

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2019080673

PARENT ON BEHALF OF STUDENT,

v.

LONG BEACH UNIFIED SCHOOL DISTRICT.

DECISION

MARCH 19, 2020

On August 16, 2019, the Office of Administrative Hearings, referred to as OAH, received a due process hearing request from Parent on behalf of Student, naming Long Beach Unified School District as respondent. On September 23, 2019, OAH granted the parties' joint request for a continuance of the hearing. Administrative Law Judge Elsa H. Jones heard this matter in Long Beach, California, on December 17 through December 19, 2019, and on January 7, 9, and 15, 2020.

Attorney Nader Nuru represented Parent and Student, referred to collectively as Student. He was accompanied by Attorney Seshah G. Wolde-Tsadik on December 17, 18, and 19, 2019. Parent attended all hearing days on behalf of herself and Student.

Attorney Debra K. Ferdman represented Long Beach Unified. Wendy Rosenquist, Long Beach Unified's special education administrator, attended all hearing days on Long Beach Unified's behalf.

Sworn testimony and documentary evidence were received at the hearing. At the parties' request, the matter was continued until February 18, 2020, for written closing briefs. The briefs were timely filed, the record closed, and the matter submitted on February 18, 2020.

ISSUES

1. Did Long Beach Unified deny Student a free appropriate public education, referred to as a FAPE, by failing to fulfill its child find obligations from August 16, 2017, to November 2, 2018?
2. Did Long Beach Unified deny Student a FAPE by failing to assess Student in the area of attention deficit hyperactivity disorder, or by failing to appropriately assess Student in the area of emotional disturbance, from September 11, 2018, to August 16, 2019?
3. Did Long Beach Unified's November 2, 2018 individualized education program, referred to as an IEP, as amended by the May 29, 2019 IEP, deny Student a FAPE by:
 - a. Failing to address Student's needs in the areas of behavior, academics, counseling, and educationally-related mental health services, by failing to provide Student with a one-to-one academic and behavior aide and supervision, academic tutoring, educationally related mental health services counseling, and appropriate behavior plans, and
 - b. Failing to offer an appropriate placement?

4. Did Long Beach Unified deny Student a FAPE by failing to implement the accommodations and services in his IEP of November 2, 2018, and the May 29, 2019 amended IEP?
5. Did Long Beach Unified deny Student a FAPE by failing to provide prior written notice with respect to Student's change of placement in May 2019?

These issues were discussed at the Prehearing Conference, referred to as a PHC, held in this matter on December 9, 2019. On the first day of the due process hearing, they were slightly modified and confirmed. They were also slightly modified in this Decision to correct small typographical errors, such as the September date in Issue 2, and to clarify that the May 29, 2019 IEP team amended the November 2, 2018 IEP.

At the PHC, the ALJ ordered submission of a statement detailing the accommodations and services listed in Issue 4, above, an order which was documented in the Order Following Prehearing Conference dated December 11, 2019. On December 11, 2019, Student submitted a document entitled Statement of Issues, which attempted to "clarify" all of the issues. Student's post-PHC Statement of Issues did not comply with the ALJ's Order regarding further specification of Issue 4 only, but rather unilaterally regrouped and reworded some of the issues discussed and affirmed at the PHC as the issues for hearing. The issues heard were those stated above, and were not the issues as stated in the Statement of Issues.

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 (2006) et seq.; 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 FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living, and
- 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 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, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see 20 U.S.C. §1415(i)(2)(C)(iii).) Here, Student is the petitioning party, and has the burden of proof. The factual statements below constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. sec. 1415(h)(4); Ed. Code, sec. 56505, subd. (e)(5).)

Student was 11 years old and in sixth grade in a general education classroom at Tincher Middle School at the time of the hearing. Student resided with Parent within Long Beach Unified's geographic boundaries at all relevant times. At all relevant times he attended Long Beach Unified schools.

STUDENT'S FAMILY BACKGROUND

Student's family life was troubled. Prior to the events that are the subject of this due process hearing, Student was neglected and abused by his biological mother and her boyfriend. Biological mother is referred to as Mother. As a result, Student was removed from Mother's care in March, 2017, when he was nine years old and in third grade. Student then became a ward of the state and a client of the Los Angeles County Department of Children and Family Services. Soon thereafter, the court appointed Parent as his guardian, and Parent has served in that position at all relevant times.

ISSUE 1: DID LONG BEACH UNIFIED DENY STUDENT A FREE APPROPRIATE PUBLIC EDUCATION, REFERRED TO AS A FAPE, BY FAILING TO FULFILL ITS CHILD FIND OBLIGATIONS FROM AUGUST 16, 2017, TO NOVEMBER 2, 2018?

Student contends that Long Beach Unified violated its child find obligations during the 2017-2018 school year, and through November 2, 2018, by failing to assess Student despite knowledge that Student was struggling academically, behaviorally, and emotionally.

Long Beach Unified contends that it had no reason to suspect Student was a student with a disability who might require special education and related services during the 2017-2018 school year. It also contends that it generated an assessment plan and commenced to assess Student promptly in response to Mother's request for assessment in September 2018.

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 (2006).) Parents and school personnel develop an IEP for an eligible student based upon state law and the IDEA. (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 (2006); Cal. Code Regs., tit. 5, § 3001, subd. (p).)

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 District v. Rowley* (1982) 458 U.S. 176 (*Rowley*); *Endrew F. v. Douglas County School Dist.* (2017) 580 U.S. ____ [137 S.Ct. 988, 1000] (*Endrew F.*); *E.F. v. Newport Mesa Unified School Dist.* (9th Cir. 2018) 726 Fed.Appx. 535.)

A school district is required to actively and systematically seek out, identify, locate, and evaluate all children with disabilities, including homeless children, wards of the state, and children attending private schools, who are in need of special education and related services, regardless of the severity of the disability, including those individuals advancing from grade to grade. (20 U.S.C. § 1412(a)(3)(A); Ed. Code, § 56171, 56301, subds. (a) and (b).) This duty to seek and serve children with disabilities is known as "child find." A school district's child find obligation toward a specific child is triggered when there is knowledge of, or reason to suspect, a disability, and reason to suspect that special education services may be needed to address that disability. (*Dept. of Ed., State of Hawaii v. Cari Rae S.* (D. Hawaii 2001) 158 F.Supp. 2d 1190, 1194 (*Cari Rae S.*).

The threshold for suspecting that a child has a disability is relatively low. (*Id.* at p. 1195.) A school district's appropriate inquiry is whether the child should be referred for an evaluation, not whether the child actually qualifies for services. (*Ibid.*)

The school district's duty for child find is not dependent on any request by the parent for special education testing or services. (*Reid v. Dist. of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 518.)

The actions of a school district with respect to whether it had knowledge of, or reason to suspect a disability, and that special education services may be necessary to address the disability must be evaluated in light of information that the district knew, or had reason to know, at the relevant time. It is not based upon hindsight. (See *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, (citing *Fuhrmann v. East Hanover Board of Ed.* (3rd Cir. 1993) 993 F.2d 1031).) Further, a student shall be referred for special educational instruction and services only after the resources of the regular education program have been considered and, where appropriate, utilized. (Ed. Code, § 56303.) The law requires that general education interventions be considered and used before a student is referred for special education, and school districts have a reasonable time to observe and work with students in general education before identifying and assessing them for special education. (*Panama-Buena Vista Union School Dist. v. A.V.* (E.D. Cal. Dec. 5, 2017, No. 1:15-cv-01375-MCE-JLT) 2017 WL 6017014, **5-6.)

Violations of child find, and of the obligation to assess a student, are procedural violations of the IDEA and the Education Code. (*Cari Rae S., supra*, 158 F. Supp. 2d at p. 1194.); *Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1031.)

States must establish and maintain certain procedural safeguards to ensure that each student with a disability receives the FAPE to which the student is entitled, and that parents are involved in the formulation of the student's educational program. (*W.G., et al. v. Board of Trustees of Target Range School Dist., etc.* (9th Cir. 1992) 960 F.2d 1479, 1483.) (*Target Range*). Citing *Rowley, supra*, the court also recognized the importance of adherence to the procedural requirements of the IDEA, but noted that procedural flaws do not automatically require a finding of a denial of a FAPE. (*Id.* at 1484.) Procedural violations may constitute a denial of a FAPE if they result in the loss of educational opportunity to the student or seriously infringe on the parents' opportunity to participate in the IEP process. (*Ibid.*) These requirements are also found in the IDEA and California Education Code, both of which provide that a procedural violation only constitutes a denial of FAPE if it:

- impeded the child's right to a FAPE;
- significantly impeded the parent's opportunity to participate in the decisionmaking process regarding the provision of a FAPE to the child; or
- caused a deprivation of educational benefits.

(20 U.S.C. § 1415 (f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2).)

STUDENT'S PERFORMANCE DURING THE 2017-2018 SCHOOL YEAR

Long Beach Unified did not violate its child find duties as contended by Student during the 2017-2018 school year.

Student transferred from another Long Beach Unified school and entered Hartley Rappaport's fourth grade class at Herrera Elementary School on August 27, 2017, the

first day of the 2017-2018 school year. Shortly after the first day of school, Parent advised Mr. Rappaport of Student's personal history. Mr. Rappaport advised Parent that he would take special note of Student, and he did so. Mr. Rappaport communicated frequently with Parent, as he did with other parents of his students. He also gave Student extra support to help him finish his classwork or homework at lunch and outside of school hours. Mr. Rappaport gave similar assistance to other students in his class.

Student's behavior at school was unremarkable during the fall semester. Student was a little shy, but no shyer than some of the other students. He got along well with his peers. He engaged with others. He would occasionally initiate interactions, and when others initiated, he responded. Student was respectful, kind, honest, not aggressive, and not disruptive. He participated in class. Student followed classroom rules.

Mr. Rappaport did not recall Parent expressing any concerns about Student. In particular, he did not recall Parent communicating with him regarding whether Student had symptoms of an attention deficit hyperactivity disorder. Parent testified that at the end of November 2017, she expressed concerns to Mr. Rappaport about Student's struggles focusing on homework and becoming frustrated when trying to complete homework. She therefore asked Mr. Rappaport to fill out a form Parent had received from Student's therapist to screen Student for this disorder. Mr. Rappaport declined to complete the form, because he did not believe Student had any such symptoms. Parent produced no documentation to support her testimony.

During the fall semester of the 2017-2018 school year, Student's dependency court proceedings were pending, and Student was stressed by the prospect that the court might order him returned to Mother. Student received counseling, as was typical for foster children. At home, Student was angry, anxious and frustrated. Student did not demonstrate any maladaptive behaviors at school. Parent believed during the fall semester Student needed constant redirection and help with academics, including completing homework. Mr. Rappaport, however, did not recall Student requiring any more assistance in these areas than other students in the class. Mr. Rappaport was not strict with respect to students completing their homework. If they demonstrated they made the effort, that was sufficient.

The fall semester of the 2017-2018 school year ended on January 26, 2019. Student's report card for the fall semester revealed that Student's attendance was nearly perfect. He earned an "Excellent" rating in seven of the 10 areas of life and career skills. The life and career skills section described a variety of classroom behaviors, such as following rules and procedures, respecting others' feelings, participating and cooperating in group settings, and demonstrating other positive traits. Student received one rating of "Needs to Improve" in the area of properly managing materials, and two ratings of "Improving" in the areas of effective use of time to complete work and participation and cooperation in group settings.

Student obtained benchmark reading levels of mid-third grade in fiction and mid-fourth grade in nonfiction. In basic math facts, he obtained levels of third grade in addition and fourth grade in subtraction, multiplication, and division. By the end of the school year, fourth grade students were required to read at the end of third grade level in fiction and nonfiction, and achieve third grade level in addition, subtraction,

multiplication and division math facts. If they did not meet those levels, they would be recommended for retention. Since Student had only a mid-third grade benchmark reading level in fiction at the end of the first semester, his report card mentioned that retention was possible.

Teacher comments on the report card reflected that Student improved in reading comprehension, and that his writing could be improved to match the “high level of proficiency” he demonstrated in other subject areas. The comments mentioned Student had a positive attitude, tried hard, and participated during class with thoughtful and accurate answers.

Turning to Student’s grades in academic areas, Student received a 3, meets grade level standards, in the area of reading literature and informational text, and in the area of speaking and listening. He received a 1, does not meet grade level standards, in writing. Writing was difficult for Student, as it was a task that Mother employed as a punishment tool when he lived with her. Parent advised Mr. Rappaport of this during the fall semester.

Student received grades of 3 in technology and physical education, and grades of 2, partially meets grade level standards, in science, history/social sciences, health, music, and art.

During the first semester of the 2017-2018 school year, Student did not manifest any behavioral or academic difficulties at school that set him apart from his peers. His attendance was good, his behaviors were good, and his report card reflected that he was doing well academically in the general education setting, except that he struggled with writing as a result of his experience with Mother. As of the end of the fall semester,

Long Beach Unified had no knowledge or reason to suspect that Student was a student with a disability who might need special education and related services to access his curriculum. Further, the law permitted Long Beach Unified a reasonable time to observe how Student performed in general education before identifying him and assessing him for special education. Student was not obligated to assess Student for special education and related services during the fall semester of the 2017-2018 school year.

SECOND SEMESTER OF 2017-2018 SCHOOL YEAR

On or about January 29, 2018, the first day of the spring semester, Student had an emotional breakdown. He told Parent and his brother to take a knife and kill him. Student was hospitalized outside of Long Beach Unified's boundaries. There was no evidence that anybody at Long Beach Unified would have been able to predict that Student's mental and emotional state warranted hospitalization. On January 30, 2019, Parent notified the school of Student's hospitalization, the reasons for it, and that Student would not be attending school for awhile. Student was discharged from the hospital on February 6, 2018, with an After-Care Plan form.

The After-Care Plan form described Student's mental status and level of functioning at discharge. He denied "feelings/thoughts to not harm self or others," which is a confusing statement due to the double-negative implicit in the "denial." There was no evidence as to what that statement meant.

Student's primary diagnosis on admission was Major Depressive Disorder. His discharge diagnosis was "Axis 1: Major Depressive Disorder, severe, single episode, versus Adjustment Disorder, depressed episode." No witness was called to interpret what this meant. Axis II was "None." Axis III was "Severe."

