLDS AND HARNESS ON THE BUS

The 2017-2018 school year began on August 22, 2017. Beginning September 2017 through January 31, 2018, there were approximately 19 incidents when Student's paraeducation aide, Galit Gottlieb, used emergency behavioral and aversive techniques on Student on the bus, which were not part of Student's three applicable positive behavior support plans. Ms. Gottlieb placed Student in a mechanical restraint on the bus at least 15 times when it was not required for his safety or the safety of others, making these uses inappropriate. Ms. Gottlieb grabbed Student's wrists and pushed his hands into the bus seat until they were red. Ms. Gottlieb grabbed at Student forcefully enough for her to feel a shaking vibration. Ms. Gottlieb pulled and twisted Student's

arm. She skipped steps in Student's behavior support plans and overreacting by harnessing and grabbing Student in situations that were not behavioral emergencies. Ms. Gottlieb reluctantly admitted using the harness on Student three to four other times. This is inferred to be in addition to the 15 Ms. Silvestre identified. Thus, Ms. Gottlieb did not file 19 required behavioral emergency reports.

The testimony of Santa Monica-Malibu's bus driver, Ernestine Silvestre, was very convincing. She established that Ms. Gottlieb did not follow Student's IEPs positive behavior support plans in a material way. There were no behavioral or medical emergencies affecting Student on the bus when Ms. Gottlieb buckled him into the five-point harness, and aggressively grabbed him, between September 2017 and January 2018.

Ms. Silvestre was visibly shaken, tearful, and upset when she described how she saw Ms. Gottlieb act toward Student. She appeared sincere and earnest when recalling the events. Ms. Silvestre answered questions with spontaneous and emotional responses. Her answers were not rehearsed, guarded, or calculated. In her 23 years as a school bus driver, she had never been upset about any aide's conduct with a student until she saw Ms. Gottlieb's conduct. In those 23 years, this was the first time she reported an aide's behavior to her supervisor and to administration. Ms. Silvestre went out of her way to follow up and report Ms. Gottlieb's actions to several people over the course of several months. Ms. Silvestre's testimony was corroborated by other witnesses, email messages, video tapes, and documents. Therefore, considerable weight is given to her testimony.

Ms. Silvestre first noticed Ms. Gottlieb act very roughly with another student having a tantrum, when she twisted and pulled that student's arm upward. Ms. Silvestre had an uninterrupted view of Ms. Gottlieb from the "pupil mirrors" she used on the bus to scan the students. Ms. Gottlieb and Student sat two rows behind her.

Ms. Silvestre described Student's progressive behavior on the bus at the beginning of the school year. Student was a lovable boy who came onto the bus easily and kissed her. He wore a seatbelt every day, and it was not difficult to get him buckled up. If he became upset or grabbed at her while getting seated, she helped him get settled by saying, "Look at me." Then he would relax and smile and allow himself to be buckled in his seat belt. Ms. Silvestre said Student was easy to redirect when he became aggressive.

Beginning September 2017, Ms. Silvestre observed Ms. Gottlieb become more aggressive toward Student, place unnecessary demands on him, and cause his behavior to escalate. By October and November 2017, she saw Ms. Gottlieb routinely strap Student in the mechanical harness on the bus in the morning, shortly after leaving Parents' house when they were out of view. Ms. Gottlieb then removed the harness shortly before arriving to school. In the afternoon, Ms. Gottlieb similarly strapped Student in the harness shortly after they left the school parking lot, and removed it shortly before arriving back at Parents' house.

Ms. Silvestre recalls seeing Ms. Gottlieb strap Student in the harness in October 2017 once or twice, and in November 2017 every day for one to two weeks, then once every other day for two weeks. This is approximately 15 times. On the bus, Ms. Silvestre questioned Ms. Gottlieb multiple times about whether the use of the

harness was on Student's IEP. Ms. Silvestre finally stopped Ms. Gottlieb from using a harness by limiting her access to it. Ms. Silvestre reported that she even ejected Ms. Gottlieb from the bus once because Ms. Gottlieb needed to calm down.

Ms. Silvestre did not think Student required a harness any of the times Ms. Gottlieb used it. Ms. Silvestre observed Ms. Gottlieb provoking and agitating Student constantly, becoming easily frustrated with him. Once Student dropped his backpack, and Ms. Silvestre saw Ms. Gottlieb yank Student forcefully. She felt a shaking vibration from the force of the movement. She also saw Ms. Gottlieb grab Student's arm once. At least once, Ms. Silvestre saw Ms. Gottlieb grab Student's wrists, twist him to the left, and push his hands down, which she thought was unnecessary because he had his harness on. Ms. Silvestre recalled seeing red marks on Student's wrists and hands. She recalled Student made uncomfortable facial expressions when he saw Ms. Gottlieb. Student did not like or feel comfortable with Ms. Gottlieb.

Ms. Silvestre spoke to Student's mother near the end of November or early December 2017 about Ms. Gottlieb.

Ms. Silvestre's bus ride was always videotaped. Her supervisor Mr. Neil Abrahamson had access to the tapes. Ms. Silvestre activated a red button a total of three times, once on three different days during the fall semester, to "bookmark" the moments she wanted the video to capture Ms. Gottlieb's behavior. Ms. Silvestre spoke to her supervisor to review these three videos with him. Only one video properly recorded, from January 24, 2018.

On January 24, 2018. Ms. Silvestre reported an incident on the bus that morning to Mr. Neil Abramson, her supervisor. Later that day, they watched the video.

Ms. Silvestre recalled the video showed Student did not present a risk of harm to himself or to others when Ms. Gottlieb strapped Student into a mechanical harness when there was no behavioral emergency. Student reacted by repeatedly taking his shoes off. Ms. Gottlieb repeatedly asked him to put his shoes on. Student became agitated and grabbed her hair. Ms. Silvestre pulled the bus over to the side of the road. Ariana Brewer, the other aide on the bus, helped remove Ms. Gottlieb's hair from Student's tight grasp.

