

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

DEL NORTE COUNTY UNIFIED SCHOOL DISTRICT,

V.

STUDENT.

CASE NO. 2024110598

DECISION

March 14, 2025

On November 19, 2024, the Office of Administrative Hearings, called OAH, received a due process hearing request from Del Norte County Unified School District, called Del Norte, naming Student. On December 2, 2024, OAH granted Del Norte's request for a continuance. Administrative Law Judge Cararea Lucier heard this matter by videoconference on January 7, 8, 9, 14, 15, 16, 22, 23, and 28, 2025.

Attorney Vivian Randolph represented Del Norte. Jennifer Armington, Director of Special Education, attended all hearing days on Del Norte's behalf. Attorney Joshua Cruz represented Student. Father attended all hearing days on Student's behalf. OAH provided qualified interpreters for Father for the entirety of the hearing. Mother attended on January 7, 8, and 9, 2025, on Student's behalf, and also attended on various other dates disguised as an anonymous member of the public.

At the parties' request, the matter was continued to February 25, 2025, for written closing briefs. Del Norte and Student timely filed closing briefs. The record was closed, and the matter submitted on February 25, 2025.

## PROCEDURAL MATTERS

### STUDENT'S MOTION TO EXCLUDE STUDENT AS A WITNESS AND REQUEST FOR A PROTECTIVE ORDER

On January 13, 2025, Student filed a Motion to Exclude Student as a Witness and Request for a Protective Order. Del Norte included Student as a potential witness in its December 24, 2024 First Amended Notice of Potential Witnesses and Documentary Evidence. Student argued Student was an unnecessary witness and that it would be distressing to Student and her family if she was forced to testify. At the due process hearing, Del Norte argued it had the right to call Student as a witness because she was a party. However, Del Norte did not ultimately call Student as a witness in this matter. As such, Student's motion is denied as moot.

### DEL NORTE'S MOTION TO DECLARE A MISTRIAL FOR MISCONDUCT AND WITNESS TAMPERING

On January 21, 2025, Del Norte filed a Motion to Declare a Mistrial for Misconduct and Witness Tampering. Del Norte alleged Mother and Attorney Cruz sought to intimidate and harass witness Lindsie Jones. Ms. Jones conducted the functional behavior assessment at issue in this matter. Del Norte argued that communications to Ms. Jones from Mother and Attorney Cruz were for the purpose of intimidating Ms. Jones from appearing as a witness and providing testimony favorable to Del Norte.

On January 22, 2025, Student filed an Opposition to District's Motion for a Mistrial. Student asserted they had the right to contact Ms. Jones about the case because she was not a Del Norte employee and that all communications were benign.

Neither federal nor California law provides a legal standard for a mistrial in a special education due process hearing. Generally, a mistrial is a process for declaring a trial invalid due to a hung jury, which means a jury cannot come to a verdict, or serious errors or misconduct during the proceedings. Del Norte argued OAH should look to provisions in the California Penal Code and civil litigation for guidance in declaring a mistrial.

The evidence showed Mother attempted to intimidate and harass Ms. Jones for the purpose of improperly influencing her testimony in this due process hearing. Mother's conduct was highly inappropriate. Following Mother's testimony on January 9, 2025, she joined the Zoom videoconference of the hearing disguised as an anonymous member of the public. She then contacted Ms. Jones through telephone, electronic mail, and Facebook messages with misinformation about the hearing. Mother was aware witnesses were prohibited from attending the Zoom hearing prior to their testimony, and that witnesses were admonished at the conclusion of their testimony not to discuss the hearing with any future witnesses. As such, Ms. Jones, following these rules, had no way of knowing the information Mother told her was untrue.

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Mother made numerous false statements and factual distortions to Ms. Jones to intimidate her and dissuade her from testifying favorably to Del Norte. On January 16, 2025, Mother left a voicemail for Ms. Jones saying:

"Hey Lindsie, I think this is your number. Um. This is [Mother]. My attorney, Joshua Cruz, um ... gave me your number. I've messaged you on Facebook .... I'm very concerned they are sitting here dragging your name, the school district, Del Norte County, is dragging your name and blaming you for the [functional behavior] assessment .... It's really hard as someone who has their master's in [applied behavioral analysis] to watch them sit here and drag you and blame you for them not having her records and blame you for not giving an appropriate assessment and it just breaks my heart."