The After-Care Plan included an Initial Treatment Plan. The treatment plan provided Student would receive individual and group therapy three to five times per week, and set forth Student's therapy goals.

Student received medication for depression during his hospitalization and at discharge. His prognoses at both six months and 12 months were fair to good with treatment, and poor without treatment.

The After-Care Plan also included a Discharge Plan, which described strategies and techniques for Student to work on, and recommended individual and family therapy for Student and Parent.

The After-Care Plan form included a section entitled "Other Services at Discharge," which listed 12 agencies, programs, or placements, including "Educational Services (IEP)." There was no specific evidence as to the purpose of the list. None of the listed agencies, programs, or placements were marked or circled to designate that it was recommended for Student. There was no evidence that the inclusion of "Educational Services" in the list had any particular significance regarding Student's eligibility for special education.

Parent gave a copy of the After-Care Plan to the school when Student was discharged. She also notified Mr. Rappaport that Student had been discharged and was on medication.

Student's medical diagnosis of depression was not sufficient to confer knowledge of, or reason to suspect, a disability on the part of Long Beach Unified, or reason to suspect that special education services might be necessary to address that disability. A medical or psychological diagnosis pursuant to the Diagnostic and Statistical Manual of

Mental Disorders, referred to in this Decision as the Diagnostic, Manual, is not synonymous with eligibility under the IDEA. (*Letter to Coe*, Office of Special Education Programs, interpretative letter, 32 IDELR 204, September 14, 1999.)

In early March 2018, as a result of his hospitalization and pursuant to court order, Student started to receive wraparound mental health services from Bayfront Youth and Family Services. The wraparound team included a facilitator, a therapist, a therapeutic behavior services coach, a parent partner, and a child and family specialist. Parent was in close touch with the team, communicating with the parent partner almost daily, and she and Student attended weekly wraparound team meetings.

After his hospitalization, Student continued to get along with his peers, but he became more withdrawn. He fell behind in his classwork. At home, Student was irritable, and it took him a long time to complete his homework. At school he isolated himself, and was moody and sometimes rude. He had headaches, said he was hot and dizzy, and sometimes would vomit. Mr. Rappaport let Student go to the bathroom whenever Student asked. Student sometimes spent a long time in the bathroom, but Mr. Rappaport would send two boys to check on him. Student told Parent he would cry when he was in the bathroom, but nobody informed Mr. Rappaport that Student was crying in the bathroom.

Overall, Student was more distracted than he was before his hospitalization. Student still followed class rules, unless he was not feeling well. Student was not typically irritable or hostile at school. Student was not aggressive and not disruptive. Student was not distraught in class. Student never mentioned to Mr. Rappaport that he was depressed or wanted to hurt himself.

Student would not always complete his work if he did not feel well. If he had a multi-day project, he could not always complete it because he was called out of class to see his counselor, or he was late to school. He struggled more with academics and focusing in class after the hospitalization. Mr. Rappaport attributed the changes in Student's classroom behaviors, and his physical disorders, to side effects from Student's medication.

Mr. Rappaport became so concerned about the side-effects from Student's medication that he mentioned the issue to the assistant principal, as well as to Parent. There was no evidence that anyone advised Mr. Rappaport that his concerns about Student's medication and its side-effects were misplaced.

In general, Student had good relationships with peers during the spring semester 2018. Mr. Rappaport did not recall that Student had any issues with his peers, except one time in March 2017, when Student threw a plastic Hawaiian necklace at a girl during a class game. Mr. Rappaport advised Parent about this event, but did not formally discipline Student for this one-time occurrence. Except for this incident, Student followed the class rules and was not disruptive. He participated in class and positively responded to interactions with his peers, even if he did not initiate such interactions as much as he did in the fall semester.

Mr. Rappaport transferred to another school in May 2018, and was replaced by several substitute teachers. Mr. Rappaport considered Student to have met Long Beach Unified standards during the school year. Parent believed Student was further behind at the end of school year than after his hospitalization.

Student's final report card showed that his absences and tardies increased somewhat during the second semester. At least some of the absences and tardies were due to his hospitalization and therapy appointments.

Overall, Student's final report card reflected that he was making some progress in school. There was no precipitous drop in any of his academic grades or the life and career skills marks. Indeed, his grades in technology, music and art increased. His ratings in life and career skills diminished somewhat from his first semester report card, which reflected some deterioration in his behaviors. For example, he received a single "Excellent" rating, in the area of adjusting to transitions and changes in routines. He received ratings of "Satisfactory" in six other areas. However, he raised his level of performance in the area of managing materials to "Improving," and maintained his levels of "Improving" in the areas of effective use of time to complete work and participated and cooperated in group settings. His benchmark reading levels improved to end-fourth grade level in both fiction and nonfiction. His math facts levels were third grade level in addition and subtraction, and fourth grade level in multiplication and division, which reflected a drop in subtraction from the fourth grade level he received on his first semester report card.

Teacher comments on the report card again mentioned Student's improvement in reading comprehension, but noted that Student's writing could be improved. The comments suggested Student had more trouble focusing that semester, and sometimes needed reminders to be on-task and to complete work in a timely manner when working in small groups and individually. Mr. Rappaport attributed Student's difficulty in concentrating, as referred to on the report card, to tardies, absences, and the side effects of Student's medication.

There was no evidence during spring 2018 that any of Student's physical symptoms at school, his increased distractibility, or his increased withdrawal after his hospitalization were sufficiently serious or intense that Long Beach Unified should have reasonably suspected that Student had a disability and he might require special education and related services. Rather, Student's performance at school during the spring semester of the 2017-2018 school year was similar to his performance during the fall semester. Student was well-behaved at school and able to access his education.

Consequently, Long Beach Unified was not required to assess Student for special education and related services during the 2017-2018 school year. Long Beach Unified did not violate its child find obligations and deprive Student of a FAPE during the 2017-2018 school year.

EARLY FALL SEMESTER, 2018-2019 SCHOOL YEAR.

Long Beach Unified did not violate its child find obligations during the 2018-2019 school year through November 2, 2018, as Student alleges.

During the summer of 2018, Student's behavior deteriorated. There was a possibility that he would be returned to live with Mother. Student directed physical aggression towards Parent. He fought with his siblings, he became angry, and he could not regulate his emotions. He had several meltdowns, but he was not hospitalized.

Student left Herrera Elementary at the end of the 2017-2018 school year. He began fifth grade on Tincher Elementary on Wednesday, August 29, 2018, the first day of the 2018-2019 school year. Parent transferred Student to Tincher, because she was familiar and comfortable with the school. Student joined Silvia Peverini's fifth grade general education class, which had 35 children and no teacher's aide. Ms. Peverini was

then in her 19th year of teaching general education classes as a credentialed teacher in California. In addition to her bachelor's degree in psychology, she held a master's degree in educational leadership, and she received a California Administrative Services credential in 2006.

During the first week or two of school, Parent advised Ms. Peverini of at least some of Student's background and issues. Student displayed anxious and non-compliant behaviors at school on the second or third day of school, which fell on August 30 and August 31. School was not in session on Labor Day, which fell on the following Monday, September 3. Student went to Arizona to visit Mother over Labor Day weekend. His behaviors were disruptive on the way back to California, as Student's behaviors and emotions intensified when he had contact with Mother. Parent sought assistance from the wraparound team as soon as she and Student returned to California.

On the morning of September 4, 2018, the day Student returned to school after Labor Day, David Soto, the child and family specialist on Student's wraparound team, emailed Ms. Peverini. He advised that Parent had given permission for him and Ms. Peverini to communicate with each other about Student's behaviors.

On September 4, 2018, Student was agitated, disruptive, and non-compliant at school. During class, he mentioned an insulting name that Mother called him, and described his negative experiences with Mother. He also wrote a journal entry in class about his unhappiness and how poorly Mother treated him. Parent testified that the journal entry included thoughts about whether Student should live. No other witness testified regarding the contents of this journal entry, and Student produced no documentation regarding the contents of the journal entry. Parent was called to pick

Student up early from school, due to his behavior. After Student left school, Student's wraparound team performed a threat assessment.

On September 5, 2018, Ms. Peverini wrote an email to Mr. Soto describing Student's classroom behavior on that day. Student had a tantrum in the classroom, was disruptive and oppositional in class, screamed at another student, and wrote comments on a class internet website regarding his feelings of depression which Ms. Peverini considered inappropriate.

On September 11, 2018, the ninth day of the school year, Parent requested in writing that Student be assessed for special education. Annette Miller, the school psychologist, discussed the request with Parent, and suggested a 504 Plan, but Parent asserted that she wanted an assessment for an IEP. On September 12, 2018, Ms. Miller presented Parent with an assessment plan for signature. The assessment plan reflected that Student would be assessed in the areas of academic performance, general intelligence, and social emotional status. On September 13, 2018, Parent signed consent to the assessment plan, and returned it to Long Beach Unified on the same day. Ms. Miller proceeded to assess Student over the course of five days in fall 2019. She wrote an assessment report dated November 2, 2018. Long Beach Unified timely convened an IEP team meeting to discuss the assessment on November 2, 2018.

Long Beach Unified did not violate its child find obligations during the 2018-2019 school year by not commencing the assessment process until the tenth day of the new school year in response to Parent's request the day before. This is especially so when, as here, Student was a new student at Tincher, who was unknown to Ms. Peverini, and his behavior was quite different from the behavior Student had demonstrated the previous school year at Herrera. School districts have a reasonable time in which to observe

students in a general education setting before identifying and evaluating students for special education.

Here, Student's behavior at the beginning of the 2018-2019 school year was entirely different from his behavior in Mr. Rappaport's class. Furthermore, Ms. Peverini's September 5, 2018 email to Mr. Soto reflected that she did not ignore the situation, but rather engaged with Student's wraparound team to consider how to manage Student's behavior. Ms. Peverini and Long Beach Unified were entitled to at least a brief period of time after the beginning of the school year to see if Student could adjust to his new campus, and to develop a reasonable suspicion that Student had a disability that might require special education and related services. Long Beach Unified did not violate its child find obligations by failing to refer Student for special education in the handful of school days between the second or third day of school when Student first demonstrated challenging behaviors, to September 11, 2018, when Parent requested an assessment. Long Beach then immediately began the assessment process. The fact that Long Beach first recommended a Section 504 assessment does not mean that Long Beach violated its child find duties, as it promptly agreed to the special education assessment when Parent declined the Section 504 assessment.

Moreover, a violation of the child find mandate is a procedural violation of the IDEA. Student did not demonstrate that any delay by Long Beach Unified in starting the assessment process during the first seven or eight school days of the school year impeded his right to a FAPE, significantly impeded Parent's opportunity to participate in the decisionmaking process regarding the provision of a FAPE, or deprived Student of educational benefits.

Under the circumstances, Long Beach Unified fulfilled its child find obligation by promptly responding to Parent's request for an assessment and commencing the assessment process. Long Beach Unified did not violate the child find mandate so as to deprive Student of a FAPE.

ISSUE 2. DID LONG BEACH UNIFIED DENY STUDENT A FAPE BY FAILING TO ASSESS STUDENT IN THE AREA OF ATTENTION DEFICIT HYPERACTIVITY DISORDER, OR BY FAILING TO APPROPRIATELY ASSESS STUDENT IN THE AREA OF EMOTIONAL DISTURBANCE, FROM SEPTEMBER 11, 2018, TO AUGUST 16, 2019?

Student contends that Long Beach Unified should have assessed Student for attention deficit hyperactivity disorder, performed a functional behavior assessment, and conducted an educationally related mental health services assessment, sometimes referred to as a mental health services assessment.

Long Beach Unified contends Student failed to prove that Long Beach Unified's assessment was inappropriate for not assessing Student for attention deficit hyperactivity disorder, or that it failed to properly assess Student in the area of emotional disturbance.

The general law pertaining to assessments provides that, before any action is taken with respect to the initial placement of an individual with exceptional needs, an assessment of the pupil's educational needs shall be conducted. (20 U.S.C. § 1414(a)(1)(A); Ed. Code, § 56320.) The pupil must be assessed in all areas related to his or her suspected disability, and no single procedure may be used as the sole criterion

for determining whether the pupil has a disability or whether the pupil's educational program is appropriate. (20 U.S.C. § 1414 (a)(2), (3); Ed. Code, § 56320, subds. (e) & (f).) The assessment must be sufficiently comprehensive to identify all of the child's special education and related service needs, regardless of whether they are commonly linked to the child's disability category. (34 C.F.R. § 300.306.)

Tests and assessment materials must be administered by trained personnel in conformance with the instructions provided by the producer of such tests. (20 U.S.C. § 1414(a)(2), (3); Ed. Code, § 56320, subds. (a), (b).) Assessments must be conducted by individuals who are both "knowledgeable of the student's disability" and "competent to perform the assessment, as determined by the school district, county office, or special education local plan area." (Ed. Code, §§ 56320, subd. (g), and 56322; see 20 U.S.C. § 1414(b)(3)(B)(ii).) A psychological assessment must be performed by a credentialed school psychologist. (Ed. Code, § 56324.) A health assessment shall be conducted by a credentialed school nurse or physician who is trained and prepared to assess cultural and ethnic factors appropriate to the pupil being assessed. (Ed. Code, § 56325, subd. (b).) Tests and assessment materials must be validated for the specific purpose for which they are used; must be selected and administered so as not to be racially, culturally, or sexually discriminatory; and must be provided and administered in the student's primary language or other mode of communication unless this is clearly not feasible. (20 U.S.C. § 1414(a)(2), (3); Ed. Code, § 56320, subds. (a), (b).)

In conducting the assessment, the school district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student. This includes any information provided by the parent which may assist in determining whether the student is a child with a disability

and the content of the IEP. (20 U.S.C. § 1414(b)(2)(A)(i).) The school district must use technically sound instruments to assess the relative contribution of cognitive and behavioral factors, as well as physical or developmental factors. (20 U.S.C. § 1414(b)(2)(C).)

Assessments must be selected and administered to best ensure that the test results accurately reflect the pupil's aptitude, achievement level, or any other factors the test purports to measure and not the pupil's impaired sensory, manual, or speaking skills unless those skills are the factors the test purports to measure. (Ed. Code, § 56320, subd. (d); 34 C.F.R. § 300.304(c)(3).)