After Ms. Silvestre spoke to Mr. Abramson, she went to the special education administrative office and reported her concerns to Ms. Jennifer Engle, an administrative assistant. Ms. Engle immediately sent an email dated January 24, 2018, to Kris Vegas, program coordinator, memorializing Ms. Silvestre's concerns that Ms. Gottlieb was "manhandling and irritating" Student. Ms. Silvestre reported Ms. Gottlieb "grabs his hands" like she is hurting him, and once saw Ms. Gottlieb "twisting his arm in what appeared to be a painful way." The email reported Ms. Silvestre's opinion that Student could easily be strapped into his seatbelt by the driver. Ms. Gottlieb appeared "frustrated" with Student, "speaking harshly." Ms. Gottlieb's abrupt manner seemed to exacerbate Student's behaviors. Ms. Silvestre also reported to Ms. Engle that she heard from a classroom aide that Student was "afraid of hand sanitizer bottles," and Ms. Gottlieb "has been seen putting the bottle on the desk to scare him into behaving." At hearing, Ms. Silvestre commented that she reported even more inappropriate behaviors than the email detailed.

Ms. Gottlieb reported the January 24, 2018 bus incident on a January 25, 2018 behavioral emergency report, with the help of Ms. Sciutto. Ms. Gottlieb admitted she didn't file any other emergency behavioral reports during the 2017-2018 school year.

After Ms. Sciutto saw the videotape, she believed Ms. Gottlieb had not been truthful when reporting the events. Ms. Gottlieb claimed there had been a behavioral emergency which required the harness, but the videotape disputed her version. Ms. Gottlieb claimed she strapped Student into the five-point harness for his own safety. She claimed Student was continually escaping from his seat, so she strapped him into the mechanical restraint. The video was viewed by Ms. Silvestre, Mr. Abrahamson, program supervisor Kris Vegas, and Ms. Sciutto. They concluded that Ms. Gottlieb gave them false information when she completed the behavioral emergency report for that incident.

Ms. Silvestre reported these events five or six times to her supervisor Mr. Abrahamson, two to three times to Mr. Vegas, twice to Ms. Engle, and at least once to another administrator, Sean Sandoval. Ms. Silvestre was reassigned to another bus route by the end of January, after she spoke to Ms. Engle. After that time, Student and Ms. Gottlieb were no longer on her route. Ms. Silvestre's reports about Ms. Gottlieb's concerning behavior was corroborated by the testimony of Ms. Engle and Mr. Abramson, and supported by subsequent email and a video of one bus incident they watched.

Ms. Sciutto explained that a five-point harness, or mechanical restraint, is used as a safety measure for a child during a behavioral emergency, which includes harm to himself or others, or involves a medical emergency, such as epilepsy. She did not believe using a five-point harness in itself was aversive, and that it depended on the circumstances.

Ms. Sciutto was surprised Ms. Gottlieb was using a harness on the bus because it was not part of Student's positive behavior support plan. Ms. Gottlieb told Ms. Sciutto

the bus driver was no longer letting her use the harness on Student because that was not part of his behavior support plan. Ms. Sciutto understood this to mean Ms. Gottlieb had been using the harness on the bus. Ms. Sciutto retrained Ms. Gottlieb. Ms. Sciutto also asked the transportation department to allow Student to use toys or snacks on his one-hour bus ride to help distract him.

Ms. Gottlieb worked as Student's paraeducation aide during the 2016-2017 and 2017-2018 school years. Ms. Gottlieb was not a credible witness and exhibited an overly dramatic demeanor. The tone and expression of her voice sounded rehearsed when she denied any wrong doing. During her testimony, Ms. Gottlieb frequently burst into dramatic tears claiming she did nothing wrong. She insisted the other witnesses who testified against her were making up the accusations because they did not want to work as hard as she worked in the classroom. Ms. Gottlieb claimed the bus driver who saw her act aggressively with Student simply did not like her.

Ms. Gottlieb also initially denied ever using a harness on Student during the bus ride, but then claimed she used it once when staff required her to write a behavioral emergency report. Then she provided false information when she completed the behavioral emergency report. When confronted directly, Ms. Gottlieb reluctantly admitted using the harness on Student three to four other times, but never filing a behavioral emergency report.

INCIDENTS OF AIDE'S IMPROPER USE OF HAND SANITIZER IN THE CLASSROOM

On October 5, 2017, Abraham Ucan, a paraeducation aide 3, observed Ms. Gottlieb using hand sanitizer on Student and re-directed Ms. Gottlieb from applying

it. Mr. Ucan was in Student's classroom with a clear view of Ms. Gottlieb, yelled at her, and stopped her from using hand sanitizer on Student as a consequence for his non-compliant and task avoidant behavior. Mr. Ucan was concerned about Ms. Gottlieb's tone and mannerisms because it did not look or feel right. He watched Student react to the hand sanitizer, and realized Student did not want her to use it.

When he yelled, Ms. Ernst and Lindsey Stermner, paraeducation aides, looked at him. He told Ms. Ernst he actually saw Ms. Gottlieb use the hand sanitizer on Student's hands. Ms. Ernst thanked him for re-directing Ms. Gottlieb, because she saw Ms. Gottlieb do it too, but froze and didn't know what to do.

That evening, Mr. Ucan wrote an email to Ms. Sciutto to document his concerns about Ms. Gottlieb. His email stated he had to "redirect a colleague from using hand sanitizer as a consequence for a student's non-compliance behavior, a corporal punishment when the student has broken skin on his fingers." Mr. Ucan urged that all paraeducation aides "should only implement [applied behavior analysis] strategies. . . . And this is not the first time this has happened, only the first I witnessed." Mr. Ucan asked for more training for all the paraeducators.

Ms. Sciutto was responsible for training the paraeducators. She did not see Ms. Gottlieb apply or threaten to apply hand sanitizer to Student's hand. However, she wrote in an October 10, 2017 email that Ms. Gottlieb was quick to use partial or full physical prompts on Student, to gain control or compliance. Ms. Gottlieb skipped through steps in the behavior support plan. Ms. Gottlieb did not chart behavior contemporaneously and did not keep her clipboard with her, as required by applied behavior analysis protocols. Ms. Sciutto did not include aversive techniques in Student's

positive behavior support plan. She would never put hand sanitizer on a child with broken, cracked skin because it would cause harm.