However, this was not true. Del Norte filed the due process hearing to defend Ms. Jones' report. At no time in the hearing did Del Norte blame or criticize Ms. Jones.

Mother left a second voicemail on January 16, 2025, stating:

"[t]his is the sixth day of court and they are constantly saying you're at fault for all of this. They're saying you didn't keep any records, that you didn't do your job.... Del Norte Unified School District and we both know that's not true and they're sitting there blaming you this entire time and trying to get you to lose your license ...."

This was also not true. Del Norte did not say anything at the due process hearing that suggested it wanted Ms. Jones to lose her professional license.

Mother had a specific request for Ms. Jones in these voicemails: to make a written statement saying Del Norte was at fault.

On January 16, 2025, Mother emailed Ms. Jones:

"They want you to lose your license, and they want you to be at fault .... All I'm asking for is a letter that says you recommend [Student] needs an [independent functional behavior assessment] because you had been overworked and this is the fault of the district."

Mother also messaged Ms. Jones through Facebook, continuing to use untrue statements to intimidate Ms. Jones and influence her testimony:

"I wanna protect you and I've always told our attorney that I don't want you to be called because I don't think this is your fault .... I don't want you to lose your ability to help people .... I was wondering if you would be OK, which is sending me some kind of statement or letter that says you were under distressed and pressure from the school district and they were so under resourced that you couldn't conduct an appropriate assessment for her and it would be best for her to have [an independent functional behavior assessment] .... Please if you could just send me a letter or our attorney Joshua Cruz a letter saying the district is at fault because they keep blaming you and saying you lost the records, you didn't keep records and you wrote the bad report .... This is open to the public. They're sitting there, dragging your name to the public."

Parents requested the hearing be open to the public, and then Mother used the open hearing to intimidate Ms. Jones.

Ms. Jones appeared frightened and anxious when she appeared as a witness for the due process hearing. Ms. Jones also explained in a sworn declaration attached to Del Norte's motion she felt threatened and intimidated. Based upon Mother's communications, she believed her reputation was being tarnished in the small community in which they lived, and that Del Norte was slandering her name and character in public. Ms. Jones was worried the due process hearing was damaging her reputation and would harm her ability to work with the local school districts and regional center for disabled children and adults.

While Mother's communications and conduct were unacceptable, they did not ultimately prevent Ms. Jones from testifying in the due process hearing or cause her to alter her testimony to state things she believed were untrue. As such, Del Norte was not prejudiced by Mother's conduct, and the motion for a mistrial was denied. Nonetheless, Mother's dishonesty during the due process hearing reflected negatively on her credibility as a witness.

## ISSUE

Was Del Norte's November 2, 2022 functional behavior assessment appropriately conducted such that Del Norte is not obligated to fund an independent educational evaluation at public expense?

In the December 27, 2024, Order Following Prehearing Conference for Hearing by Videoconference, OAH erroneously referred to the assessment at issue as the November 1, 2022, functional behavior analysis. Del Norte's request for a due process hearing refers to the assessment at issue as a November 2, 2022 functional behavioral assessment. Lindsie Jones, the assessor, testified that the terms "functional behavior

analysis," "functional behavior assessment," and "functional behavioral assessment," are interchangeable and mean the same thing. The term "functional behavior assessment" will be used in this Decision.

## 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 free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living, and
- the rights of children with disabilities and their parents are protected.(20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

A free appropriate public education, called FAPE, means special education and related services that are available to an eligible child that meets state educational standards at no charge to the parent or guardian. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) Parents and school personnel develop an individualized education program, called an IEP, for an eligible student based upon state law and the IDEA. (20 U.S.C. §§ 1401(14), 1414(d)(1); and see Ed. Code, §§ 56031, 56032, 56341, 56345, subd. (a), and 56363, subd. (a); 34 C.F.R. §§ 300.320, 300.321, and 300.501.)

In general, a child eligible for special education must be provided access to specialized instruction and related services which are individually designed to provide educational benefit through an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. (*Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201-204; *Endrew F. v. Douglas County Sch. Dist. RE-1* (2017) 580 U.S. 386, 402 [137 S.Ct. 988, 1000].)