The personnel who assess the student shall prepare a written report that shall include, without limitation, whether the student may need special education and related services and the basis for making that determination; the relevant behavior noted during observation of the student in an appropriate setting; the relationship of that behavior to the student's academic and social functioning; the educationally relevant health, development and medical findings, if any; if appropriate, a determination of the effects of environmental, cultural, or economic disadvantage; and the need for specialized services, materials, and equipment for students with low incidence disabilities. (Ed. Code, § 56327.) The report must be provided to the parent at the IEP team meeting regarding the assessment. (Ed. Code, § 56329, subd. (a)(3).)

LONG BEACH UNIFIED'S PSYCHOEDUCATIONAL ASSESSMENT

Soon after September 13, 2018, when Long Beach Unified received Parent's consent to the assessment, Ms. Miller commenced to assess Student. Her assessment met all statutory requirements.

Ms. Miller was employed by Long Beach Unified as a credentialed school psychologist since 2000. She earned a master's degree in learning handicapped education from California State University, San Bernardino. She obtained a learning handicapped credential, and, in 1986, obtained a resource specialist credential.

Ms. Miller received her pupil personnel services credential in 1998 from Chapman University, and received a California school psychology certificate. During her career, she served as a general education teacher, a resource specialist teacher, and a special day class teacher in a mild-to-moderate class, all prior to her 19-and-one-half years of experience working as a school psychologist. She was trained and experienced in administering the assessment instruments she used in assessing Student, and she administered them according to their respective manuals, as applicable.

Ms. Miller produced a written report of the assessment on November 2, 2018. The title of her report included not only the psychoeducational assessment, but also referred to an educationally related mental health services evaluation. The report stated that Student's challenging behaviors at the beginning of the school year provided the basis for the assessment referral, and interventions were tried.

Ms. Miller's report listed the assessment procedures. The assessment was conducted in English, Student's primary language. The possibility of environmental, cultural or economic disadvantages was addressed and information on their effects on Student's assessment results, where noted, were specified in the report. Tests used were selected carefully, with consideration given to their validity for Student and were valid for the purpose for which they were used. Test results were interpreted in relation to the limits of the test's measured validity and within the context of other relevant data. Test results were combined with other relevant findings for decisions on educational

needs. Ms. Miller believed that the results of the evaluation provided a valid assessment of Student's abilities and educational needs.

Ms. Miller reviewed Student's educational background, and briefly reviewed his family situation and how he came to live with Parent. She reported that Student was receiving court-ordered therapy, including wraparound services and medication management. The goal of Student's therapy was reunification with Mother, however, Student was very resistant to living with her.

The report included developmental and health information, based partly on the Health and Developmental History Parent completed and discussed with Ms. Miller. On the form, Parent stated that Student's desire not to live with Mother produced family stress. She reported Student had a history of anxiety and depression, and was taking a prescription medication for depression, anxiety, and post-traumatic stress disorder. The form had boxes to check if Student had a hyperactivity disorder or an attention deficit disorder, but Parent did not check those boxes.

The form requested information regarding Student's educational history. Student spent approximately one hour per day on homework, but during the previous school year he spent about two to three hours per day on homework. Under the heading Behavior/Temperament, the form contained a checklist of a variety of behaviors and issues. Parent checked the following: over-active, disruptive, defiant, easily frustrated, homework problems, excessive fears, aggressive, over-anxious, and disorganized. The form requested information regarding how Student got along with others. Student had trouble with other children bossing him around, but otherwise, he got along with them pretty well. He was willing to share, and he liked making people laugh. He could be shy or reserved, and sometimes felt like an outcast. His strengths were that he was good

with technology, liked to tell jokes, loved to sing, was a good motivator, and was a great talker. He was independent.

In response to a question on the form as to what Parent found most challenging about Student, Parent stated "Focusing." Student was in motion, whether it was shaking his leg, moving his hand, or fidgeting with something, or else he became frustrated. He was also dealing with the possibility that he would have to live with Mother against his wishes. He struggled with completing homework assignments on paper. He received therapy to help him cope with the removal from Mother's custody due to abuse, and to help him talk about the trauma he experienced. Parent did not include information on the form about Student's behaviors, because she believed that the school was familiar with them.

The school nurse screened Student's vision and hearing. Student wore glasses and had normal hearing. Parent told Ms. Miller that Student's doctor had advised Student could not be assessed for attention deficit hyperactivity disorder due to his anxiety. The report described Student's emotional breakdown on January 29, 2018, and his subsequent hospitalization. Ms. Miller reported that Student was discharged with the diagnosis of Major Depressive Disorder, severe, recurrent, without psychosis, and prescribed medication.

Ms. Miller spoke with Amy Lee, Student's therapist at Bayfront. Ms. Lee advised Ms. Miller that Student had clinical diagnoses of post-traumatic stress disorder and major depressive disorder. Ms. Miller also noted Parent reported that Student was diagnosed with anxiety.

Ms. Miller's report listed Student's previous general education interventions at school to help him be successful. These included modified classwork, preferential seating, frequent breaks, and daily contact with Parent.

The report addressed Student's cognitive level. Based on information derived from interview, observation, the Differential Ability Scale II, and classroom achievement, Student appeared to be functioning within the average range of cognitive ability. His scores on the Differential Ability Scale reflected Student's cognitive nonverbal and verbal ability scores were within the average range. His scores on the nonverbal reasoning subtest, spatial subtests, and verbal subtests, fell in the average range.

Ms. Miller also performed the academic achievement portion of the assessment. She administered the Woodcock Johnson Tests of Achievement IV, to evaluate Student's reading, math, and written language skills. In reading, Student's word recognition and comprehension were within the average range. He passed his end of fourth grade benchmarks, and his reading fluency rate was at a fifth grade level.

In math, Student's skills were within the average/low average range.

Student's written language skills were a weakness. His spelling was below average. His writing was simplistic. He struggled with grammar, structure, and mechanics.

Ms. Miller assessed Student's psychological processing using the Test of Visual Perceptual Skills 4, Differential Ability Scales II, and the Beery Buktenica Developmental Test of Visual Motor Integration. Student's scores reflected that his visual and auditory skills, as well as his visual motor integration skills, were within the average range.

The report included Ms. Miller's assessment observations. Student was resistant to being with her. He appeared annoyed and irritated. He was rewarded for completing tasks, and he negotiated points for his rewards. He selected the order of the tasks. At times, he hummed or made soft noises. He was quick to say "I don't know" if the task appeared difficult. He did not look at the examiner, but watched the clock. He frequently said he did not want to do the tasks, called them boring, and said he did not like them. He tapped his foot hard on the floor or shook his foot while sitting. He tried to look at the protocol to see how he was doing. He became talkative when Ms. Miller started to converse about *The Legend of Zelda*.

Ms. Miller summarized some of the notes kept by Ms. Peverini regarding Student's daily activities in class, to demonstrate how challenging his behaviors were. She also summarized her interview with Ms. Peverini. Student conscientiously performed his classroom job of putting the Chromebooks away. Student was good with technology. He had great difficulty focusing. He had low frustration tolerance, was impulsive, lost his temper easily, was irritable, and could be disrespectful to peers and adults. Student had difficulty recovering from a setback. His moods changed quickly, and he could become defiant and argumentative. He was easily stressed and attempted to isolate himself. Student was often in a negative mood. He said he did not have friends, and appeared lonely. He seemed to act without thinking, and he lacked self-control. Student often shut down when questioned about his behavior. He shouted out or sang loudly, and was emotional. He found fault and failed to take responsibility for his actions. Student tended to disturb others while they were working. He had difficulty starting and completing assignments. He failed to put effort into his work or participate in class discussions.

When Student became angry, he made noises. He slammed things on his desk or jerked his desk around to interrupt others. He screamed at peers who attempted to engage him in conversation. Peers expressed they did not feel comfortable sitting near him. Ms. Miller's report noted Student was sent home on October 4, 2018, due to physical aggression toward another peer.

Student frequently requested breaks, at which time he went across the hall to a vacant room and sat on a bean bag chair. Occasionally, he stayed there for 60 minutes.

Parent reported to Ms. Miller much of what she included on the Health and Development form regarding Student's strengths and challenges. She also reported he was physically and verbally aggressive toward her. He could manipulate a situation to his advantage. Student was self-critical when he was struggling with a project. He lost focus at times.

Ms. Miller administered the Behavior Assessment System for Children III to Parent and Student's teacher. This assessment tool is a rating scale that evaluates behavior and the degree to which behavioral and emotional problems are evident. It is also used to assess for attention deficit hyperactivity disorder, and conduct disorder. Ratings in the Clinically Significant range suggest a high level of maladjustment. Ms. Miller considered this tool, as well as observations by her and Student's teacher, and interviews, to constitute an educationally related mental health services assessment.

Student's teacher rated Student in the Clinically Significant range in the areas of adaptability, aggression, depression, atypicality, anxiety, and withdrawal. Parent rated Student in the Clinically Significant range in the areas of aggression, conduct problems, anxiety and depression.

Based on previous reports, interviews, observation, and the Behavior Assessment System ratings, Ms. Miller's report concluded that Student demonstrated characteristics of emotional disability due to his inability to build or maintain interpersonal relationships, inappropriate types of behavior under normal circumstances, and general mood of unhappiness or depression.

These characteristics occurred over a long period of time and to a marked degree and affected Student's educational performance. Ms. Miller's conclusion was based upon the IDEA and California Code of Regulations criteria for the eligibility of emotional disturbance, which Long Beach Unified termed emotional disability. As part of her assessment, Ms. Miller also considered whether Student was eligible for special education in the areas of other health impaired or specific learning disability.

The report stated that Student's speech and language abilities were not directly assessed, as they were not an area of suspected disability.

The report briefly summarized the assessment results. Ms. Miller concluded that Student seemed eligible and in need of special education services due to emotional disability, but noted the IEP team would make the final determination of Student's eligibility and need for services, as well as the programming Student needed.

Based upon the information obtained during the course of the evaluation, no educational, environmental, economic disadvantage, or cultural/ethnic difference was considered the primary factor affecting Student's educational difficulties. Student's educational difficulties could not be met in the regular education classroom without special education support.

The report recommended the IEP team consider placing Student in an emotional disability special day class classroom to address behavioral challenges as well as academics, and develop a behavior plan to manage anger. The report also proposed specific accommodations to redirect and manage Student's attention and behavior.

Ms. Miller attached to the report Student's scores on the standardized assessment tools, with graphs of the ratings she obtained from his teacher and Parent on the Behavior Assessment Scales. The information contained in Ms. Miller's written report complied with all requirements for an assessment report.

At hearing, Parent testified that, prior to the completion of the assessment, Ms. Miller divulged to her that Student was eligible as a student with emotional disability and required a smaller class, and had also revealed to Student that he was being assessed for emotional disability. Ms. Miller denied this conduct. Parent offered no documentation or corroborating witness to support her testimony. Parent's testimony about these matters is not persuasive, especially in view of Ms. Miller's long professional career as a school psychologist.

APPROPRIATENESS OF LONG BEACH UNIFIED'S ASSESSMENT IN THE AREA OF EMOTIONAL DISABILITY

Student's contends that Long Beach Unified failed to adequately assess Student in the area of emotional disability, specifically by failing to conduct a mental health services assessment and a functional behavior assessment. Ms. Miller appropriately assessed Student's social and emotional functioning, and appropriately concluded that Student met eligibility criteria as a student with an emotional disability. Her mental health services assessment consisted of the behavior assessment scales, her

observations and teacher observations, and interviews with Parent and teacher. Student did not meet his burden of demonstrating that the mental health services assessment performed by Ms. Miller was deficient.

Student also contends that Long Beach Unified should have conducted a functional behavior analysis. The IDEA requires that if a child's behavior "impedes the child's learning or that of others," the IEP team must "consider the use of positive behavior interventions and supports, and other strategies, to address that behavior." (20 U.S.C. §1414(d)(3)(B)(i).) If a student's behavioral issues impede appropriate learning, the IEP must reasonably address those behavioral issues. (*See Endrew F. supra*, 137 S.Ct. at 996–997 (requiring the application of IDEA's "reasonably calculated" standard to IEP of student who "exhibited multiple behaviors that inhibited his ability to access learning in the classroom.") *Department of Education v. L.S. by and through C.S.* (D. Hawaii, Mar. 29, 2019, No. 18-CV-00223 JAO-RT) 2019 WL 1421752 [nonpub. opn.], at p.11.) These behavioral supports need only include a functional behavior assessment if the child requires one to receive a FAPE. (71 Fed. Reg. 46,683 (August 14, 2006).)

The IDEA specifically requires a school district to perform a functional behavior analysis in school disciplinary situations, which are not at issue here. (20 U.S.C. §1415(k)(1)(F)(i); 34 C.F.R. § 300.530.) In other situations, the IDEA leaves it to state law as to when a functional behavior assessment is required. California law does not articulate a situation in which a functional behavior assessment is mandated.

Student did not demonstrate that he required a functional behavior analysis at the time of Ms. Miller's assessment to address his behavior and to receive a FAPE. As is discussed below, Student's November 2, 2018 IEP and amended IEP included a behavior support plan. That behavior support plan was based upon data and other information

obtained by Ms. Miller during her assessment. No witness testified that the behavior support plan was insufficient to address Student's behaviors as they were known to Long Beach Unified at the time of the IEPs, or were insufficient to provide Student a FAPE. Accordingly, Long Beach Unified was not required to conduct a functional behavior analysis as part of its assessment of Student in September 2018.

APPROPRIATENESS OF LONG BEACH UNIFIED'S ASSESSMENT WITH RESPECT TO ATTENTION DEFICIT HYPERACTIVITY DISORDER

Finally, Student's contention that Long Beach Unified should have assessed Student for attention deficit hyperactivity disorder is not meritorious. There was no evidence that this was an area of suspected disability for Student at the time of the assessment. First, Student was not formally diagnosed with attention deficit disorder until late winter or spring 2019, well after Ms. Miller's assessment was performed, despite being under the care of a team of mental health professionals. Indeed, Student presented no documentation at hearing that Student was ever formally diagnosed with attention deficit hyperactivity disorder, including in 2019.

Second, as Ms. Miller testified, school districts do not diagnose attention deficit hyperactivity disorder, rather, as part of the assessment process, she considered whether Student had characteristics of the disorder, and she determined he did not. Had she observed such symptoms, she would have performed additional assessments.