Mr. Ucan thought Ms. Gottlieb's actions were inappropriate. He thought she was using corporal punishment because it would cause pain on Student's obviously cracked skin on his fingers. Mr. Ucan thought it was cruel because the hand sanitizer contained alcohol. Mr. Ucan knew Student's hands were cracked, especially at the cuticles, because he had helped wash Student's hands at the sink during that time frame. He never saw Ms. Gottlieb use hand sanitizer for a proper purpose, such as wiping to clean hands before and after bathroom breaks or nutrition and lunch.

At hearing, Mr. Ucan testified he did not actually witness Ms. Gottlieb using the hand sanitizer on October 5, 2017, but rather just saw her hold up the bottle as a threat to Student. Mr. Ucan was emphatic he would not allow Ms. Gottlieb to apply the hand sanitizer on Student. Mr. Ucan felt it looked like corporal punishment because there had been a request made of Student, so putting hand sanitizer on him was an intended physical punishment for non-compliance.

However, when Ms. Ernst interviewed all the classroom staff to create a log about Ms. Gottlieb, Mr. Ucan affirmed he actually saw Ms. Gottlieb had used hand sanitizer on Student's hands as an aversive consequence several times before, and it was not an applied behavior analysis approved strategy.

In analyzing the discrepancy between Mr. Ucan's testimony at hearing, with his earlier contemporaneous verbal comments to Ms. Ernst, his email to the behavior supervisor, and his log of events compiled for an investigation, the statements and emails he made closest to the events are determined to be more accurate and are therefore more persuasive. Mr. Ucan wrote, "It is not the first time it happened, but the

first time I saw her do it.” The contemporaneous email documented that Mr. Ucan saw Ms. Gottlieb use hand sanitizer on Student’s hands as a punishment. The email reflected Mr. Ucan’s experience closer to the event, was a more reliable recollection of what he saw, and is therefore more persuasive.

Another factor establishing that Mr. Ucan saw Ms. Gottlieb actually use hand sanitizer on Student was the log of events Ms. Ernst compiled when she interviewed the classroom staff at the principal’s request, in January 2018. Ms. Ernst’s log notes memorialized that between September 2017 and November 27, 2017, Mr. Ucan told her he saw Ms. Gottlieb put hand sanitizer on Student’s hand as a punishment; he yelled across the room for her to stop; and reported it to Ms. Sciutto. The log did not detail how many times Mr. Ucan saw Ms. Gottlieb do so during that period of time, but he saw it at least once, and then yelled to stop it from happening again. Mr. Ucan went on personal leave from December 2017 to April 2018 and was not in the classroom.

Regarding the period from October 5, 2017 through January 31, 2018, on October 5, 2017, Ms. Ernst heard Mr. Ucan yell at Ms. Gottlieb to stop using hand sanitizer on Student. Ms. Ernst confirmed that Ms. Gottlieb temporarily stopped using the hand sanitizer as a threat when Mr. Ucan was working in the classroom, but began using it again at least by January 18, 2018, when Mr. Ucan was on personal leave.

Ms. Ernst recalled multiple times when Ms. Gottlieb held up the hand sanitizer bottle up, and Student would behave. Ms. Ernst believed Student behaved better because Ms. Gottlieb had used the hand sanitizer on him in the past, and he was afraid of it.

Ms. Ernst spoke to Student's mother more than three times, when Ms. Gottlieb threatened Student with using hand sanitizer.

On January 19, 2018, Ms. Ernst emailed Ms. Sciutto and Lakin Crane, another teacher who sometimes mentored Student's classroom teacher, that Ms. Gottlieb was using hand sanitizer in the classroom as a threat and punishment on Student's and his sibling's dry, chapped hands. Ms. Ernst confirmed that all the adults in the class knew about this. She identified multiple witnesses including a speech assistant, behavior consultant Ms. Stermner, and paraeducators Mr. Ucan, Ms. Brewer, and April Stewart.

Ms. Ernst also spoke to the principal Dr. Pam Herkner, who requested she create a log of what the other paraeducators in the classroom observed Ms. Gottlieb do. Ms. Ernst interviewed them and they had witnessed Ms. Gottlieb hold up the hand sanitizer to show it to Student.

The log entries began with Mr. Ucan witnessing Ms. Gottlieb applying hand sanitizer on Student between September 2017 through November 27, 2017, an unspecified number of times, but at least twice. Between January 15 and 19, 2018, a paraeducator identified as Rodney saw Ms. Gottlieb hold up the hand sanitizer, an unspecified amount of times, but at least once a day. On January 18, 2018, Ms. Ernst and the speech assistant, identified as Liz, saw Ms. Gottlieb hold the hand sanitizer over Student threatening to squirt him, and then brag to the adults that all she had to do was hold the sanitizer bottle up and Student would behave. On January 22, 2018, Ms. Gottlieb told the speech assistant she only had to apply the hand sanitizer for Student to behave. On the same day, Ms. Stewart saw Ms. Gottlieb hold up the hand sanitizer toward Student.

Ms. Ernst also recalled that the speech assistant had also seen Ms. Gottlieb apply the hand sanitizer on Student, but did not know the date.

Ms. Crane recalled reading Ms. Ernst's January 19, 2018 email that Ms. Gottlieb was using hand sanitizer on Student's cracked hands. Ms. Crane immediately conducted her own investigation that morning. She went to the classroom and asked the paraeducation aides what they saw. Mr. Ucan told Ms. Crane that Ms. Gottlieb used hand sanitizer on Student's hands to gain compliance. Mr. Ucan explained how Ms. Gottlieb used it as a consequence and punishment, because it would hurt their chapped hands. He told Ms. Crane that he saw Ms. Gottlieb do it, and told her to stop. Ms. Crane heard about the incidents on the bus when Ms. Gottlieb was videotaped. Ms. Crane reported her findings to principal Dr. Pam Herkner the same day. One week later, Ms. Crane called child protective services to report Ms. Gottlieb's actions.

Ms. Ernst's interviews and log entries, and Ms. Crane's interviews, and witness testimony established Ms. Gottlieb applied hand sanitizer directly to Student's hands three times, and threatened Student with using it at least 15 times.

Regarding the use of the hand sanitizer, like with the harness on the bus, Ms. Gottlieb was not a credible witness and exhibited an overly dramatic demeanor. The tone and expression of her voice sounded rehearsed when she denied any wrong doing.