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, and 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents, and has the burden of proof by a preponderance of the evidence. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 57-58, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) Del Norte had the burden of proof in this matter. The factual statements in this Decision constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

Student was a three-year-old preschool student at the time of the assessment at issue. Student resided within Del Norte's geographic boundaries with Parents at all relevant times. Student was eligible for special education under the category of speech or language impairment. She was diagnosed with autism and asthma. Student was a social, creative, and joyful child. She enjoyed books, art, and creating imaginary animals such as a "bunnybear," her version of a combination of a rabbit and a bear.



Student's primary language was English, although Parents described her native language as Arabic due to her exposure to the language while visiting relatives in Algeria and at times from Father. Student spoke English at home with Mother, whose native language was English, and at school.

ISSUE: WAS DEL NORTE'S NOVEMBER 2, 2022 FUNCTIONAL BEHAVIOR ASSESSMENT APPROPRIATELY CONDUCTED SUCH THAT DEL NORTE IS NOT OBLIGATED TO FUND AN INDEPENDENT EDUCATIONAL EVALUATION AT PUBLIC EXPENSE?

Del Norte contends its November 2, 2022 functional behavior assessment did not deny Student a FAPE and met all legal requirements. Del Norte further contends school staff did not view Student's behavior as problematic or atypical in the general education preschool setting, but agreed to conduct the functional behavior assessment at Parents' request. Generally, Del Norte contends Student did not have maladaptive behaviors at school. Any lack of data in the report, therefore, reflected the lack of behavioral incidents Student had at school and was not a flaw in its assessment.

Student contends Del Norte's November 2, 2022 functional behavior assessment was flawed in both procedure and substance. Student contends the assessment plan was not in Father's native language, did not include procedural safeguards in Father's native language, and failed to include Student's English language proficiency information. Student contends Del Norte relied on the wrong legal standard in conducting the

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assessment and neglected to take into consideration Student's behavior intervention plan. Student further contends Del Norte failed to include information about Student's autism diagnosis and her educational records. Student contends Del Norte:

- failed to include a sufficient behavioral data analysis,
- failed to consider all Parents' concerns,
- failed to evaluate Student's social skills needs and peer conflicts,
- failed to allow Father to participate in the assessment, and
- overlooked Student's autism symptoms.

For these reasons, Student contends Del Norte should fund an independent functional behavior assessment.

## REQUEST FOR INDEPENDENT EDUCATIONAL EVALUATION

A parent has the right to obtain an independent educational evaluation if the parent disagrees with a school district's assessment. (34 C.F.R. § 300.502 (2006); Ed. Code, § 56329, subd. (b).) If a parent requests an independent educational evaluation at public expense, the education agency must, without unnecessary delay, file a due process hearing request to demonstrate that its assessment is appropriate, or ensure that an independent educational evaluation is provided at public expense. (34 C.F.R. § 300.502(b)(2); see also Ed. Code, § 56329, subds. (b) & (c).) The determination of unnecessary delay is a fact specific inquiry. (See *Pajaro Valley Unified School Dist. v J.S.* (N.D.Cal. 2006) 2006 W.L. 3734289 (an unjustified delay of almost three months was unreasonable); *J.P. v Ripon Unified School Dist.* (E.D.Cal. 2009) 2009 W.L. 1034993 (filing less than three weeks after negotiations came to an impasse was not unnecessary delay).)

The term "assessment" used in the California Education Code has the same meaning as the term "evaluation" in the IDEA. (Ed. Code, § 56302.5.)

If the final decision resulting from the due process hearing is that the assessment is appropriate, the parent still has the right to obtain an independent educational evaluation, but not at public expense. (34 C.F.R. § 300.502(b)(3); Ed. Code, § 56329, subd. (c).)

On October 25, 2024, Parents requested an independent educational evaluation because they disagreed with Del Norte's November 2, 2022 functional behavior assessment of Student. On November 19, 2024, Del Norte timely filed a due process hearing request to demonstrate the appropriateness of the assessment.