Third, Parent asserted at trial that she suspected Student had attention deficit hyperactivity disorder since 2017, and had given both Mr. Rappaport and Ms. Peverini forms to complete regarding attention deficit disorder. Parent did not produce any documentation of these assertions at hearing, and neither teacher affirmed they were

given the forms. Parent also testified at hearing that she requested Ms. Miller assess Student for attention deficit hyperactivity disorder. Ms. Miller denied receiving such a request. Parent's testimony on this issue was not persuasive. Ms. Miller's report documented what Parent told her, based on what his doctor had told Parent: Student could not be assessed for attention deficit hyperactivity disorder because of his anxiety. Moreover, Parent did not mention her suspicion that Student had attention deficit hyperactivity disorder on the Health and Developmental History form she completed, and Parent did not check boxes pertaining to that specific disorder on the form. Parent mentioned on the form that she was concerned about Student's ability to focus, but, as Ms. Miller testified, an inability to focus can be a symptom of depression and anxiety, two of Student's diagnoses reported to Ms. Miller.

Fourth, Student presented no expert testimony that any of Student's behaviors at the time of the assessment were attributable to attention deficit hyperactivity disorder, as opposed to any of Student's previously diagnosed disorders, such as depression and anxiety.

Student contends that the case of *Timothy O. v. Paso Robles Unified School Dist.* (9th Cir. 2016) 822 F.3d 1105, 1121 (*Timothy O.*) requires a district to assess for special education when a parent expresses concerns about a child's symptoms, and that Parent's alleged request to Ms. Miller to assess for attention deficit disorder met this requirement. Beyond Student's failure to establish that Parent made such a request, *Timothy O.* is distinguishable. The school district in *Timothy O.* was in the process of assessing Student, when the assessors noted the student was displaying symptoms of autism. Without parental permission, they included another school psychologist to informally observe student. Based on that observation, the school psychologist advised

that student likely did not have autism and the assessors therefore decided not to formally assess for it. In short, the *Timothy O.* assessment team, and the parent in that case, were aware of symptoms of a disability. Nevertheless, the assessment team disregarded those symptoms based on an informal observation, instead of advising the parent of their suspicions and conducting a formal assessment. (*Timothy O. supra*, 822 F. 3d 1105, at 1114.) The facts in this case are different, in that during her assessment, Ms. Miller did not observe Student display any characteristics of attention deficit hyperactivity disorder.

Under these circumstances, Long Beach Unified had no reason to suspect that attention deficit hyperactivity disorder was an area of disability for Student.

Student did not demonstrate that Long Beach Unified's assessment was deficient as alleged. Long Beach Unified assessed Student in all areas of suspected disability, and consequently did not deprive Student of a FAPE.

Moreover, if Long Beach Unified's initial assessment was not appropriate because it failed to include a mental health assessment, or a functional behavior assessment, or an assessment for attention deficit hyperactivity disorder, such failures were procedural violations. (*Park v. Anaheim Union High School Dist., supra*, 464 F.3d 1025, 1031.) Procedural violations are only actionable if they impeded Student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decisionmaking process regarding the provision of a FAPE to the child; or caused a deprivation of educational benefits. Student failed to meet his burden of demonstrating that he required the subject assessments, but he also failed to meet his burden of proving that the lack of these assessments impeded Student's right to a FAPE, significantly impeded

Parent's opportunity to participate in the decisionmaking process regarding the provision of a FAPE, or caused a deprivation of educational benefits.

NEED FOR FURTHER ASSESSMENT SUBSEQUENT TO LONG BEACH UNIFIED'S INITIAL ASSESSMENT

Student contends that Long Beach Unified should have performed a mental health assessment, a functional behavior assessment, and an assessment for attention deficit hyperactivity disorder not only as part of Long Beach Unified's initial assessment, but also subsequent to that assessment. However, the evidence reflected that Ms. Miller's assessment continued to constitute an assessment of Student in all areas of suspected disability. Student failed to produce any evidence to show that Long Beach Unified was required to assess Student in these additional areas. Indeed, despite his ongoing maladaptive behaviors, Student made academic progress during the 2018-2019 school year. As is discussed below in Issue 3, Student's November 2, 2018 IEP was reasonably calculated to allow Student to make meaningful progress during the 2018-2019 school year. Student did not demonstrate that Student's continuing display of maladaptive behaviors during the school year were due to any failure of Long Beach Unified to appropriately assess Student, as opposed to being a result of Parent failing to sign consent to Student's November 2, 2018 IEP, which prevented Long Beach Unified from implementing the IEP.

STUDENT'S ACADEMIC PERFORMANCE DURING THE 2018-2019 SCHOOL YEAR

Student's academic progress was reflected in his report cards. The first semester grading period of the 2018-2019 school year ended on January 25, 2019. Student's

attendance was good during this period. He was absent only seven days, and tardy one day.

His report card stated the criteria for promotion. Fifth grade students must achieve an end of fourth grade level in fiction and nonfiction benchmarks, and achieve a Level 3 in addition, subtraction, multiplication, and division math facts by the end of the fifth grade school year. By the end of reporting period one, Student had met these criteria. His benchmark reading levels for fiction and nonfiction were end of fourth grade level. His basic math facts levels were 4 in addition, and 3s in subtraction, multiplication, and division.

Student's scores in the 10 categories of life and career skills, which were the same categories as appeared in all of his report cards, were lower than during the 2017-2018 school year. His highest mark was a "Satisfactory" in the area of respecting others' rights, feelings, and property. He received marks of "Improving," in three categories, and he received Ns, for "Needs to Improve" in the remaining six categories. These marks reflected that Student's classroom behaviors deteriorated in fifth grade. In contrast, at the end of fourth grade and the 2017-2018 school year, Student received one mark of "Excellent," six "Satisfactory" marks, and three marks of "Improving. However, Student's grades were largely similar to the grades he received at the end of the 2017-2018 school year, when he was in fourth grade. He received 2s in Overall Achievement in mathematics, reading literature and informational text, and writing. He received a 3 in Overall Achievement in speaking and listening. He received 4s in music and art; a 3 in technology; and 2s in science, history/social sciences, and physical education.

Ms. Peverini's comments on the report card stated Student was eager to learn and liked to contribute to class discussions. She wrote he had excellent comprehension when text was read to him, and had a great sense of humor. She commented that when he was interested, he worked hard to learn about a subject. She also commented that most of the time, Student struggled to start or complete his work. He rarely took notes, which negatively impacted his achievement significantly. Ms. Peverini's comments stated Student would benefit greatly from completing his online math homework consistently and reading every night at home. Her comments also recommended Student read increasingly complex texts to develop his academic vocabulary and comprehension.

Student's report card at the end of the 2018-2019 school year again reflected good attendance.

Student's benchmark reading level was mid-fifth grade for both fiction and nonfiction; an increase from his first semester report card. His basic math facts levels were the same as his first semester report card. His life and career skills marks improved somewhat, in that he had Satisfactory marks in two areas: follows rules and procedures and reports others' rights, feeling, and property. He received a mark of Needs to Improve in only two areas. He received marks of Improving in the other six areas. His overall level of achievement in math and writing remained at 2. His overall level of achievement in speaking and listening remained at 3. He raised his overall level of achievement in reading, literature, and information text to a 3. His grades in science, history/social sciences, technology, music, and art, remained the same as his first semester scores. He raised his score in physical education to a 3.

Ms. Peverini wrote in her comments that Student showed growth in all academic subjects. She wrote he was motivated to improve in the last semester which allowed him to perform at a proficient level in reading. Ms. Peverini also noted that as Student became more confident in his academic skills, he would be able to perform at very high levels because he was very talented and capable.

Ms. Peverini testified at hearing that, in her opinion, Student had the potential to work at grade level if he did his classwork and homework. She realized his emotional and behavior issues made this difficult for him. She was not sure whether he had attention issues.

Under the heading "Interventions," there was an X next to Small Group Instruction. There was no information on the report card as to what this meant, or when it occurred, but Ms. Peverini instructed Student in a small group in an attempt to manage his behaviors.

STUDENT'S BEHAVIORS DURING THE 2018-2019 SCHOOL YEAR

Student's behaviors during the fifth grade year were troubling. Bayfront provided wraparound services to Student from August 2018 through December 2018. From the beginning of the school year through November 2, 2018, Ms. Peverini sent emails to Parent on an almost daily basis, to keep Parent apprised of Student's conduct and activities during the school day. Parent was also present in the classroom on many days, because she was a parent volunteer. Ms. Peverini tried to give Parent clerical tasks so that she would not assist Student during the school day, but the evidence reflected that Parent assisted Student in the classroom to some degree. Sometimes Parent would redirect Student, and take him out of class when he needed a break. He misbehaved even with Parent in the classroom. Gabriela Chavez, a therapeutic behavior coach and

part of Student's wraparound team, worked with Student at school from September 2018 through December 2018. She assisted Student at school two to four times per week, one to two hours each time.

After December 2018, wraparound services ceased. Wraparound services were typically authorized for a short period of time, because a few months of services were all that a child ordinarily required. However, Student's wraparound services resumed in February 2019, and continued until at least the end of the 2018-2019 school year. Student's therapeutic behavior coaches changed several times over the course of the wraparound services.

Student sat in the back of the class, alone. He did not like people sitting next to him. Student exhibited frustration in class daily, often multiple times. Student would become frustrated with his schoolwork, or noise, or people moving around him. He liked to tap the table, or his foot, or play with paper, and if another child asked him to stop, Student would become angry. He had extreme and unpredictable moods. Student was disruptive in class, which interfered with Ms. Peverini's ability to teach. He spoke loudly, asked for breaks, and needed frequent attention and redirection. He did not retain material Ms. Peverini taught in class, and became frustrated when he could not do the work correctly. He did not like other people giving him direction. His behaviors worsened sometimes, such as when a court date approached and Student stressed over the possibility that he would have to live with Mother. At other times his behaviors improved.

At the beginning of the school year, Ms. Peverini attempted a few general education behavioral interventions, such as putting Student in a small group and giving him more one-to-one attention. She would also give him reminders about his behavior,

and gave him opportunities to join the group. These strategies were not effective in reducing Student's maladaptive behaviors.

On a daily basis, Ms. Peverini would let Student "take 5." Student would leave the classroom and sit in a beanbag chair in a room across the hall, to calm down. Sometimes he would take a book to read there. Ms. Peverini could observe Student in this room from her classroom. Ms. Peverini believed that Student would not respond well if someone were in the other classroom monitoring Student. These breaks were intended to last for only approximately five minutes, but on occasion, Student would fall asleep there and sleep for an hour or more. Ms. Peverini wondered whether Student's fatigue was due to not being able to sleep at home. Sometimes he "took 5" in the restroom. Ms. Peverini did not consider these breaks or other assistance she provided or allowed Student a special accommodation as they were available to any child who needed them. Student missed instruction during these breaks, but he was not willing to stay after school and make up the work.

The members of the wraparound team recommended Student use a stress ball and other manipulative objects to help calm him. Ms. Peverini objected to the objects Student brought to class, such as bubbles, and required he keep them home. She considered them toys and toys were not allowed in class, but she did not object to stress balls. Student became upset if other students interfered with these or other possessions, by accidentally touching or moving them, thereby disrupting the class. In general, Student was often confrontational or rude with peers.

On several occasions, Student wrote or made comments at school regarding the neglect and abuse he had suffered, or about his negative mood. These comments sometimes upset the other children, or their parents. Ms. Peverini and school

administrators believed these comments and writings were inappropriate, and discouraged them. Ms. Peverini would also consult with the school principal and Parent to discuss how to better support Student. Student's wraparound team members, and Parent, believed that it was beneficial for Student to express, rather than repress, these thoughts and feelings at school.

As is described below, Parent requested mental health services at the May 2019 IEP amendment team meeting, and Ms. Miller made a referral to an outside agency for a mental health assessment and services. Student did not demonstrate that Long Beach Unified should have performed, or referred Student for, another mental health assessment after the November 2, 2018 IEP team meeting, and Parent requested no such assessment between the November 2, 2018 IEP team meeting and the May 29, 2019, amended IEP team meeting.

Student produced no specific evidence that Long Beach Unified should have conducted a functional behavior assessment and an assessment for attention deficit hyperactivity disorder subsequent to Long Beach Unified's initial psychoeducational assessment. Parent requested neither of these assessments during this time. The evidence showed that Student indeed had behavioral challenges. However, Ms. Peverini was able to address most of them with general education accommodations, despite not having the behavioral supports in the November 2018 IEP due to Parent's lack of consent.

Long Beach Unified had conducted an appropriate psychoeducational assessment, appropriately assessed Student's social and emotional functioning, and, at the November 2, 2018 IEP discussed in Issue 3 below, found Student eligible for special education under the category of emotional disability. As is further discussed in Issue 3

below, the November 2, 2018 IEP, and the May 29, 2019 amendment IEP offered behavior supports, including an appropriate behavior support plan, which constituted a FAPE. Except for the behavior goal, Parent did not consent to Long Beach Unified implementing any of the behavior supports in the IEPs from November 2, 2018 through at least August 2019, when the complaint was filed. Student was formally diagnosed with attention deficit hyperactivity disorder in late winter or spring 2019, and placed on medication, but, as was stated in *Letter to Coe, supra*, 32 IDELR 204, such a diagnosis does not require a school district to conduct an assessment. This is especially so when, as here, the evidence of such a diagnosis is weak. Parent produced no documentary evidence at hearing that Student was so diagnosed, and Ms. Miller denied that Parent provided her with any documentation of such a diagnosis.

Student's report cards during the 2018-2019 school year demonstrated that Student made academic progress, and there was no evidence that Student would have made more progress had he received these assessments. Rather, the evidence demonstrated that he would likely have made more progress had Parent consented to Long Beach Unified providing at least some of the services offered in the November 2, 2018 IEP.

Long Beach Unified did not procedurally violate the IDEA by failing to conduct these additional assessments. Even had it committed such a procedural violation, Student did not demonstrate that the failure to perform either of these assessments impeded Student's right to a FAPE, significantly impeded Parent's opportunity to participate in the decisionmaking process regarding the provision of a FAPE to the child, or caused a deprivation of educational benefits.