Ms. Gottlieb lied multiple times at hearing, and repeatedly contradicted her own testimony. She claimed she never used hand sanitizer in the classroom. She claimed she never saw hand sanitizer in the classroom. Minutes later, she did remember seeing hand sanitizer in the classroom, and had actually used it to clean the Student's hand up

to four times a day for several weeks when a classroom sink was broken. Ms. Gottlieb claimed she could not remember anything unusual about her interactions with Student during the 2017-2018 school year. She claimed she never thought about her interactions with Student. She showed no remorse for or acknowledgment of her actions.

USE OF AVERSIVE BEHAVIORAL TECHNIQUES

"[T]he materiality standard does not require that the child suffer demonstrable educational harm in order to prevail. However, the child's educational progress, or lack of it, may be probative of whether there has been more than a minor shortfall in the services provided." (*Van Duyn, supra*, 502 F. 3d 811, at 822.) Thus, if a student does not receive the needed reading instruction and there was a resulting shortfall in the student's reading performance, "that would certainly tend to show that the failure to implement the IEP was material." *Van Duyn, supra*, 502 F. 3d 811, at 822, emphasized that IEPs are clearly binding under the IDEA, and nothing changes the school's obligation to provide services "in conformity with" students' IEPs. (20 U.S.C. §§ 1414(d)(3)(F), 1415(b)(3).)

Student suffered educational detriment by the material failure to implement his IEP as his behavioral problems escalated due to the aversive behavioral techniques used on him.

His behavioral problems continued to escalate during spring 2018, when his home service providers refused to work with him. The incidence of behavioral emergency reports dramatically increased. All of them involved Student being

aggressive to staff at home and at school, which required them to put him in a transport hold to safety.

At the May 21, 2018 IEP team meeting, the IEP team discussed Student's behavior support plan and bus safety. Parents agreed to allow the five-point harness if it was not overused. The IEP team discussed a plan if there was a disruption at the end of the day and it became too dangerous for Student to be on the bus. Parents agreed to pick him up at school.

By fall 2018, Student's behavior deteriorated significantly. The life skills class constructed a calming corner with a padded floor and padded walls. Student started biting through his aides' gloves and protective sleeves in a ravenous way. Between October 2018 and January 2019, his classroom teacher filed up to 40 behavior emergency reports. Many behavioral incidents were clustered on the same day. For example, on October 31, 2018, Student's classroom teacher filled out six behavioral emergency reports involving staff holds and transports. On November 1, 2018, his classroom teacher filled out eight behavioral emergency reports involving staff holds and transports. On November 2, 2018, his classroom teacher completed seven behavioral emergency reports, involving holds. On January 7, 2019, there were nine incidents before 9:00 AM, and six more during the day. Staff usually held him one to two minutes and transported him to his calming corner, with ultimate success.

Student's December 20, 2018 IEP provided him with two behaviorally trained aides, a ratio of 2:1. The behavior consultation increased to 180 minutes a month with Parents and his classroom teacher, and 30 minutes weekly with his behavior aide and other providers.

Student's February 27, 2019 IEP provided him with two behaviorally trained aides, but began to build flexibility into using one aide for 1800 minutes a day, and one for 900 minutes a day.

Santa Monica-Malibu placed Student at the non-public school Academy for Advancement for Children with Autism for the 2019 extended school year, to see if it would be an appropriate placement and program for him. Student's August 22, 2019 IEP formalized his placement there. Parents agreed to the IEP, placement and related services. Student presented little evidence of Student's progress or lack of progress at this placement. Student presented no evidence that the non-public school placement was not appropriate. By late December 2019, Student had made some slight behavior progress, and was finally behaviorally stable enough to take the bus to his non-public school. Additionally, Student's aides were ready to remove their neoprene arm guards, but Parents wanted the staff to keep them on.

Although *Van Duyn, supra*, 502 F. 3d 811, at 822, does not require demonstrable harm for Student to prevail, the overwhelming weight of the evidence established that Student's behavior, cognitive function, and functional speech significantly deteriorated due to the sustained use of aversive techniques.

Elizabeth Schwandt, Student's expert witness, was a Board Certified Behavior Analyst with a Master's degree in Curriculum Design in Special Education from American University. She was a Doctoral Student in Clinical Child Psychology at the Reiss Davis Graduate Institute. Ms. Schwandt was a well-credentialed behaviorist who was deemed an expert witness in the field of assessing trauma in developmentally delayed children. She testified as an expert witness for the Department of Social Services in

Massachusetts, and served as a professional advisor for many mental health agencies in Massachusetts and Connecticut. The scope of her practice provided clinical supervision and training to schools, hospitals, and home-based programs, for assessment and functional communication training, with a specialty in complex behavioral disruptions among individuals with low communication skills. Most often, those individuals had neurological disorders with a diagnosis of autism, intellectual disability, or traumatic brain injury that affects their communication function.

Although Santa Monica-Malibu stipulated that Ms. Schwandt be deemed an expert in the assessment of trauma in children with developmental disabilities, it challenged the weight of her testimony because she did not conduct a standardized assessment and prepare a written report. However, Ms. Schwandt could not conduct a standardized assessment for trauma, because it does not yet exist. She is currently developing the gold standard assessment tool for assessing trauma in young, non-verbal developmentally disabled children. She is educating staff at hospitals and school districts across the country how to make such early assessments of trauma in those settings.

Ms. Schwandt's conclusions about Student were related to her specialized expertise of trauma assessment in non-verbal developmentally disabled children. Ms. Schwandt's clinical research and experience focused on neurobiological models of assessment and school-based behavioral intervention for children with early developmental trauma and interruption. Her dissertation studies included designing an assessment tool to screen the co-morbid conditions of trauma and developmental disabilities. In many cases, the children were non-verbal. She worked with

750 pediatricians collecting data to help detect trauma, which would manifest as dysregulation, behavioral disturbance, and somatic symptoms affecting appetite and sleep. Therefore, Ms. Schwandt's education, training extensive specialization in the field of diagnosing trauma in non-verbal developmentally disabled children, bolsters her testimony. Her opinions as an expert witness in her field are given considerable weight.