## ASSESSMENT PLAN

A school district must obtain parental consent before assessing a student. (Ed. Code, §§ 56321, subd. (a), and 56043, subd. (a).)

The assessment plan must be in writing, and:

- be in language easily understood by the public;
- be provided in the native language of the parent;
- explain the type of assessments to be conducted; and
- state that no IEP will result from the assessment without the consent of the parents. (Ed. Code, § 56321, subd. (b).)

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A school district must include a copy of the notice of parents' rights attached to the assessment plan, including procedural safeguards under the IDEA. (Ed. Code, § 56321, subd. (b).) The notice of procedural safeguards must be in the parent's native language. (34 C.F.R. §§ 300.504(d) and 300.503(c).)

In addition to the assessment plan requirements of Education Code section 56321, the proposed written assessment plan must include a description of any recent assessments conducted, including any available independent assessments and any assessment information the parent requests to be considered, and information indicating the pupil's primary language and language proficiency in the primary language as determined by Education Code section 52164.1. (Cal. Code Regs., tit. 5, § 3022.) The determination of a student's primary language is made upon enrollment. (Ed. Code, § 52164.1, subd. (a).) Once determined, the primary language of a student is not redetermined unless the parent or guardian claims there is an error. (*Id.*)

Student joined the general education preschool classroom in January of 2022 after traveling internationally with Parents for three months. On March 14, 2022, Del Norte found Student eligible for an IEP under the category speech or language impairment. On April 27, 2022, Mother requested a functional behavior assessment following an incident in Student's preschool classroom.

In early April 2022, Student was seated on the carpet of her preschool classroom and tipped onto her back, flailing her legs in the air. A peer poked his finger at her vagina. Melissa Ferguson, Student's teacher, believed the incident was inappropriate but not unusual in the preschool environment. In her experience, young preschool

students poked and prodded each other's bodies. She instructed the students that the behavior was not acceptable. However, she did not view Student's behavior as atypical or problematic.

Parents were extremely concerned about the incident. Parents' believed Student's behavior was unsafe and increased the likelihood she would be a victim of sexual assault. They refused to send her back to the preschool. Mother requested a functional behavior assessment of Student to consider whether Student's behavior of sitting on the carpet in such a position made her a target to be touched, thereby interfering with her education and ability to be safe at school.

On May 10, 2022, Del Norte convened an IEP team meeting to discuss Parents' concerns. Ms. Jones offered to do a simple behavior plan to support Student in completing the school year. This informal behavior plan was intended to be a safety plan to facilitate Student's return to school. The plan described Student's problem behavior as lying on her back with her legs in the air, lacking safety awareness. The behavior tended to occur at circle time or during free exploration time. The plan instructed staff to use verbal prompting with Student such as "feet on the floor" and "criss cross." Del Norte did not see Student's behavior as atypical or problematic. She had been in preschool for only four months and was still learning classroom skills such as sitting correctly on the carpet. However, Del Norte agreed to conduct a functional behavior assessment of Student in fall 2022 when she would transition to a new preschool site.

Parents agreed. Student returned to the preschool and completed the 2021-2022 school year.

On August 25, 2022, Mother emailed Tom Kissinger, Del Norte's assistant superintendent, to follow up about the functional behavior assessment. Parents also followed up in another email to Mr. Kissinger on August 30, 2022. While the August 30, 2022 email was written from Father's email address, and asked that he be considered the primary contact for Student, at hearing, Mother testified that she wrote the email. The email stated English was Father's second language. However, Parents did not inform Del Norte Father's native language was Arabic. Parents believed Del Norte County, a rural community, would not accept an Islamic man whose native language was Arabic. They decided to keep this information private while they worked on improving Father's English. Father spoke to school staff in English.

On August 30, 2022, Student's IEP case carrier Alishia Beers emailed Father that the assessment plan was ready for him to sign so Del Norte could move forward with the functional behavior assessment. Ms. Beers offered to meet with Father at his convenience to review and sign the assessment plan. Father did not respond.

On September 9, 2022, when Father picked Student up from preschool, he was directed to an assessment plan sitting on a chair in the classroom. He did not read the document. He signed and dated the assessment plan immediately and left it in the classroom.