ISSUE 3. DID LONG BEACH UNIFIED'S IEP OF NOVEMBER 2, 2018, AND AMENDED IEP OF MAY 19, 2019, DENY STUDENT A FAPE BY:

A. FAILING TO ADDRESS STUDENT'S NEEDS IN THE AREAS OF BEHAVIOR, ACADEMICS, COUNSELING, AND EDUCATIONALLY-RELATED MENTAL HEALTH SERVICES, BY FAILING TO OFFER STUDENT A ONE-TO-ONE AIDE, BEHAVIOR INTERVENTION DEVELOPMENT SERVICES; BEHAVIOR INTERVENTION IMPLEMENTATION SERVICES; ACADEMIC TUTORING, EDUCATIONALLY RELATED MENTAL HEALTH SERVICES COUNSELING, AND AN APPROPRIATE BEHAVIOR PLAN; AND

B. FAILING TO PROVIDE AN APPROPRIATE PLACEMENT?

Student contends that Parent orally agreed that Long Beach Unified would provide special education services at the November 2, 2018 IEP team meeting, and agreed in writing to the provision of special education services at the May 29, 2019 amended IEP team meeting. Student contends that the parties reached impasse over the issue of placement at these IEPs. Therefore, Student contends Long Beach Unified was obligated to file for due process to obtain a determination that its IEPs offered a FAPE. Student contends Long Beach Unified's failure to do so was a procedural violation that deprived Student of a FAPE. Consequently, Student contends he is entitled to compensatory education in the areas of academics, behavioral services, and counseling.

Long Beach Unified contends that the November 2, 2018 IEP and May 29, 2019 amended IEP offered appropriate services, and supports, addressed Student's

behavioral, academic, and mental health needs, and offered a FAPE in the least restrictive environment.

In developing the IEP, the IEP team shall consider the strengths of the child, the concerns of the parents for enhancing the child's education, the results of the most recent evaluation of the child, and the academic, developmental, and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. § 300.324(a) (2006).)

An IEP is evaluated in light of information available to the IEP team at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) "An IEP is a snapshot, not a retrospective." (*Id.* at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*) As the court noted in *Endrew F., supra*, 137 S.Ct. at p. 999, crafting an IEP requires a prospective judgment, and judicial review of an IEP must recognize that the question is whether the IEP is reasonable, not whether it is regarded as ideal.

The contents of the IEP are mandated by the IDEA. The IEP must include a statement of the special education and related services and supplementary aids and services to be provided to the child, an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in extracurricular and non-academic activities; and a statement of the program modifications or supports for school personnel that will be provided. (20 U.S.C. § 1414(d)(1)(A)(i); 34 C.F.R. § 300.320 (2006); Ed. Code, § 56345, subd. (a)(7).) The IEP must also include an assortment of information, including a statement of the child's present levels of academic achievement and functional performance, a statement of measurable annual goals designed to meet the child's needs that result from his

disability to enable the child to be involved in and make progress in the general education curriculum, and, when appropriate, benchmarks or short-term objectives, that are based upon the child's present levels of academic achievement and functional performance. (20 USC § 1414(d)(1)(A)(i); 34 C.F.R. § 300.320 (2006).)

NOVEMBER 2, 2018 IEP TEAM MEETING

On November 2, 2018, Long Beach Unified convened an IEP team meeting to discuss the results of its initial psychoeducational assessment. The team included Long Beach Unified's school counselor Marci White; Parent; Ms. Miller; Long Beach Unified Administrator Rosemary Sissons, Ms. Peverini, Long Beach Unified Research Specialist Marleen Soto; Bayfront parent advocate Evelyn Cortez; social worker Ana Delino from Children and Family Services Department; and Bayfront child and family specialist Mr. Soto.

Parent waived reading or review of the parental procedural safeguards. Ms. Miller presented her report, and the IEP team agreed with her conclusion that Student met the criteria for eligibility as a student with an emotional disability. Nobody at the meeting raised any concerns regarding Ms. Miller's report or her conclusion that Student met the criteria for eligibility for special education as a student with an emotional disability. The IEP documented Student's eligibility for special education as a student with an emotional disability.

The team noted Student's hospitalization in January 2018 for depression and suicidal thoughts. He currently took medication for depression. He received counseling from Dr. Lee and other outside mental health services, including therapeutic behavior services, three to five times per week.

The team recorded Parent's concerns about Student's education, which were consistent with the concerns about Student Parent reported to Ms. Miller during the assessment. Teacher gave present levels. She stated Student was inconsistent when following group instruction, working independently, and completing homework. He could not be grouped in class due to his behavior and did not complete classwork. Student's interactions with peers could be inappropriate at times. He could become aggressive when playing with others, and he self-isolated. He enjoyed technology. When something was challenging he did not persist. Teacher was concerned that Student was angry and defiant. Parent had to monitor him about his work, and he could do it with assistance. A social worker stated that Student had regressed developmentally.

The team reported on Student's academics, and considered Student's report card at the end of fourth grade. Student's score met grade level standards on the Long Beach Unified Grade 5 English Language Arts Unit 1 assessment. His score was below grade level standards on the Long Beach Unified Grade 5 Math Unit 1 assessment. Student was proficient in addition, subtraction, and division math facts, but did not meet expectations in multiplication math facts.

The team also reviewed Student's state achievement test scores. In 2017-2018, he nearly met the English Language Arts standard, and did not meet the Math standard. His 2016-2017 state achievement test scores in English Language and Math each nearly met the standard.

Student's behavior impeded his learning of self or others, and the team agreed he needed a behavior support plan. The team adopted a plan developed by Ms. Miller with input from Ms. Soto, based upon data from classroom observations of Student, and

interviews with Parent and Student's teacher. The plan targeted Student's frustration, which he demonstrated four to five times per day, for five to 10 minutes each time. Student would wring his hands, make groaning noises, covered his head with his hood, stomped his feet, and shook his desk. Student's frustration occurred when he was required to perform non-preferred tasks, and it occurred in class at any time, whether he was in the entire group, a small group, or working individually. His frustration was also influenced by medication, family concerns, and academic skills. The triggers for the frustration were the unavailability of an object or activity, or the presentation of a task or activity. The possible functions of the frustration behaviors were to avoid the task, or to escape the classroom or setting, or to obtain an item or activity.

Attempted intervention for the frustration behaviors were time away in another room, and preferred seating. A suggested incentive was computer time.

The plan provided that Student would be taught to manage his frustration by requesting a break for a pre-determined amount of time, and use of calming strategies, such as deep breathing, and counting to 10 forward and backward. The calming strategies would be modeled by the special education teacher and support staff. The plan listed accommodations and supports to assist Student in demonstrating the replacement behaviors, and strategies to manage the recurrence of the frustration behaviors. An anticipated reinforcer Student might earn for appropriate behavior again included computer time. The plan provided for daily communication between Parent and school, and data was to be collected regarding the demonstration of the frustration and replacement behaviors. The behavior intervention plan was reasonably calculated to appropriately address Student's problem behaviors.

The team discussed Student's present levels of performance, and determined Student had needs in the areas of behavior, mathematics, and writing. The team developed goals in those areas.

The team recommended Student use a word processing device to respond when academically appropriate, and use of speech to text for writing assignments, because Student had post-traumatic stress disorder with respect to writing.

The team developed classroom accommodations, which included receipt of a copy of teacher's notes, a seat close to instructions, a fidget to use during stressful situations, testing in an alternative setting, and clarification of directions on tests.

The team also developed accommodations for various state and school district assessments, which included use of text to speech, simplified test directions, extended time for specified assessments, testing in small group environments, and 10-minute breaks.

The team considered placement in general education or a special day class. The offer of a FAPE was placement in a special day class for children with emotional disabilities, where Student would receive specialized academic instruction throughout the school day. Student would participate in the general education setting during lunch and other whole school activities. The team also determined Student needed extended school year services. The IEP offered specialized academic instruction for four hours per day from July 1 through July 26, 2019, in a classroom where the majority of peers had a disability. Because Tincher did not have a special day class for emotionally disabled students, the team planned that Student attend such a class at another Long Beach Unified school, and Long Beach Unified would provide transportation.

The offered special day class had a teacher and two aides. The class size was limited to 18 students, but it frequently had fewer students. The class had a general education curriculum, and emphasized behavior management. Behavior supports were embedded into the class. The class was designed to meet the needs of Students with emotional disabilities.

Ms. Miller felt this was an appropriate placement for Student. She felt he needed more support than a general education classroom could provide, and could perform better in school if he were in a smaller setting with positive behavior support and an emphasis on performing his schoolwork and managing his behaviors. She noted that the IEP provided five hours per day of specialized academic instruction, which could not be provided in the general education setting. Ms. Miller also testified that Student's behaviors affected not only his own ability to access his education but also disrupted the learning of Student's classmates. Ms. Peverini also believed that the special day class was an appropriate placement for Student. She observed his behaviors in her general education class and Student interfered with his and his classmates' access to education. Ms. Soto, the resource specialist teacher, also asserted that the special day class was appropriate, because Student needed to learn to self-regulate and be around people to succeed in a general education classroom. She testified that the special day class would still provide a general education curriculum, and he would benefit from the smaller class, the additional adult support, and the behavior support embedded into the class.

Parent, social workers, and advocate left the room to discuss the offer of a FAPE. When they returned, they informed the other IEP team members that Parent and her supporters objected to the IEP offer. They did not want to move Student to another school, and they wanted Student to have a one-to-one classroom aide. The evidence

did not reflect whether the aide was to be an aide to assist with academics, or to assist with behavior, or both. Parent and her supporters advised that in two weeks, Parent would give a final decision on whether she would sign the IEP.

Parent did not sign the November 2, 2018 IEP. Long Beach Unified did not implement any portion of the November 2, 2018 IEP, including the behavior support plan, from November 2, 2018 through May 2019, due to lack of parental consent to the IEP, which prevented Student from receiving special education services. There was no specific evidence or documentation that Long Beach Unified made any attempt to obtain Parent's signature on the IEP prior to May 2019. There was no evidence that Long Beach Unified informed Parent after November 2, 2018, that it was not implementing the IEP because Parent had not signed consent to the IEP or to the provision of special education services.

Parent contended that Student received special education services during the 2018-2019 school year, as she was aware that Student received instruction from Ms. Soto, the resource specialist teacher. Ms. Soto explained at hearing that she provided special education services to special education students who might be working on a group project with Student. Therefore, Student may have been present and received some incidental guidance when Ms. Soto was assisting a special education student with the group project. However, neither Ms. Soto, or anyone else, ever provided, or was assigned to provide, special education services to Student. Further, the terms of Student's November 2, 2018 IEP did not offer any resource services. Ms. Soto's explanation of the reason why she was engaged in an educational activity with Student was reasonable and credible. Her explanation was consistent with her job duties as a resource specialist teacher, and also consistent with the terms of Student's IEP. Contrary

to Parent's belief, Long Beach Unified did not provide Student special education services after the November 2, 2018 IEP.

IEP TEAM MEETING OF MAY 29, 2019

The parties offered differing explanations as to why the IEP team meeting of May 29, 2019, occurred. Parent asserted that she requested the meeting to document that Student had recently received a diagnosis of attention deficit hyperactivity disorder. Parent did not provide any documentation of this diagnosis at hearing, but she testified that she informed the school of the diagnosis. Ms. Miller asserted that she never received any documentation that Student had a diagnosis of attention deficit hyperactivity disorder. Rather, Ms. Miller stated she requested the meeting, because Parent had not signed the November 2, 2018 IEP and it was still open. She testified she arranged the meeting to comply with Long Beach Unified's practice to have all IEPs closed before the end of the school year. It is likely that the parties separately, but more or less simultaneously, decided that it was time for an IEP team meeting. On May 15, 2019, Long Beach Unified prepared an IEP team meeting notice, which listed Tincher as Student's current school, and stated a "Possible Change of Placement" as one of the purposes of the meeting,

The May 29, 2019 IEP team included Parent, Student, Ms. Miller, Ms. Sissons, Ms. Peverini, Ms. Soto, Bayfront child and family specialist Miriam Hernandez; social worker Ms. Delino, Bayfront wraparound services provider Richard Ascido, and Children and Family Services Department educational specialist Tina Garcia. Ms. Cortez, a parent advocate from Bayfront, appeared telephonically, as did Mother.

At the meeting, Student expressed his desire to attend middle school at Tincher. Parent observed that Student performed better using pen and paper than on a computer, and requested that Student be allowed to do his math homework on paper rather than on a computer. She also stated that Student was on new medication, which allowed Student to focus and redirect himself and discuss what he was doing at school.

Ms. Peverini reported that Student was very capable of achieving the upper level performance in English Language Arts, but instead was at a Nearly Met level. Student was very articulate. His first reaction to a request was opposition. Writing was an area of concern, but he wrote better on the computer. He struggled with math. His behavior improved since the recent change in medication. He had difficulty working in groups, but was working through how to get along with peers.

Education specialist Ms. Garcia suggested that Student have school-based mental health to assist student with his issues and to work with teachers to help them deal with Student's emotional disability and attention difficulties. She requested educationally related mental health services. Student had received six months of therapeutic wrap-around behavior services from Bayfront and that was all that was available to him. Ms. Miller agreed to refer Student another outside agency to determine whether Student was eligible for educationally related mental health services, but stated she had never seen a referral for such services without a signed IEP.

The school psychologist described the special day class for emotionally disabled students at Rogers Elementary School, where Long Beach Unified planned to send Student. The social worker stated that the least restrictive environment should be tried first.

The consent portion of the amended May 29, 2019 IEP consisted of a form for checking and initialing only one of several statements for Parent to indicate consent or lack of consent to the IEP. None of the statements contained any language to the effect of: "I consent to Student's eligibility for the receipt of special education services, but I disagree with the Individualized Education Program as to the following: ____." In short, none of the pre-typed options for Parent to check clearly and specifically included consent to a student's *receipt* of special education services, but also allowed Parent to specify that she disagreed with the IEP or parts of it.