Ms. Schwandt first met Student in the spring of 2018, after his home and community based providers refused to work with him due to his escalating aggressive and maladaptive behaviors. Student was biting, pulling hair, trying to escape rooms, and not transitioning well from a preferred task to a provider-directed task. Ms. Schwandt initially spoke with Parents for four and a half hours, before meeting Student and observing him in his home and her clinic, for two hours each. She reviewed Student's educational records, including his many behavioral emergency reports during the spring 2018 to the present. Ms. Schwandt had spent over 30 hours reviewing Student's educational, behavioral, and home agency records. Ms. Schwandt was not paid for her assessment and consultation with Student, or for her testimony.

She particularly reviewed Student's positive behavioral support plans and progress reports for 2017-2018 school year. She described Student's behavioral profile as having challenges with a predictable developmental behavioral trajectory. The positive behavioral methods listed in his behavioral support plans included praise when he performed tasks well, and calming strategies when his behavior escalated. She noted Student had a significant decrease in communication intent and attempts, a significant increase in aggression toward both Parents, disrupted sleep and appetite, and many attempts to elope from the family home.

Ms. Schwandt saw Student again in November 2019 for two hours to evaluate how he was progressing in his new IEP non-public school placement at the Academy for Advancement of Children with Autism. In November 2019, Student's behavior was improving, the paraeducators working with him were ready to stop using their protective neoprene arm guards, but Parents were concerned for their safety. By December 2019, Student made some progress managing his behaviors and began transitioning back to taking the school bus with an aide. No other information was provided about how Student was progressing at his new non-public school. Student presented no evidence his new non-public school was not an appropriate FAPE placement. The non-public school placement was a product of IEP team collaboration and agreement, and Parents were actively involved in its development.

Ms. Schwandt spent a total of 30 hours meeting with the family, reviewing all the records in Student's and Santa Monica-Malibu's exhibit binder. She was familiar with Student's level of behavioral functioning since pre-school. She opined he had a consistent profile and projected trajectory, with typical behaviors, straight forward classroom strategies, and moderate levels of support, based on his March 2017 and October 2017 behavior support plans. By his December 11, 2017 behavior support plan, his trajectory shifted, and his baseline behaviors showed greater inconsistency in skills he had previously achieved. The interventions used in his classroom included praising him, reinforcing good behavior, and calming strategies when he escalated his behavior. These strategies were still very similar to the March and October 2017 behavior support plans.

By April 2018, Student's behavior escalated, he began ravenously biting through his aide's clothes, requiring gloves and protective sleeves when working with him.

Ms. Schwandt opined Student was processing significant stressors as a non-verbal child with autism and intellectual disability. By the May 11, 2018 IEP, Student's behavior was taking a toll on the classroom, with a level of aggression and elopement far beyond the life skills program's focus. Staff were directed to clear the classroom when Student escalated. The IEP team ordered additional safety equipment, of the type more usually used in a residential treatment facility.

Ms. Schwandt opined that beginning May 2018 and continuing into the 2019 calendar year, there was a significant negative change in Student's developmental trajectory. This was not a predictable trajectory, and the most likely explanation for Student's increase in aggression was that he was trying to avoid contact with someone he was afraid of and avoid a painful stimulus. He was trying to remove himself from people he was afraid of. He lost underlying trust with the caregivers who were helping him. He had lower levels of communication than he did in pre-school. The most logical explanation was that Student experienced trauma as a non-verbal child, and did not have the ability to get help or support for his trauma. Ms. Schwandt did not believe Student's behavioral changes were caused by staff turnover, his gastrointestinal issues, or his tooth abscess. Those were not plausible explanations for such a catastrophic cascade of behaviors.

Ms. Schwandt did not assess Student in language, pragmatics, or intellectual functioning. She did not diagnose him with trauma or post-traumatic stress disorder. Nor did she prepare a written report of her assessment of Student. However, she testified at length in a detailed, knowledgeable, and convincing manner. The behavioral

characteristics Student exhibited were closely aligned with the pattern of behaviors and catastrophic changes manifested by a non-verbal child with autism and intellectual disability when there was a significant traumatic event.

Ms. Schwandt believed that the repeated use of aversive techniques, and the length of time Student was exposed to the aversive techniques, were the most likely cause of his trauma, his behavioral, cognitive, and functional communication loss and regression. This conclusion was based upon her lengthy review of Student's records, meeting with him, and talking to professionals and the family. The effects of his trauma were amplified because of his dual autism and intellectual disability and his inability to communicate. The trauma reshaped his expectations of his basic safety. The trauma disrupted his core skill building, reduced his overall cognitive ability, and his ability to make and retain new memories. With a disrupted memory, he could not use new skills. This was reflected in his reduced compliance, communication skills, and communicative intent. Student's functional communication was a fragile skill at the core of his academic program, and this significant change in his trajectory affected his ability to access his curriculum.

Ms. Schwandt's expert opinion that Student suffered from trauma caused by Ms. Gottlieb's repetitive aversive techniques was persuasive. Her expert opinion that Student required a Pivotal Response Training program to ameliorate his educational loss was convincing.

In comparing what Student's positive behavior support plans required to what Ms. Gottlieb provided, there was a material failure to implement Student's IEP. His positive behavior support plans had straightforward strategies including praise,

reinforcing good behavior, and calming strategies when he was agitated, and his behaviors were improving until Ms. Gottlieb started using aversive techniques. None of Student's positive behavior support plans included behavioral emergency techniques, aversive behavioral techniques, or corporal punishment to help him manage his behavior. He did not require a behavioral emergency plan at any of his three 2017 behavior support plans.

The overwhelming weight of the evidence established that between September 2017, and January 2018, on the bus, Ms. Gottlieb did not use the strategies required by Student's positive behavior support plans and IEPs. Instead, she inappropriately used harnesses, holds and restraints on the bus, emergency interventions, aversive techniques, and corporal punishment to gain compliance, when there was no emergency crisis. She used more force than necessary under the circumstances. The emergency interventions were not provided for in his behavior support plans and IEPs. The testimony, emails, videos, and behavioral emergency reports established that the failure to implement Student's IEP was material.