Father gave conflicting testimony as to whether he understood the assessment plan he signed was for the purpose of allowing Del Norte to conduct a functional behavior assessment of Student. He answered both yes and no to the specific question. Father was not a credible witness at the due process hearing. He presented himself as defensive and angry. At times, he stated he would not answer questions asked of him,

simply refusing. He frequently responded that he did not know or did not remember information. He was not a cooperative witness. As such, Father's testimony was given only moderate weight.

Del Norte's assessment plan:

- was in language easily understood by the public;
- explained the type of assessments to be conducted; and
- stated that no IEP would result from the assessment without the consent of the parents.

The assessment plan did not include information about Student's English proficiency level. However, Del Norte was not required to include such information because Student was not an English language learner. (See Ed. Code, § 52164.1, subd. (a).) At the March 14, 2022 initial IEP team meeting, the team, including Parents, agreed Student's primary language was English, marking on the first page of the IEP she was not an English language learner. The initial IEP further indicated the English Language Development Test was not necessary and she did not require English language development. Mother attended the meeting and signed full consent. Parents did not claim any error as to the designation of English as Student's primary language. The documentary evidence and testimony from school staff overwhelming established Student's primary language at school was English. As such, Del Norte did not commit any error by omitting Student's English language proficiency level on the assessment plan.

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The assessment plan was provided in Mother's native language of English. Father signed and dated the assessment plan, rather than asking for a copy in Arabic or taking it home for Mother to review.

Del Norte did not provide the assessment plan in Father's native language because it did not have actual knowledge that Father's native language was Arabic. Student argued Parents notified Del Norte that English was his second language and Student's native language was Arabic, and as such, Del Norte should have understood Father's native language was Arabic. However, Parents deliberately concealed Father's native language from Del Norte because they feared the community was racist and intolerant. Parents communicated with Del Norte exclusively in English, which was also Mother's native language. Del Norte persuasively argued it would be discriminatory for staff to assume Father could not speak or understand English based upon his appearance or accent.

The assessment plan did not include a copy of the notice of parents' rights and procedural safeguards under the IDEA in English or Arabic.

Del Norte's failure to provide Father with a copy of the procedural safeguards was a procedural violation of the IDEA.

A procedural error results in a denial of a FAPE only if the violation:

- impeded the student's right to a FAPE;
- significantly impeded the parent's opportunity to participate in the decision-making process; or
- caused a deprivation of educational benefits.



(20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2); Ed. Code, § 56505, subds. (f)(2) & (j); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484, superseded on other grounds by statute; *L.M. v. Capistrano Unified School Dist.* (9th Cir. 2009) 556 F.3d 900, 910.)

The preponderance of the evidence demonstrated Del Norte's procedural errors with respect to the assessment plan did not deny Student a FAPE. Parents unequivocally wanted Del Norte to conduct a functional behavior assessment of Student and consented to the assessment. They requested the assessment, followed up about it several times, cooperated with the assessment process, and actively participated in an IEP team meeting to discuss the results.

Furthermore, Del Norte had recently provided Parents with a copy of the notice of procedural safeguards under the IDEA, and explained them to Parents. At the March 14, 202 IEP team meeting and again prior to the May 10, 2022 IEP team meeting, where the team discussed Parents' request for a functional behavior assessment, Del Norte provided Parents with a copy and offered to explain them. Parents had no questions. In this case, Del Norte's failure to provide the procedural safeguards was a harmless error and did not constitute a denial of FAPE or invalidate the resulting assessment.

## FUNCTIONAL BEHAVIOR ASSESSMENT

A student's unique needs that must be addressed under the IDEA may include behavior, social-emotional functioning, and mental health. (*County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467.)

A “functional behavior assessment” is not defined by the IDEA or California state law.

In informal policy guidance, the United States Department of Education’s Office of Special Education and Rehabilitative Services defined a functional behavior assessment as a process for identifying the reasons behind, or factors contributing to, a child’s behavior. The functional behavior assessment process is rooted in the understanding that behavior is a form of communication. A functional behavior assessment leads to the development of appropriate, effective behavioral interventions that address the root cause of the behavior rather than using a punitive approach to stop or reduce the behavior. (Positive, Proactive Approaches to Supporting Children With Disabilities: A Guide for Stakeholders, OSEP Policy Support 22-01 (U.S. Dept. of Educ., Office of Special Education and Rehabilitative Services, July 19, 2022).)