Therefore, Parent selected, checked, and initialed the statement which she felt best represented what she wanted, and signed the IEP. Parent testified that she received advice from Ms. Soto at the IEP meeting with respect to signing the IEP, and she also received some advice from her parent advocate. Ms. Miller denied that anyone from Long Beach Unified told Parent which box to check. Parent chose the statement that said: "I CONSENT to this Individualized Education Program EXCEPT for the following:" and then hand-wrote, "I consent only to the goals and accommodations. I am requesting [mental health] services and 1:1 aid." Parent did not check the box and initial another statement that she could have chosen on the form: "I received a FAPE offer, I am declining Special Education for my child."

Long Beach Unified did not interpret Parent's selection of the statement she initialed and checked as signifying consent to the provision of any special education services, and therefore did not implement the IEP after the May 29, 2019 IEP team meeting.

Student did not meet his burden of demonstrating that the November 2, 2018 IEP and the May 29, 2019 addendum IEP failed to offer Student a FAPE in the least

restrictive environment. In his closing brief, Student did not contend that these IEPs were substantively deficient in the services and placement they offered. Rather, Student relies upon the case of *I.R. v. Los Angeles Unified School Dist.* (9th Cir. 2015) 805 F.3d 1164 (*I.R.*), to contend that Long Beach Unified was obligated to file for due process to address whether the services to which Parent did not consent were necessary for Student to receive a FAPE. Student asserts that Long Beach Unified's failure to do so was a procedural violation that deprived Student of a FAPE.

However, Student's complaint does not allege that Long Beach Unified failed to timely file for due process, and this issue was not raised or argued at hearing. Student is limited to the issues alleged in his complaint, unless Long Beach Unified agrees otherwise. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) There was no evidence that Long Beach Unified so agreed.

In any event, *I.R.* is not applicable to the November 2, 2018 IEP. In *I.R.*, the Ninth Circuit applied Education Code section 56346, subdivision (f), which provides if a school district determines that a proposed special education component to which Parent does not consent is determined to be necessary to provide a FAPE, the school district shall initiate a due process hearing. The *I.R.* court determined that the school district in that case should have implemented the portions of the IEP to which parents had consented in writing, and initiated a due process hearing to override parents' lack of consent to the remaining portions of the IEP which the district believed were required for the student to receive a FAPE. (*I.R., supra*, 805 F.3d, 1169-1170.) However, the *I.R.* court specifically recognized that the situation before it was distinguishable from the situation, such as the case here, when parent has not consented to the provision of special education and related services *before the initial provision of such services*. The court specifically noted

such a situation was controlled by title 20 United States Code section 1414(a)(1)(d)(ii)(II) and 34 Code of Federal Regulations part 300.300(b)(3) (2006), which foreclosed the school district from filing a due process complaint to address or override parent's refusal to consent to the IEP. (*I.R.*, *supra*, 805 F.3d. at 1167-1168.)

Student unsuccessfully attempts to bring this case within the contours of *I.R.* He contends that Parent agreed to special education services in the IEP of November 2, 2018, because at the meeting she verbally agreed to the goals and accommodations, and requested a one-to-one aide, but disagreed with the placement. He also contends that Parent consented in writing to the provision of special education services in the May 29, 2019 amendment IEP. Therefore, Student contends that Long Beach Unified was obligated, as was the district in *I.R.*, to implement those portions of the IEPs to which Parent allegedly consented, and to file in a timely manner for a due process hearing to address those areas of the IEP with which Parent disagreed.

Student's reliance on *I.R.* is misplaced. First, Parent did not consent to any portion of the November 2, 2018, IEP from November 2, 2018 until May 29, 2019. The law requires a parent's consent to an IEP to be in writing. (34 C.F.R. § 300.9 (a), (b) (2006).) Parent's implied or verbal agreement to any portion of the November 2, 2018 IEP was not sufficient to constitute informed consent to the IEP. Second, *I.R.* and Educational Code section 56346, subdivision (f), upon which *I.R.* is based, do not apply to initial IEPs. As the *I.R.* court recognized, the consequences of a parent failing to consent to the provision of special education services in an initial IEP are governed by Education Code section 56346, subdivisions (a) and (b). Under those provisions, Long Beach Unified was prohibited from filing for due process to override Parent's failure to consent to the November 2, 2018 IEP. Therefore, Long Beach Unified did not deprive

Student of a FAPE by failing to file for due process with respect to this IEP, as Student now, untimely, contends.

Rather, the appropriate inquiry in this matter, which Student alleged in his complaint but then mostly ignored, is whether the November 2, 2018 IEP and the May 29, 2019 amended IEP offered Student a substantive FAPE. They did. The IEPs addressed Student's needs in the area of behavior. The IEPs offered placement in a special day class for students with emotional disability, which had emotional and behavior supports embedded. The IEPs also included a behavior support plan to address Student's behaviors when he was frustrated. These behaviors often disrupted Ms. Peverini's classroom, and affected Student's and his classmates' ability to learn. The behavior support plan was to be implemented in addition to, and in conjunction with, the emotional and behavior supports already embedded in the special day class for students with emotional disabilities.

Student failed to demonstrate that these supports were not reasonably calculated to provide student a FAPE. Gabriela Chavez, Student's therapeutic behavior services coach from Bayfront, who provided services to Student at home and at school during fall 2018, commented at hearing that Student would benefit from a one-to-one behavior aide. Rebecca Ayala, another of Student's therapeutic behavior services coaches, who only observed Student at school for approximately six hours towards the end of May, also believed he could have benefitted from the services of a one-to-one behavior aide. Neither of these witnesses had any background in education. They were unfamiliar with Student's educational background and records, and they demonstrated only limited knowledge of the IEP process and its requirements. Ms. Ayala's contact with Student at school during the 2018-2019 was also limited. Ms. Chavez and

Ms. Ayala did not have the background, information, education, training or experience to render persuasive opinions about Student's educational needs. In contrast, Ms. Peverini, Ms. Soto, and Ms. Miller convincingly testified that Student resisted one-to-one assistance, and would not want a behavior aide or any one-to-one aide. Ms. Miller was concerned that assigning Student a one-to-one aide would escalate Student's dysfunctional behaviors. A smaller class, with three adults, such as the offered special day class, would provide Student additional support, in a subtle manner, without making Student feel singled out for help.

With respect to academics, the IEPs offered a special day class, in which Student would receive specialized academic instruction for five hours per school day. Student failed to demonstrate that this amount of specialized academic instruction was not reasonably calculated to provide Student meaningful educational benefit. Rather, Student's report cards during the 2018-2019 school year reflected that, without any specialized academic instruction, or tutoring, or one-to-one academic instruction, Student received passing grades in every subject. Indeed, his final report card for the 2018-2019 school year reflected that none of his academic grades declined from his first semester report card, and his reading grade improved.

Parent wanted Student to stay in a general education class with a full time one-to-one behavior aide, and mental health services, but her position was not supported by the evidence. First, there was evidence that a one-to-one aide would not be welcome by Student, who preferred to be independent, did not want help, did not like taking direction, and did not want to be singled out.

Second, Student provided no evidence that Student needed mental health services to receive a FAPE in the November 2, 2018 IEP. Such mental health services cover a wide variety of services, some of which are directed at Student, some of which are directed at Student's family, some of which are delivered at school, and some of which are delivered at home or in the community. Student offered no evidence as to which of the services that fall under the umbrella of mental health services were necessary to meet Student's educational needs in November 2018.

Third, educationally related mental health services are to be tried after other behavior interventions have not been successful. The IEP team offered a program of behavior interventions in the November 2, 2018 IEP, which were reasonably calculated to provide Student meaningful educational benefit. This program consisted of the behavior support plan and the special day class that was specially designed to serve students with emotional disability. Based on Student's behaviors at the time of the November 2, 2018 IEP, Long Beach Unified was entitled to try the program offered in the November 2, 2018 IEP before offering the more intensive mental health services.

At the May 29, 2019 IEP, the team agreed to refer Student for mental health services, as requested by Parent. That was an appropriate step to take at the time, in view of the ongoing deterioration of Student's behaviors during the 2018-2019 school year.

Parent desired a different educational program to address Student's emotional and behavioral issues than the IEP offered, but Student did not demonstrate that the program offered in the IEP was not a FAPE. An IEP team must consider a parent's input, but it need not necessarily follow a parent's wishes. For example, in *Gregory K. v.*

Longview School Dist. (9th Cir. 1987) 811 F.2d 1307, 1314, (*Gregory K.*), the court stated that if a school district's program was designed to address the student's unique educational needs, was reasonably calculated to provide the student with some educational benefit, and comported with the student's IEP, then the school district provided a FAPE, even if the student's parents preferred another program and even if the parents' preferred program would have resulted in greater educational benefit. (*Ibid.*)

The law does not require an IEP team to offer the program Parent prefers, as long as the program the IEP offers constitutes a FAPE. Here, Student failed to demonstrate that the behavioral and emotional supports offered in the November 2, 2018 IEP and May 29, 2019 amendment IEP were not reasonably calculated to permit Student to obtain a meaningful educational benefit.

THE IEPS OFFERED A FAPE IN THE LEAST RESTRICTIVE ENVIRONMENT

Both federal and state law require Long Beach Unified to provide Student special education in the least restrictive environment appropriate to meet his needs. (20 U.S.C. § 1412 (a)(5); 34 C.F.R. § 300.114(a)(2)(i) (2006); Ed. Code, § 56040.1.) This means that Long Beach Unified must educate a special needs pupil with nondisabled peers "to the maximum extent appropriate," and the pupil may be removed from the general education environment only when the nature or severity of the student's disabilities is such that education in general classes with the use of supplementary aids and services "cannot be achieved satisfactorily." (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(ii) (2006); Ed. Code, § 56040.1.)

As a corollary to the requirement that a school district determine the least restrictive environment, the school district must make available a continuum of placement options. (34 C.F.R. 300.115 (2006).) In California, this includes regular education programs, resource specialist programs, related services, special classes, and nonpublic, nonsectarian school services, as well as others not at issue here. (Ed. Code, § 56361.) The continuum of placement options is to ensure that a child with a disability is served in a setting where the child can be educated successfully in the least restrictive environment appropriate for them. (71 Fed. Reg. 46,586-46,587 (Aug. 14, 2006).)

The Ninth Circuit Court of Appeals, in *Sacramento City Unified School District v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398 (*Rachel H.*), set forth standards to determine whether a general education classroom is the least restrictive environment for a child with a disability. The court adopted a balancing test that required the consideration of four factors:

1. the educational benefits of placement full time in a regular class;
2. the non-academic benefits of such placement;
3. the effect the student would have on the teacher and children in the regular class;
and
4. the costs of mainstreaming the student. (*Id.* At p. 1403.)

If the IEP team determines that a child cannot be educated in a general education environment, then the least restrictive environment analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1050 (*Daniel R.R.*); *B.S. v. Placentia-Yorba Linda Unified School Dist.*

(9th Cir. 2009) 306 Fed.Appx. 397, 400.) Mainstreaming is a term used to describe opportunities for disabled students to engage in activities with nondisabled students. (*M.L. v. Federal Way School Dist.* (9th Cir. 2005) 394 F.3d 634, 640, fn. 7.)

In selecting the least restrictive environment, the IEP team should consider any potential harmful effect on the child or on the quality of services that the child needs. (34 C.F.R. §300.116(d).) The child should be educated in the school the child would attend if the child were not disabled, unless the IEP otherwise requires. (34 C.F.R. § 300.116(c).) A placement must foster maximum interaction between disabled students and their nondisabled peers “in a manner that is appropriate to the needs of both.” (Ed. Code, § 56000, subd. (b).) Mainstreaming is not required in every case. (*Heather S. v. State of Wisconsin* (7th Cir. 1997) 125 F.3d 1045, 1056.) However, to the maximum extent appropriate, special education students should have opportunities to interact with general education peers. (Ed. Code, § 56040.1.)

The IEPs offered a placement in a special day class for emotionally disabled children, which was not available at Tincher. Such a class was available at Rogers. The placement was on the continuum of placement options, and was a more restrictive placement than a general education fifth grade class. The Rogers class had a maximum of 18 students, and emotional and behavior supports were embedded in the program. The class included one special education teacher and two adult aides.

Student did not demonstrate that this offered placement was not appropriate. Student offered no specific evidence that any particular feature of this class would not be appropriate for Student. There was no evidence that Parent or any of her witnesses visited or had any personal knowledge of this class.

The least restrictive environment analysis of *Rachel H.*, *supra*, supports placement of Student in a special day class as opposed to placement in a general education setting. *Rachel H.* prescribes consideration of four factors: the educational benefits of placement full time in a regular class; the non-academic benefits of such placement; the effect the student would have on the teacher and children in the regular class; and the costs of mainstreaming the student.

Applying the *Rachel H.* factors to this case, a general education setting was not appropriate at the time of the November 2, 2018 IEP and the May 29, 2019 amendment IEP, primarily due to Student's unpredictable and maladaptive behaviors in class. Student had tantrums, he spoke out of turn, he was easily frustrated and angered, and he frequently had to leave the classroom to collect himself. He obsessed over the minor slights and insults that comprised daily life in a large, general education classroom. His behaviors impacted his ability to function in a general education classroom so as to impact his ability to access the curriculum.

Student also was unable to obtain non-academic benefits in the general education classroom, such as being with typical peers to provide social interaction and role models. Student's behaviors during the 2018-2019 school year were such that he could not easily tolerate or cooperate with others. Until his moods and behaviors were better managed and controlled, his ability to obtain non-academic benefits from typical peers in a general education environment was questionable. It did not outweigh Student's need for a small classroom with embedded behavioral supports to help him manage his behaviors.

Turning to the third *Rachel H.* factor, Student's behaviors adversely affected the teacher and other students in his general education classroom during the 2018-2019

school year. Student's behaviors were disruptive to classroom order. Ms. Peverini's experiences with Student, as documented in her emails, reflect that Student's behaviors were challenging for a teacher trying to teach students in a large general education class. Some of Student's peers did not want to be around him.

There was no evidence pertaining to the fourth *Rachel H.* element, which is the relative cost of the general education classroom with supports and services versus the special day class placement. However, the evidence regarding the other factors demonstrated that a general education environment was not suitable for Student.

Parent disagreed with placement at Rogers for two reasons. First, she believed that Long Beach Unified was required to try a general education placement first. Second, she and her wraparound team supporters who attended the IEP team meetings were concerned that Student would not adjust well to a change of schools, given his history of trauma and his emotional state.