The failure to implement Student's positive behavior support plans and IEPs was material because between 15 and 19 times, Ms. Gottlieb put Student in a five-point harness on the bus when there was not a behavioral emergency. Ms. Gottlieb intended to restrict Student's physical freedom.

The failure to implement Student's positive behavior support plans and IEPs was material because Ms. Gottlieb grabbed Student's wrists and pressed his hands into the seat, leaving red marks on his wrists and hands. Ms. Gottlieb yanked Student forcefully causing the bus to vibrate. Ms. Gottlieb pulled and twisted and pulled Student's arm.

The overwhelming weight of the evidence established that between September 2017 and January 2018, in the classroom, Ms. Gottlieb did not use the strategies required by Student's positive behavior support plans and IEPs. Instead, she inappropriately used hand sanitizer directly on his hand with cracked skin, knowing it would cause pain. Ms. Gottlieb continued to threaten to use it on Student, approximately 18 other times, knowing he would comply because he did not want to experience pain from having it on his hands. Ms. Gottlieb used it as an aversive technique, and as corporal punishment to cause pain and gain his compliance, when there was no emergency crisis. The aversive techniques were not provided for in his IEPs. This was a material failure to implement Student's IEPs.

The overwhelming weight of the evidence established that the failure to implement Student's positive behavior support plans and IEPs was material, as corroborated by the testimony of witnesses and the written emails several paraeducation aides wrote at or near the time they witnessed Ms. Gottlieb use hand sanitizer on Student directly, and also threatened to use it on him. Ms. Gottlieb bragged to many paraeducation aides in the room that all she had to do was hold up the hand sanitizer bottle and Student would become compliant.

These factors convincingly established that Ms. Gottlieb intended to cause pain and gain behavioral compliance numerous times, when there were no justifiable factors. She did not apply hand sanitizer on his hands for the purpose of keeping his hands clean. There were no circumstances justifying its use as a behavioral emergency. She used more force than was necessary. The failure to implement Student's IEP and positive behavior support plan is material because Ms. Gottlieb intended to cause pain, actually caused pain, used aversive techniques and corporal punishment.

The interviews and log Ms. Ernst created, and interviews Ms. Crane conducted, establish that Ms. Gottlieb directly administered hand sanitizer onto Student's chapped hands at least three times, and threatened Student with using it at least 15 times. Ms. Gottlieb used hand sanitizer for an aversive purpose based on the account from multiple classroom witnesses who described her speech, tone, expressions, gestures, conduct, and demeanor while she was using the hand sanitizer.

Therefore, Santa Monica-Malibu denied Student a FAPE because it materially failed to implement Student's positive behavior support plans when Ms. Gottlieb used emergency behavioral techniques, aversive techniques, and corporal punishment on Student 37 times, both on the bus and in the classroom, between September 2017 and January 31, 2018. Ms. Gottlieb skipped past essential, sequential, progressive steps in Student's behavioral support plans, did not contemporaneously chart her notes, and did not follow applied behavior analysis protocols. Ms. Gottlieb applied aversive behavioral techniques that were not part of Student's positive behavior support plans. She should have used aversive behavioral techniques only as a crisis intervention plan. Ms. Gottlieb used aversive behavioral techniques when there were no behavioral emergencies. Ms. Gottlieb did not file the required behavioral emergency reports, and thus her actions were not valid emergency interventions. She used more force than necessary under the circumstances. Ms. Gottlieb intended to cause pain, trauma, and fear, to gain compliance, and therefore she used corporal punishment. Those aversive techniques and application of corporal punishment had negative consequences on Student, and caused him pain and trauma. The repeated use of these techniques caused Student educational, communicative, cognitive, and behavioral harm and regression. The harm and regression were not caused by changes in direct classroom staff, gastrointestinal

pain, or dental pain. For these reasons, Santa Monica-Malibu materially failed to implement Student's positive behavior support plans during the 2017-2018 school year.

ISSUE 2: DID SANTA MONICA-MALIBU DENY STUDENT A FAPE DURING THE 2017-2018 SCHOOL YEAR WHEN ITS PERSONNEL, CLASSROOM AIDES, TEACHERS, AND MULTIPLE ADMINISTRATORS OBSERVED OR LEARNED OF STUDENT'S AIDE'S USE OF CORPORAL PUNISHMENT AND AVERSIVE BEHAVIORAL TECHNIQUES, AND FAILED TO STOP, INTERVENE, PREVENT AND/OR REPORT SUCH ABUSE?

Santa Monica-Malibu's September 23, 2019, Motion to Dismiss claims for lack of jurisdiction did not challenge Issue 2 and therefore was not addressed in the Order to Dismiss Issues 3, 4, 5 and 6. The ALJ did not dismiss Issue 2 prior to the hearing because OAH does not have a method for summary judgment. During the hearing, the ALJ heard and received evidence potentially relevant to Issue 2. At the conclusion of the hearing, the ALJ determined that the evidence presented for Issue 2 focused on employment matters and criminal and civil law, and not the IDEA. After notice and an opportunity to be heard, both parties presented written closing briefs regarding whether Issue 2 should be dismissed for lack of OAH jurisdiction.

Student contends Santa Monica-Malibu staff repeatedly failed to stop Ms. Gottlieb from harming Student over a four-month period and therefore denied him educational opportunity. Student argues that should the ALJ determine Issue 2 was duplicative because the remedies requested were the same as for Issue 1, then the ALJ should make a ruling that no further relief could be granted as to Issue 2. Student

argues such a ruling would establish that Student had exhausted his administrative remedies, as required by *Fry v. Napoleon Community Schools* (2017) [137 S.Ct. 743, 197 L.Ed.2d 46], allowing for Student to proceed in other legal arenas.

Student alternatively argues that without such a ruling, the ALJ must reach Issue 2 on the merits, as other ALJs have determined that the failure to stop abuse constitutes a denial of FAPE. Student cites *Beaumont Indep. Sch. Dist.*, 162 SE 0214, 114 LRP 41599 (SEA TX 08/28/14), for the proposition that use of behavioral interventions, including corporal punishment, which was not specified in the non-verbal student's IEP, denied the student a FAPE. Student also cites *In re: Student with a Disability*, 2014-01, 114 LRP 34648 (SEA MT 03/18/14), as holding that a school district denied a disabled student a FAPE when it failed to sufficiently address allegations that a special education teacher abused the disabled student.