Board-certified behavior analyst Lindsie Jones conducted the November 22, 2022 functional behavior assessment of Student. Ms. Jones had the job title of district behaviorist, however, she was not employed by Del Norte. Del Norte contracted with Ms. Jones’ employer, AMN Healthcare, to provide behavior services.

Ms. Jones had an associate’s degree in human services, a bachelor of arts degree in behavioral science, a master of arts degree in special education, and a post masters’ degree certificate in applied behavior analysis. She had over 15 years-experience in special education. Ms. Jones was trained in conducting functional behavior assessments and had conducted over 50 in her career.

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Ms. Jones was a highly credible and reliable witness. She considered each question carefully and provided calm and thoughtful responses. She was professional and knowledgeable. She supported her answers with detailed references to her observations of Student and her professional experience. As such, Ms. Jones' testimony was given substantial weight.

While the law does not specify the requirements for a functional behavior assessment, Ms. Jones persuasively testified, based on her professional expertise, that a functional behavior assessment in the school setting should include:

- identification and definition of target behaviors to be assessed;
- direct observation of the student;
- data collection, specifically considering the antecedent, behavior, and consequence for each observed behavior;
- review of student records;
- interviews with people close to the student such as the parent, teacher, and school staff;
- indirect surveys such as the Functional Analysis Screening Tool;
- analysis of the data using graphs, including the duration and frequency of the behavior and the environment; and
- recommendations.

Ms. Jones also recommended that as a best practice, functional behavior assessments in the school setting should consider tier one and tier two supports that have been used with the student to evaluate whether interventions have been effective.

Tier one supports were those provided to the entire classroom. Tier two supports were provided in small group settings. Student did not provide any expert testimony to contradict or otherwise impeach Ms. Jones' testimony as to the professional requirements for a functional behavior assessment in the school setting.

Ms. Jones conducted her functional behavior assessment of Student from September 10, 2022, through November 2, 2022. School staff did not see Student exhibiting negative or unsafe behaviors in the classroom. However, based on Parents' concerns expressed at the IEP team meeting, Ms. Jones identified the behaviors to be assessed as noncompliance and tantrum behaviors.

Tantrum was operationally defined as a protest behavior in which Student did two or more of the following behaviors together:

- loud vocalization,
- stomping her feet,
- crying/whining,
- body dropping, or
- laying her body on the floor.

Noncompliance was operationally defined as Student stating "no" or refusing to complete a directive within one minute of instruction.

Ms. Jones conducted direct observations of Student on five occasions for a total of 7.65 hours. She observed Student in a variety of settings within her preschool environment, including during

- free play,
- centers,

- carpet time,
- breakfast,
- recess, and
- transitions between activities.

Ms. Jones detailed her observations of Student at school in her report. This summary of her observations was lengthy, comprising three-and one-half pages of single-spaced text.

Ms. Jones took data from her direct observations. She also collected the antecedent, behaviors, and consequences of any observed behaviors. In addition to the targeted behaviors, Ms. Jones looked at all of Student's behavior, including any that could raise safety issues. She considered Student's behavior as an individual, but also in the context of her age and compared with the behaviors of her general education preschool peers.

Ms. Jones reviewed Student's complete cumulative school records to determine any history of behavioral challenges, formerly identified antecedents, and previously implemented interventions. Ms. Jones bullet-pointed and summarized some documents she reviewed, which she felt were especially relevant to the functional behavior assessment. Ms. Jones was aware of Dr. Kissinger's September 16, 2021 Clinical Psychological Evaluation which diagnosed Student with autism, but did not summarize this report in her assessment report because it had already been summarized in a separate assessment by Del Norte School Psychologist Jennifer Eames.

Ms. Jones interviewed Mother and Student's teacher. She summarized these interviews in her report. Mother had many concerns about Student's behavior. Mother reiterated Father's concerns to Ms. Jones, as Parents had discussed their collective

concerns before the interview. Parents were concerned with Student's socialization, communication, and interactions with peers. At home, Student had frequent tantrums, trouble sleeping, wet the bed, was more interested in objects than people, and engaged in "dare devil" behaviors. Mother also described Student as too active, clumsy, and stubborn. In the interview, Mother stated Student was diagnosed with autism in 2021, and received home applied behavioral analysis services.