Parent's belief that a general education placement was required to be tried first was not persuasive. Student was in a general education class prior to the November 2, 2018 IEP meeting, with the assistance of wraparound services, and his behaviors were disruptive to the classroom. The law requires school districts to *consider* placement in a general education classroom with necessary supplemental aids and services to make that placement successful prior to considering more restrictive placement options. However, a child with a disability need not fail in the regular education environment before a local educational agency can consider or implement a placement in a more restrictive setting. (*Letter to Cohen*, Off. Of Special Education Programs, interpretative letter, 25 IDELR 516 (August 6, 1996).) Here, the evidence established that Student would not likely accept a one-to-one aide in a general education placement, as Parent

desired, and that a one-to-one aide might even exacerbate his emotional dysfunction in the classroom. Long Beach Unified was not required to implement supports for a general education placement that were not reasonably calculated to enable Student to make progress appropriate in light of his unique circumstances.

Student's contention that he would not adjust well to a change in schools was also not persuasive. Public school students change schools and teachers all the time, and are expected to adjust. Student changed schools from Herrera to Tincher, at Parent's request, during the time period at issue in this action. He will be expected to change schools from Tincher Middle School when he enters high school. Additionally, there have been a number of changes in his therapists and his wraparound services personnel since Student started receiving such services in 2018, and there was no evidence that Student did not eventually adjust to those changes.

Student could not have been satisfactorily educated in an exclusively general education environment. Therefore, the least restrictive environment analysis requires a determination of whether Student was to be mainstreamed to the maximum extent appropriate. (*Daniel R.R.*, *supra*, 874 F.2d 1036, 1050.) Student's IEPs provided that he would receive special education instruction and services in the special day class, but he would be mainstreamed during lunch, recess, passing periods, and activities during the school day. The placement offered mainstreaming to the maximum extent appropriate.

Student did not meet his burden of demonstrating that the November 2, 2018 IEP and the May 29, 2019 addendum IEP, which amended the November 2, 2018 IEP by offering mental health services and by noting that Student was taking a new medication, failed to offer Student a FAPE in the least restrictive environment

ISSUE 4: DID LONG BEACH UNIFIED DENY STUDENT A FAPE BY FAILING TO IMPLEMENT THE ACCOMMODATIONS AND SERVICES IN HIS IEP OF NOVEMBER 2, 2018 AND THE MAY 29, 2019 AMENDED IEP?

Student again contends that Parent verbally consented to Student's receipt of services at the November 2, 2018 IEP team meeting, and that she did so in writing at the May 29, 2019 amendment IEP team meeting. Student also again relies on *I.R., supra*, and asserts Long Beach Unified was obligated to file for due process to obtain an order to implement those portions of the IEPs to which Parent had not consented if Long Beach Unified believed those portions of the IEP were necessary for Student to receive a FAPE. He further argues that Long Beach Unified's failure to do so obligated it to implement those aspects of the IEP to which Parent consented, such as the goals and accommodations, as well as the services and placement Parent requested, including placement in general education with a one-to-one aide. Student contends that Long Beach Unified's failure to file for due process pursuant to *I.R.* also served to transform the IEPs, and particularly the offer of placement at Rogers, into "take it or leave it" offers.

Long Beach Unified contends that Parent did not consent in writing to either the November 2, IEP or the May 29, 2019 amendment IEP. Therefore, it could not implement these IEPs. Further, since these IEPs constituted initial IEPs for special education services and placement, Long Beach Unified contends that it was statutorily prohibited from filing for due process to override Parent's lack of consent and to implement the IEPs.

Neither party has appropriately addressed this issue, especially with respect to Parent's failure to consent in writing to the November 2, 2018 IEP. The evidence was

undisputed that Parent did not provide written consent to any portion of the November 2, 2018 IEP, as required by 34 C.F.R. section 300.9(b). Therefore, as is discussed in Issue 3, Student's attempts to find implied consent to the November 2, 2018 IEP in Parent's conduct or verbal expressions is in vain. Consequently, Student's reliance on *I.R., supra*, is misplaced.

However, Long Beach Unified is also incorrect as to its obligations in this situation. In its closing brief, Long Beach Unified relies on 34 Code of Federal Regulations part 300.300, subdivisions (b)(1) and (b)(3), (ii), and (iii). Long Beach Unified contends that, since Parent did not consent to the initial IEP and its amendment, it had no further obligation to Student under the IDEA and the Education Code. Long Beach Unified is, in essence, relying on Code of Federal Regulations part 300.300 as an affirmative defense to Student's allegations regarding its failure to implement the IEPs. However, Long Beach Unified has not demonstrated that it has complied with Code of Federal Regulations part 300.300, so as to absolve it from liability here.

The IDEA, and specifically Code of Federal Regulations part 300.300 sets forth a statutory scheme pertaining to the need for a parent to give informed consent to the initial provision of special education and related services. The law provides the school district must make reasonable efforts to obtain informed consent from the parent before providing special education and related services to an eligible child. (20 U.S.C. § 1414(a)(1)(D)(i)(II); 34 C.F.R. § 300.300(b)(1), (2) (2006); Ed. Code, § 56346, subd. (a).) Consent means that the parent has been fully informed, in their native language, of all information relevant to the activity for which consent is sought, and that the parent understands and agrees *in writing* to the carrying out of the activity for which his or her consent is sought. (34 C.F.R. § 300.9 (a), (b) (2006).) Education Code section 56346,

subdivision (a) further specifies that the school district shall make reasonable efforts to obtain informed consent from the parent for the initial provision of special education and related services to the child in accordance with title 34, Code of Federal Regulations part 300.300 (b)(2) (2006) of the Code of Federal Regulations.

To meet the reasonable efforts requirement of 34 Code of Federal Regulations part 300.300(b)(2) (2006), the school district must document its attempts to obtain parental consent, using the procedures in 34 Code of Federal Regulations part 300.322(d) (2006). (34 C.F.R. § 300.300(d)(5) (2006).) These procedures consist of keeping a record of its attempts to obtain consent, such as keeping detailed records of telephone calls made or attempted, and the results of those calls; copies of correspondence sent to the parents and any responses received, and detailed records of visits made to the parent's home or place of employment and the results of those visits. (34 C.F.R. § 300.322(d) (2006).)

If parent fails to respond to the school district's efforts to obtain informed consent to the initial provision of special education and related services, or refuses to provide consent to the initial provision of such services, the school district may not use special education due process mediation or hearing procedures to obtain agreement, or to obtain a ruling that it may provide services to a child. (34 C.F.R. § 300.300(b)(3) (2006); Ed. Code, § 56346, subd. (b).) Furthermore, under those circumstances, the school district will not be considered in violation of the requirement to make a FAPE available to the child for failing to implement the IEP, and is not required to convene an IEP team meeting or develop an IEP for the special education and related services for which the public agency requests such consent. (34 C.F.R. § 300.300 (b)(3), (4) (2006); Ed. Code, § 56345, subd. (c)(1), (2).)

Both the IDEA and the Education Code required Long Beach Unified to make reasonable efforts to obtain informed consent from Parent to the IEP document dated November 2, 2018, to which Parent provided no written consent. (34 C.F.R. § 300.300(a)(1)(iii); and Ed. Code, section 56346, subd. (a).) To meet this requirement, Long Beach Unified needed to document its efforts to obtain such consent. For example, Long Beach Unified was required to keep detailed records of phone calls to Parent, and the results of those calls, keep copies of correspondence between Long Beach Unified and Parent regarding its efforts to obtain Parent's consent, and maintain detailed records of visits made to Parent's home or place of employment as part of its effort to obtain Parent's consent. (34 C.F.R. § 300.300(d)(5); 34 C.F.R. § 300.322(d) (2006).) Long Beach Unified offered no documentation of any efforts to obtain Parent's informed consent to the November 2, 2018, IEP. Indeed, even though Parent appeared frequently on Tincher's campus during the 2018-2019 school year, there was no specific evidence of any particular attempt that Long Beach Unified made to obtain Parent's written consent to the IEP prior to May 15, 2019, the date of the IEP meeting notice of the May 29, 2019 IEP meeting.

Long Beach Unified failed to make reasonable efforts to obtain Parent's informed consent to the November 2, 2018 IEP, as required by 34 Code of Federal Regulations part 300.300 (b)(2) (2006), and Education Code section 56346, subdivision (a). Therefore, Long Beach Unified cannot rely upon 34 Code of Federal Regulations part 300.300(b)(3) (2006) or Education Code section 56346, subdivision (b) to relieve it of its obligation to provide Student a FAPE because of a lack of parental consent.

Long Beach Unified's failure to demonstrate that it complied with the procedures of the IDEA and the Education Code to obtain Parent's consent to the November 2, 2018 IEP resulted in its failure to provide any special education services to Student during the

bulk of the 2017-2018 school year. It thereby deprived Student of the opportunity to receive a FAPE, and to receive educational benefits. It also deprived Parent of the opportunity to participate in the decisionmaking process regarding the provision of a FAPE to Student. This is especially so in this case. The evidence reflected that Parent did not realize that Long Beach Unified would not provide any special education services to Student at all if she did not sign the IEP.

The only arguably documented effort that Long Beach Unified made to obtain Parent's informed consent to the IEP occurred towards the end of the school year, when it sent notice of the May 29, 2019 IEP team meeting to close the November 2, 2019, IEP. This end-of-school-year action came too late to be considered a reasonable effort to obtain Parent's consent to the IEP so as to constitute conformity to the IDEA and Education Code requirements described above. Additionally, when Parent signed the May 29, 2019 IEP, and consented to implementation of the goals and accommodations, Long Beach Unified concluded that she had not consented to the provision of special education and services. Therefore, Long Beach Unified did not provide special education and related services to Student pursuant the May 29, 2019 amendment IEP.

However, Long Beach Unified erred again. Its conclusion that Parent had not consented to the May 29, 2019 amended IEP was based on an erroneous interpretation of Parent's modification of the language of the IEP consent page. The IEP consent page consisted of a form that stated various ways in which a parent could express consent or lack of consent to the IEP, or to the receipt of special education and services. None of the options represented what Parent wanted to say. Parent, therefore tried to fit the round peg of the pre-printed consent page of the IEP into the square hole that expressed Parent's intentions. The typed portion of the statement Parent initialed and checked stated "I CONSENT to this Individualized Education Program EXCEPT for the

following: " Parent added the following handwritten words: " I consent only to the goals and accommodations. I am requesting [mental health] services and 1:1 aid." The printed part of the statement and the written portion, taken as a whole, reflects Parent's consent to receipt of special education and services. The statement referred to Parent's agreement with the goals and accommodations, and requested two specific related services: mental health services and a one-to-one aide. This statement is not the same as another statement on the form that declined special education outright that Parent did not check and initial. Rather, the statement Parent checked reflects that Parent agreed with Long Beach Unified providing the goals and accommodations in the IEP, and that Parent wanted Long Beach Unified to provide additional special education services. This statement sufficiently informed Long Beach Unified that the basis of Parent's disagreement was not a disagreement with Student's receipt of special education services.

Accepting Long Beach Unified's argument that Parent's statement of disagreement with the IEP except for accommodations and goals amounted to Parent's failure to consent to special education and services would prevent parents from ever challenging the appropriateness of aspects of a pupil's first IEP for fear of losing all special education rights and protections. Long Beach Unified's position is contrary to the IDEA and California Education Code. It was error on Long Beach Unified's part to interpret the Parent's statement of disagreement with the IEP to subsume all of Student's special education rights and protections.

Rather, Parent's consent to the implementation of the goals and accommodations in the May 20, 2019 IEP, which incorporated the November 2, 2018 IEP, and her request for mental health services and a one-to-one aide, signified consent

to the provision of special education and services to Student. Long Beach Unified's failure to implement any portion of the May 29, 2019 amended IEP, including those consented to by Parent, deprived Student of a FAPE.

Therefore, Student is entitled to the remedies set forth below.

ISSUE 5. DID LONG BEACH UNIFIED DENY STUDENT A FAPE BY FAILING TO PROVIDE PRIOR WRITTEN NOTICE WITH RESPECT TO STUDENT'S CHANGE OF PLACEMENT IN MAY 2019?

Student's contends that Long Beach Unified deprived Parent of participation in the decisionmaking process regarding the provision of a FAPE by reason of transferring Student to Rogers without parental consent and failing to provide prior written notice of the transfer. More specifically, Student asserts that Long Beach Unified unilaterally decided to change the placement of Student to the special day class at Rogers Elementary at the November 2, 2018 IEP team meeting because Long Beach Unified had an unseemly desire to remove Student from Tincher, that Long Beach Unified actually transferred Student to Rogers prior to the May 29, 2019 IEP, and it failed to provide prior written notice of the transfer.

Long Beach Unified contends that Student was never transferred to or placed at Rogers. Rather, Student remained at Tincher Elementary through the 2018-2019 school year, and then enrolled at Tincher Middle School.

A school district must provide written notice to the parents of a pupil whenever the district proposes to initiate or change, or refuses to initiate or change, the identification, evaluation, or educational placement of the pupil, or the provision of a

FAPE to the pupil. (20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503(a); Ed. Code, § 56500.4, subd. (a).)

The notice must contain:

1. a description of the action proposed or refused by the agency,
2. an explanation for the proposal or refusal, along with a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposal or refusal,
3. a statement that the parents of a disabled child are entitled to procedural safeguards, with the means by which the parents can obtain a copy of those procedural safeguards,
4. sources of assistance for parents to contact,
5. a description of other options that the IEP team considered, with the reasons those options were rejected, and
6. a description of the factors relevant to the agency's proposal or refusal.

(20 U.S.C. § 1415(c)(1); 34 C.F.R. § 300.503(b) (2006); Ed. Code, § 56500.4, subd. (b).)

Prior written notice should be given regardless of whether a parent or the school district suggested the proposed change, and regardless of a parent's position as to the proposed change. (*Letter to Lieberman*, Off. Of Special Education Programs, interpretative letter, 52 IDELR 18 (August 15, 2008).) An IEP may constitute part of the prior written notice so long as the documents the parent receives meet all the requirements in 34 Code of Federal Regulations part 300.503. (*Ibid.*) Verbal notice to the parents does not fulfill the prior written notice requirements of the IDEA. (*Union School Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526, cert. den. (1994) 513 U.S. 965.)