Santa Monica-Malibu contends it cannot be a mandated reporter under the Penal Code. The Penal Code defines child abuse, mandated reporters, and unlawful corporate punishment. In essence, Santa Monica-Malibu asserts Issue Two is outside the IDEA and, therefore, OAH's jurisdiction.

OAH only has jurisdiction to hear matters brought under the IDEA (20 U.S.C. § 1400 et. seq.) to "ensure that all children with disabilities have available to them a free appropriate public education," and to protect the rights of those children and their parents. (20 U.S.C. § 1400(d)(1)(A), (B), and (C); see also Ed. Code, § 56000.) A party has 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) [party has a right to present a complaint regarding matters involving proposal or refusal to initiate or change the identification, assessment, or educational placement of a child; the provision of a free appropriate public education to a child; the refusal of a parent or guardian to consent to an assessment of a child; or a disagreement between a parent or guardian and the public education agency as to the availability of a program appropriate for a child, including the question of financial responsibility].) The jurisdiction of OAH is limited to these matters. (*Wyner v. Manhattan Beach Unified School. Dist.* (9th Cir. 2000) 223 F.3d 1026, 1028-1029.)

OAH does not have jurisdiction to decide claims based on section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 701 et seq.), section 1983 of title 42 United States Code, the Americans with Disability Act (42 U.S.C. §§ 1201, et seq.), or the Unruh Civil Rights Act (Civ. Code, § 51). OAH does not have jurisdiction to decide claims based upon criminal law. OAH does not apply Penal Code section 11166, and does not decide whether school personnel were mandated reporters pursuant to Penal Code section 11165.7. OAH does not have jurisdiction over child abuse proceedings pursuant to the Welfare and Institutions Code. Finally, these proceedings are not the proper venue for school employment and union contracts, nor for school professional and paraprofessional licensing and certifications.

In determining whether Student seeks relief for the denial of FAPE, the ALJ must look to the gravamen of the complaint, as set out in *Fry, supra*, 137 S.Ct. at p. 746-748. The IDEA guarantees individually tailored educational services for disabled students. A complaint brought under the IDEA must seek redress for a school's failure to provide FAPE. The same conduct by the parties may violate other statutes in other venues.

Thus, the ALJ must examine the substance, not the surface of the complaint., and should consider the diverse means and ends of statutes covering people with disabilities, including the history of the proceedings, to determine if the claim falls within the IDEA. (*Fry, supra*, 37 S.Ct. at p. 747.)

Fry established two other guidelines for determining whether an issue was brought under the IDEA or Title II of the Americans with Disabilities Act, when a school district denied a student's service animal equal access to her school program. In this case, those two other equal access guidelines are not relevant to determining whether Issue 2 is within OAH's jurisdiction.

In looking to the history of Student's complaint, a pattern emerges. Student's complaint initially alleged six issues. Issues 1 and 2 explicitly allege a denial of FAPE under the IDEA. Issues 3 and 4 explicitly alleged a violation of Title II of the Americans with Disabilities Act, and were dismissed by OAH. Issues 5 and 6 explicitly alleged violations of section 504 of the Rehabilitation Act of 1973, and were dismissed by OAH. Student's Proposed Resolution A appropriately requested compensatory educational programming, services, and supports to address educational loss and regression. Proposed Resolution B requested general and special damages under title 42 United States Code section 12133 and title 29 United States Code section 794(a), and was dismissed by OAH. Proposed Resolution C requested any and other damages as allowed pursuant to that federal law, and was dismissed by OAH. Proposed Resolution D requested reasonable attorneys' fees under those federal statutes, and was dismissed by OAH. Proposed Resolution E appropriately requested the costs of suit. Finally, Proposed Resolution F appropriately requested such other and further relief as

the ALJ deems just and proper. Three of the six proposed resolutions seek remedies available under the IDEA, whereas the three that were dismissed were brought under non-IDEA law for the purpose of exhausting all available legal remedies. Student seeks additional relief from other courts and venues.

Unlike Issue 1, Issue 2 does not relate to the identification, evaluation, or educational placement of Student, or the provision of a FAPE to Student. It does not relate to the proposal or refusal to initiate or change the identification, assessment, or educational placement of Student; the provision of a FAPE to Student; the refusal of a parent or guardian to consent to an assessment of Student; or a disagreement between a parent or guardian and the public education agency as to the availability of a program appropriate for Student, including the question of financial responsibility. Under *Wyner*, OAH's jurisdiction is limited to these issues.

In Issue 2, Student asks OAH to conclude that Santa Monica-Malibu denied Student a FAPE because first, its staff knew its aide used corporal punishment and aversive techniques on Student, and second, staff failed to stop, intervene, and/or report the alleged abuse to either the police department or child protective services. Corporal punishment and aversive techniques are defined in the Education Code. However, Student used the conjunctive "and" when alleging staff saw and failed to stop, intervene, and/or report abuse. In Issue 2, Student does not challenge the adequacy of Student's educational program, and does not seek the available proposed resolutions of compensatory educational programming, services, and supports for a loss of educational benefit.

Instead, the gravamen of Issue 2 is that the staff failed to stop, intervene, and/or report “abuse” to law enforcement or child protective services. Issue 2 relies on the same alleged aversive actions as Issue 1, but the focus is significantly different. Issue 1 asserts that the aversive techniques used by staff caused Student harm, while Issue 2 asserts that the failure to stop or report the aversive techniques to law enforcement or child welfare authorities caused the harm. Issue 1 addresses the same events but focuses on Student’s behavior support plans and IEPs. Issue 2 focuses on failures to report suspected child abuse to police and child welfare departments, a claim over which OAH has no jurisdiction.

While the Education Code does define corporal punishment and aversive techniques, it does not define mandatory reporter of abuse. The gravamen of Issue 2 does not challenge the adequacy of the Student’s educational program under the IDEA. The gravamen of Issue 2 does not seek redress for a denial of FAPE. Thus, the claim goes beyond the IDEA, as do the Proposed Resolutions B, C, and D, because under a *Fry* analysis, the gravamen of Student’s Issue 2 is something other than the denial of the IDEA’s core guarantee. (*Id.*, 37 S.Ct. at p. 746.)