Student argues Ms. Jones should have taken affirmative steps to interview the providers of Student's applied behavioral analysis services in the home. However, Ms. Jones was not required to interview these providers about Student's behaviors at home. The assessment was for the purpose of considering Student's behavior at school.

Student's teacher, Amber Otterbach, did not have concerns about Student's behavior at school. Student was friendly, talkative, and enjoyed being around her peers at school. On the witness stand, Ms. Otterbach smiled as she recalled Student as a "bubbly" personality. While Student did occasionally have moments of getting upset or stomping her feet, Ms. Ottersbach viewed these behaviors as age appropriate, typical in her preschool classroom, and easily redirectable.

Ms. Jones analyzed the data from the Functional Analysis Screening Tool surveys as well as her data sheets collecting antecedents, behaviors, and consequences. She graphed the data in her report. The data showed Student had three tantrums during the assessment period. Two of the tantrums lasted for less than 30 seconds. One tantrum lasted for 11 minutes. Ms. Jones described the 11-minute tantrum as an outlier. A classroom staff member was eating ice cream but did not share or offer ice cream to the class. Several of the students became upset because they wanted ice cream,

including Student. Student's tantrum behavior during the ice cream incident was typical of her peers and typical for her age. The data showed Student exhibited noncompliance on two occasions during the assessment period, each lasting less than one minute.

Ms. Jones considered tier one and tier two interventions used for Student. In her half-day general education preschool program Student had:

- a step stool for toileting,
- headphones for loudness,
- transition warnings,
- calm down area,
- green/red choices,
- calm voices for redirection,
- access to the classroom token system,
- encouragement to use a calm body,
- instruction and prompting for breathing techniques,
- reminders for safe hands,
- classroom wide instructions to take a minute,
- positive praise, and
- modeled appropriate language between students.

At circle time the teacher reminded the class to use green choices, including:

- safe and gentle hands,
- listening ears,
- "criss cross applesauce" seating,
- cleaning up messes,
- kind words,

- sharing,
- level two voices, and
- not throwing objects.

Ms. Jones determined Student responded well and benefitted from these tier one and tier two interventions.

Ms. Jones concluded her report with recommendations for Student. She concluded Student's behaviors were not impeding her education. Student's behavior was typical of her same age peers. However, Ms. Jones suggested Student would benefit from a peer social group to encourage her to build and establish peer connections. While Student did play with her peers, she preferred socializing with adults.

Ms. Jones' functional behavior assessment had several minor errors. In the first paragraph of her assessment report, Ms. Jones included boilerplate language that was part of the assessment report template. This paragraph cited and quoted California regulations that have been repealed: title 5, California Code of Regulations, section 3001, subsection aa [definition of a "serious behavior problem"]; and title 5, California Code of Regulations, section 3052, subsection (a)(1) [Designated Positive Behavioral Interventions]. Ms. Jones was not aware these regulations were repealed at the time of her assessment. However, this error did not have any negative impact on the overall validity of her assessment. California did not replace these regulations with new guidance that would have changed Ms. Jones' assessment process.

Ms. Jones included Student's medical diagnosis of autism only in the summary of the parent interview in her report. Ms. Jones did not explicitly discuss Student's autism diagnosis when analyzing her behavior in the classroom. However, Ms. Jones considered



all of Student's behaviors, not just tantrums and noncompliance. The data did not show Student having behaviors related to her autism diagnosis interfering with her education in the preschool environment. Therefore, Ms. Jones did not overlook Student's diagnosis of autism even though the report did not emphasize the fact.

Finally, Ms. Jones' report included some minor formatting errors and inconsistencies. For example, the report switched from bullet points to numbers at times. These errors were minor and did not impact the validity of the assessment.

The preponderance of the evidence demonstrated Del Norte's November 2, 2022 assessment of Student was appropriate and consistent with professional expectations for a functional behavior assessment in the school setting.