The weight of the evidence did not support Student's contentions, which were largely based on Parent's testimony at hearing. Parent testified that she was told at the November 2, 2018 IEP meeting that Long Beach Unified could not afford a one-to-one aide as she requested, but Student would receive it if she agreed to the transfer to Rogers. Parent also testified that at some unspecified time she received a written notice from Long Beach Unified that said Student would be transferred to Rogers, and, when she looked at Long Beach Unified's web portal for students and parents, the web page stated Student was transferred to Rogers.

Parent's testimony on this issue was not credible. First, Parent testified at hearing as the last witness in the parties' cases-in-chief, after having listened to all of the other witness' testimony. Parent testified about these and a variety of matters which witnesses who testified before her did not mention and about which they were not asked. These factors diminished Parent's credibility with respect to several aspects of her testimony.

Second, after Parent testified, Long Beach Unified re-called Ms. Miller as a witness. Ms. Miller, who had attended approximately 1,000 IEP team meetings in her career, denied that she had ever told a parent that the school district could not provide a service because of cost. She also denied that Parent was told that Long Beach Unified could not afford a one-to-one aide. Ms. Miller also denied that Parent was told that she had to consent to the entire IEP or Student would receive no services, and denied that the IEP was presented on a "take it or leave it" basis.

Third, Parent's testimony on these matters was not confirmed by any documentation. Mother was accompanied at the November 2, 2018 IEP meeting and the May 29, 2019 IEP meeting by several supporters to help her through the process,

including a Parent advocate, yet Parent's version of events was not documented in the IEP, nor did Parent or any of her supporters create their own documentation of these events to attach to the IEP. Parent did not produce the written notice that she testified Long Beach Unified sent advising her that Student was being transferred to Rogers, nor did she produce the screen shot of the web page that she asserted stated Student had been transferred to Rogers. Parent did not even produce any note she made of what the web page said.

Nor was Parent's version of events confirmed by any other witness. Finally, Parent's version of events barely makes sense. Parent presented no reason as to why Long Beach Unified IEP team members would engage in such a blatant violation of the IDEA by stating that Long Beach Unified could not afford a one-to-one aide, and then offer one anyway, as part of a deal that also blatantly violated the IDEA.

Long Beach Unified did not unilaterally attempt to change Student's placement, as Student contends. A parent's right to be involved in the development of their child's educational program is one of the most important procedural safeguards. (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 892-895.) To fulfill the goal of parental participation in the IEP process, the school district is required to conduct a meaningful IEP team meeting. (*Target Range, supra*, 960 F.2d 1479,1485.) A parent has meaningfully participated in the development of an IEP when she is informed of her child's problems, attends the IEP meeting, expresses her disagreement regarding the IEP team's conclusion, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Bd. of Educ., supra*, 993 F.2d

1031, 1036 [parent who had an opportunity to discuss a proposed IEP and whose concerns were considered by the IEP team has participated in the IEP process in a meaningful way].)

Long Beach Unified offered a placement in the special day class for emotionally disabled students at Rogers only through the IEP process, at two IEP team meetings attended by Parent and her supporters. The evidence reflected that the offered placement was not a random placement as part of a plot to remove Parent from Tincher, but rather was the culmination of a placement discussion held at the IEP team meetings. Indeed, a change of placement was listed as a reason for the May 29, 2019 amended IEP team meeting in the IEP team meeting notice Long Beach Unified created on May 15, 2019. At hearing, Parent stated she was offered the special day class on a “take it or leave it” basis, but no other witness, including the Bayfront representatives on the IEP team, so testified. Rather, the evidence demonstrated Parent and her supporters not only participated in the placement discussions, but also questioned its appropriateness and objected to it at the IEP team meetings. The offered placement was an appropriate placement in the least restrictive environment, and the offer was reached in an appropriate manner, with full parental participation.

Finally, Long Beach Unified did not implement the IEP or the amended IEP at all. There was no credible evidence that Long Beach Unified changed or unilaterally attempted to change, Student’s placement to Rogers at any time.

As was stated above, prior written notice is required when a school district proposes to change a child’s placement. A failure to provide a prior written notice is a procedural violation of the IDEA and the Education Code. A procedural violation only

constitutes a denial of FAPE if the violation impeded the child's right to a FAPE, caused a deprivation of educational benefits to the child, or significantly impeded the parent's opportunity to participate in the decisionmaking process regarding the provision of a FAPE to the child. None of those circumstances occurred here. Parent protested any change of placement, and Long Beach Unified did not actually change or attempt to change Student's placement. The weight of the evidence does not support Student's assertions on this issue. Long Beach Unified did not deny Student a FAPE on this ground.

CONCLUSIONS AND PREVAILING PARTY

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

Issue 1: Long Beach Unified did not deny Student a free appropriate public education by failing to fulfill its child find obligations. Long Beach Unified prevailed on Issue 1.

Issue 2: Long Beach Unified did not deny Student a FAPE by failing to appropriately assess Student in the area of attention deficit hyperactivity disorder from September 11, 2018, to August 16, 2019. Long Beach Unified prevailed on this portion of Issue 2.

Long Beach Unified did not deny Student a FAPE by failing to appropriately assess Student in the area of emotional disturbance during the period from September 11, 2018, to August 16, 2019. Long Beach Unified prevailed on this portion of Issue 2.

Issue 3, subsection a: The November 2, 2018 IEP, as amended by the May 29, 2019 IEP, did not deny Student a FAPE. Long Beach Unified prevailed on Issue 3, subsection a.

Issue 3, subsection b: The November 2, 2018, IEP, as amended by the May 29, 2019 IEP, offered Student an appropriate placement. Long Beach Unified prevailed on Issue 3, subsection b.

Issue 4: Long Beach Unified denied Student a FAPE by failing to make reasonable efforts to obtain Parent's consent to implement the accommodations and services in the IEP of November 2, 2018, and by its failure to implement the accommodations and services in the amended IEP of May 29, 2019. Student prevailed on Issue 4.

Issue 5: Long Beach Unified did not deny Student a FAPE by failing to provide prior written notice. Long Beach Unified prevailed on Issue 5.

REMEDIES

Student prevailed on Issue 4. As relief, Student proposed a variety of remedies in his closing brief. These included an independent psychoeducational evaluation, an independent functional behavior analysis, and an independent mental health services assessment. Student also sought compensatory education, including 200 hours of compensatory academic services 100 hours of compensatory counseling services, and 100 hours of compensatory behavioral services.

Courts have broad equitable powers to remedy the failure of a school district to provide a FAPE to a child with a disability. (20 U.S.C. § 1415(i)(1)(C)(iii); Ed. Code, § 56505, subd. (g); see *School Committee of the Town of Burlington, Massachusetts v.*

Dept. of Education (1985) 471 U.S. 359, 369 [105 S.Ct. 1996] (*Burlington*); *Parents of Student W. v. Puyallup School Dist.*, No. 3 (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*). This broad equitable authority extends to an ALJ who hears and decides a special education administrative due process matter. (*Forest Grove School Dist., v. T.A.* (2009) 557 U.S. 230, 240 [129 S.Ct. 2484].)

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); *Burlington, supra*, 471 U.S. at 374 [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.”].) Appropriate relief means “relief designed to ensure that the student is appropriately educated within the meaning of the IDEA.” (*Puyallup, supra*, 31 F.3d. 1489, 1497.)

School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Puyallup, supra*, 31 F.3d 1489, 1496.) These are equitable remedies that courts may employ to craft “appropriate relief” for a party. (*Ibid.*) An award of compensatory education need not provide a “day-for-day compensation.” (*Id.* at p. 1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.) An award to compensate for past violations must rely on an individualized analysis, just as an IEP focuses on the individual student’s needs. (*Reid v. District of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be fact-specific and be “reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” (*Ibid.*)

Student demonstrated that he was denied a FAPE because Long Beach Unified failed to provide any special education services to Student during the 2018-2019 school year. However, an appropriate remedy should not be the implementation of the November 2, 2018 IEP, as amended by the May 29, 2019 IEP. Those IEPs offered a FAPE at the time that they were developed, but they are dated. They likely do not represent Student's current needs.

Similarly, the program Student proposed when she failed to consent to the IEPs, which included a one-to-one aide in a general education placement, would not be an appropriate remedy. Student did not demonstrate that such a program provided Student a FAPE in the least restrictive environment.

Student presented no specific evidence as to Student's current educational needs. However, Student likely still has needs in the areas of academics and behavior. In view of Long Beach Unified's failure to provide Student any special education services during the 2018-2019 school year and the current school year, Long Beach Unified shall conduct assessments to ascertain the nature and extent of Student's current needs. Based on the results of these assessments, Long Beach Unified shall offer Student appropriate special education services and placement. None of these assessments are to be independent assessments, because, as discussed in Issue 2 above, Long Beach Unified appropriately assessed Student in all areas of suspected disability.

Therefore, Long Beach Unified shall conduct a psychoeducational assessment, which shall include an assessment for attention deficit hyperactivity disorder. As discussed above, Long Beach Unified's initial psychoeducation assessment of Student was appropriate. However, Student received a diagnosis of attention deficit hyperactivity disorder sometime in late winter or spring 2019, after Long Beach Unified's

initial psychoeducational assessment. Therefore, it is appropriate to assess for characteristics of that disorder so as to obtain current, updated information as to Student's educational needs.

Long Beach Unified should also conduct a functional behavior assessment to obtain current information regarding Student's behavior needs.

Long Beach Unified shall also conduct a mental health services assessment. A mental health assessment is appropriate at this time as part of the effort to obtain updated information regarding Student's needs.

Long Beach Unified shall hold an IEP team meeting to discuss all of the assessments ordered in this Decision and develop an IEP within 60 days after receiving Parent's signature on the assessment plan.

Long Beach Unified's denial of a FAPE as described in Issue 4 warrants an additional award of compensatory education. Long Beach Unified's failure to provide Student with special education and related services likely contributed to Student's inability to improve his maladaptive behaviors at school during the 2018-2019 school year, despite occasional wraparound services. For example, Student's report card at the end of the 2018-2019 school year reflected he struggled with coping and life-management skills. The teacher's comments on the report card also reflected that Student's behaviors were affecting his academic progress. Student's grades revealed that he particularly struggled with math and writing. This evidence supports an award of compensatory education in the areas of counseling, behavior, and academics.

Student's November 2, 2018 IEP offered Student extended school year special education services during summer 2019, but no compensatory education will be ordered for that period. Attendance at school during the extended school year is voluntary, and Student presented no evidence that he sought to avail himself of extended school year special education services during summer 2019.

Student failed to offer specific evidence to support a particular amount of compensatory education, despite the direction in the PHC Order to do so. However, the school calendar provides a basis for calculation of a compensatory education award. Subsequent to the November 2, 2018 IEP team meeting, the 2018-2019 regular school year proceeded for 28 weeks. Approximately 13 weeks have elapsed during the 2019-2020 school year to the first date of the hearing. Therefore, the total of 41 weeks provides the basis for calculating the compensatory education award, to compensate for Long Beach Unified's failure to provide Student any special education or behavioral services during the 2018-2019 school year through the beginning of the hearing.

Long Beach Unified shall provide Student a block of 41 hours of specialized academic instruction in the area of math, and an additional block of 41 hours of specialized academic instruction in the area of writing. These services shall be provided on a one-to-one basis by a California certified nonpublic agency.

Long Beach Unified shall also provide Student a block of 41 hours of behavioral intervention services, provided on a one-to-one basis by a California certified nonpublic agency, and 8 hours of behavioral supervisory services provided by a board certified behavior specialist from a California certified nonpublic agency.

Long Beach Unified shall provide school-based individual counseling for 30 minutes per week, pending the IEP team meeting to discuss the results of the assessments.

ORDER

1. Within 15 days from the date of this Decision, Long Beach Unified shall provide an assessment plan to Parent to obtain Parent's consent for Long Beach Unified to perform an educationally related mental health services assessment, a functional behavior assessment, and an assessment for attention deficit hyperactivity disorder.
2. Long Beach Unified shall perform the assessments and hold an IEP team meeting within 60 days after receiving Parent's consent to assessment, to review the assessment results and develop an IEP based upon those results.
3. While the assessments ordered in items 1 above are pending, and through the completion of the IEP team meeting ordered in item 2, Long Beach Unified shall provide 30 minutes per week of individual school-based counseling to Student. This remedy is equitable only and is not stay put.
4. Long Beach Unified shall provide Student a block of 41 hours of specialized academic instruction in math by a California certified nonpublic agency, to occur at home or at another location to be agreed upon by Parent and the nonpublic agency. If the services are held at a location other than Student's home, Long Beach Unified shall reimburse Parent for transportation for one round trip for travel to the location, not to exceed 50 miles per round-trip. The block of hours must be used by no later than December 31, 2021. Any hours not used by that date shall be forfeited. This remedy is compensatory only and is not stay put.

5. Long Beach Unified shall provide Student a block of 41 hours of specialized academic instruction in writing by a California certified nonpublic agency, to occur at home or at another location to be agreed upon by Parent and the nonpublic agency. If the services are held at a location other than Student's home, Long Beach Unified shall reimburse Parent for transportation for one round trip for travel to the location, not to exceed 50 miles per round-trip. The block of hours is to be used by no later than December 31, 2021. Any hours not used by that date shall be forfeited. This remedy is compensatory only and is not stay put.
6. Long Beach Unified shall provide Parent a block of 41 hours of behavior intervention services, to be provided by a California certified nonpublic agency, to occur at home or at another location to be agreed upon by Parent and the nonpublic agency. If the services are held at a location other than Student's home, Long Beach Unified shall reimburse Parent for transportation for one round-trip for travel to the location, not to exceed 50 miles round-trip. The block of hours is to be used by no later than December 21, 2021. Any hours not used by that date shall be forfeited. This remedy is compensatory only and is not stay put.
7. Long Beach Unified shall provide Parent a block of 8 hours of supervision of the behavior intervention services. The supervision shall be performed by a board certified behavior analyst from a California certified nonpublic agency. The block of hours is to be used by no later than December 21, 2021. Any hours not used by that date shall be forfeited. This remedy is compensatory only and is not stay put.
8. All other relief sought by Student is denied.

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/

Elsa H. Jones

Administrative Law Judge

Office of Administrative Hearings