Student cites *In re: Student with a Disability*, 2014-01,114 LRP 34648 (SEA MT 03/18/14) as holding that a school district denied a disabled student a FAPE when it failed to sufficiently address allegations that a special education teacher abused the disabled student. That case is distinguishable, as student claimed the people who knew the teacher was restraining the student in a posture-supporting chair as a punishment did not report it to responsible district personnel, and that district personnel did not

stop the unapproved use of the restraint, thereby denying the student a FAPE. The claim did not relate, as Student's Issue 2 does, to school employees failing to report the teacher to the police or child welfare departments.

Therefore, Issue 2 is dismissed for lack of jurisdiction.

CONCLUSIONS AND 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.

Issue 1: Santa Monica-Malibu denied Student a FAPE when it materially failed to implement Student's positive behavior support plans between October 2017 and January 2018, when his behavioral aide used aversive techniques. Student prevailed on Issue 1.

Issue 2: OAH has no jurisdiction over Santa Monica-Malibu's personnel, classroom aides, teachers, and multiple administrators' failure to report the use of corporal punishment and aversive behavioral techniques by Student's aide, and failure to stop, intervene, and prevent, abuse, because it does not involve a claim under the IDEA. Issue 2 is dismissed.

REMEDIES

Student prevailed on Issue 1, proving Santa Monica-Malibu denied him a FAPE by materially failing to implement his IEP. As a proposed resolution, Student asks for compensatory education in the form of Santa Monica-Malibu funding Student and his

family participating in the University of California, Santa Barbara Pivotal Response Training program for the next five years. Student requests Santa Monica-Malibu fund all costs related to the week-long assessment and training program, and 20 hours per month consultation for 60 months. Student seeks the ability to attend another national center of excellence in complex communication disorders, if the University of California, Santa Barbara is unavailable. Student also asks to be unilaterally placed at any non-public school or residential treatment center of Parents' choice, with Santa Monica-Malibu funding all costs, until the age of 22.

Remedies under the IDEA are based on equitable considerations and the evidence established at hearing. (*Burlington v. Department of Education* (1985) 471 U.S. 359, 374.) School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Student W. v. Puyallup School District* (9th Cir. 1994) 31 F.3d 1489, 1496.) The conduct of both parties must be reviewed and considered to determine whether relief is appropriate. (*Id.* at p. 1496.) These are equitable remedies that courts may employ to craft "appropriate relief" for a party. An award need not provide a "day-for-day compensation." An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid ex rel. Reid v. District of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be reasonably calculated to provide educational benefits that likely would have accrued from special education services the school district should have provided in the first place." (*Ibid.*)

The core therapeutic modality to treat trauma is cognitive behavioral therapy, talking about trauma and stressors. However, because Student was unable to share his experiences, his ability to learn new skills was impacted, and he was unable to form new

and different relationships. It diminished his ability to benefit from behavioral learning. Student now required much more complex clinical interventions to restart his acquisition of new skills. The architecture of his learning was disrupted so significantly that the same strategies no longer worked.

Ms. Schwandt opined that Student's trauma would affect him for a long time, and that he specifically required a Pivotal Response Training program to remediate his regression. Pivotal Response Training is a behavioral learning modality that uses principles of verbal behavior to create the needed architecture of communication for a child with a no and low communication profile. The University of California, Santa Barbara, has an excellent Pivotal Response Training program with different levels of intensity. Ms. Schwandt was personally familiar with that program, and other centers of excellence in the country, such as Kennedy Krieger Center in Maryland, the Anderson Clinic in southeastern New York, and the University of North Texas.

The program at the University of California, Santa Barbara, had a five-day intensive comprehensive developmental communication and behavioral multidisciplinary assessment. The next step in the response to intervention approach is robust, ongoing consultation and guidance from expert clinicians who monitor, analyze, and review data, and make trauma informed treatment decisions. They create a comprehensive service map that addresses all major barriers to communication. The program is designed to be delivered 15 to 20 hours a month, and would include also Student's family, paraprofessionals, and educators so Student would receive consistent support. Communicative intent is a very specialized practice, and requires the professional to assess a child's motivation to communicate. Ms. Schwandt believed the

key to remediating the academic skills Student lost was for him to develop the ability to trust his teacher, and to regain the ability to communicate to allow him to learn.

Ms. Schwandt did not know how long it would take for Student to respond positively, as she anticipated the trauma would affect him for life. She believed he required the program at a minimum of 15 to 20 hours per month for five years. His need for trauma informed decisions and support would continue into adulthood.

The data showed the correlation and causation of Student's increased behavioral escalations. Student's developmental trajectory significantly changed from a consistent profile, in response to the aversive techniques Ms. Gottlieb applied. He could not be regulated by previously successful methodology.

Ms. Schwandt understood the signs of trauma in non-verbal, young children with autism and intellectual disability. She recognized Student's behavioral outbursts as a strong desire to avoid people and places that remind him of Ms. Gottlieb. The appropriate remedy must be able to specifically address pivotal response training to help build functional communication skills again.

Student is entitled to an equitable remedy for Santa Monica-Malibu's material failure to implement his positive behavior support plans and IEPs from October 2017 through January 2018. The aversive techniques were traumatic for Student, causing behavioral and cognitive regression. Because of Student's unique disabilities of autism, intellectual disability, and speech and language impairment, he requires a specific compensatory education for remediation in the form of a Pivotal Response Training program for him and his family, at the University of California, Santa Barbara, or another

recognized program. He requires the intensive week long assessment, and follow up consultation for 20 hours per month for a period of two years.

Student is not entitled to the non-public school placement or residential treatment center of his choice until the age of 22. There is no indication Student needs a non-public school as a remedy for a past denial of FAPE, when he is attending a non-public school through the IEP process. This decision should remain with the IEP team and the parents.

ORDER

Santa Monica-Malibu shall directly fund the University of California, Santa Barbara Pivotal Response Training program for Student and his family, including initial assessments and up to 20 hours a month of consultation, for a period of two years, to be used by June 30, 2023.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56505, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within 90 days of receipt.

/s/
Deborah Myers-Cregar
Administrative Law Judge
Office of Administrative Hearings