## ASSESSMENT TECHNICAL REQUIREMENTS

Assessments must be conducted by persons who are trained and knowledgeable in the pupil's disability, and who are competent to perform them as determined by the local educational agency. (20 U.S.C. §§1414(b)(3)(A)(iv); 34 C.F.R. 300.304(c)(1)(iv)(2006); Ed. Code, §§ 56320, subd. (g), 56322.) The assessor must be competent in the student's primary language or mode of communication, and have knowledge and understanding of the cultural and ethnic background of the student. (Cal. Code Regs., tit. 5, § 3023, subd. (a).)

Testing and assessment materials and procedures must be valid and reliable for the purpose of the assessment and not racially, culturally, or sexually discriminatory. (Ed. Code, § 56320.)

Under California law, an assessment must be provided and administered in the language and form most likely to yield accurate information on what the pupil knows and can do academically, developmentally, and functionally. (Ed. Code, § 56320, subd. (b).) Tests must be selected and administered to best ensure that a student with impaired sensory, manual, or speaking skills produces test results that demonstrate the student's aptitude and achievement level rather than the child's impairment. (Ed. Code, § 56320, subd. (d).)

Ms. Jones was trained and knowledgeable in Student's disability and competent to conduct the November 2, 2022 functional behavior assessment. Ms. Jones was competent in Student's primary language of English. She reviewed Student's cumulative records, attended an IEP team meeting with Parents prior to conducting the assessment, and interviewed Mother in the assessment process, leading her to understand Student's cultural and ethnic background.

Del Norte satisfied the technical legal requirements for assessments. Ms. Jones used assessment materials and procedures valid and reliable for the purpose of the assessment and not racially, culturally, or sexually discriminatory. She conducted the assessment in the language and form most likely to yield accurate information on what Student knew and could do academically, developmentally, and functionally. As part of her assessment, she did not administer standardized testing, which was typical for functional behavior assessments.

## ASSESSMENT REPORT

Upon completion of an assessment the school district must convene an IEP team meeting, including the student's parents, to discuss the assessment, the educational

recommendations, and the reasons for any recommendations. (Ed. Code, § 56329, subd. (a)(1).) The assessment report must be provided to the parent. (Ed. Code, § 56329, subd. (a)(3).)

On November 7, 2022, Del Norte convened an IEP team meeting to discuss several assessments of Student, including the November 2, 2022 functional behavior assessment. Mother attended the meeting. She was provided a copy of the report. The team discussed the functional behavior assessment, Ms. Jones' recommendations, and the reasons for her recommendations.

Mother actively participated in the IEP team meeting. She asked questions and corrected the team with respect to the number of toileting accidents Student had at the beginning of the year. She requested Student's diagnosis of autism be added to the medical section of the IEP, which Del Norte agreed to do. She asked about Student's placement for transitional kindergarten. She was concerned about the school respecting Student's ethnic and cultural background, and requested that Student not participate in Christmas pageants or learn Christmas songs. She requested that Student be pulled from the classroom if Christmas was brought up. Mother did not disagree with Del Norte's November 2, 2022 functional behavior assessment at the IEP team meeting or anytime until two years later on October 25, 2024, when she requested an independent educational evaluation.

The evidence showed Del Norte complied with the legal requirements to provide Parents a copy of the assessment report and convene an IEP team meeting to discuss the November 2, 2022 functional behavior assessment of Student.

In summary, the preponderance of the evidence showed Del Norte's November 2, 2022 functional behavior assessment of Student was appropriately conducted such that Del Norte is not obligated to fund an independent educational evaluation at public expense. Procedural errors related to the assessment plan and minor flaws in the assessment report were harmless errors that did not invalidate the assessment. Student has the right to an independent educational evaluation in behavior, if Parents so desire, but not at public expense.

## CONCLUSIONS AND PREVAILING PARTY

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

Del Norte's November 2, 2022 functional behavior assessment was appropriately conducted such that Del Norte is not obligated to fund an educational evaluation at public expense.

Del Norte prevailed on the sole issue.

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## ORDER

1. Del Norte's November 2, 2022 functional behavior assessment was legally compliant.
2. Student is not entitled to an independent educational evaluation in functional behavior at public expense.

## 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.

Cararea Lucier

Administrative Law Judge

Office of Administrative Hearing