BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. BRENTWOOD UNION SCHOOL DISTRICT.	OAH Case No. 2015050567

DECISON

On May 5, 2015, Parents filed a due process hearing request on Student's behalf with the Office of Administrative Hearings naming Brentwood Union School District as respondent. On June 22, 2015, the matter was continued for good cause.

Administrative Law Judge Joy Redmon heard this matter in Brentwood, California, on August 18, 19, and 24, 2015, and September 2, 3, 8, 9, 10, 15, and 16, 2015. A continuance was granted and the record left open until Wednesday, October 7, 2015, for the parties to file written closing arguments. Written closing arguments were timely received, the record was closed, and the matter was submitted for decision.

Attorney Nicole Hodge Amey represented Student. Also present on Student's behalf at various times throughout the hearing were Parents and paralegal Marie Fajardo. Attorney Elizabeth Rho-Ng represented Brentwood. Jeff Weiss, Brentwood's Director of Special Education, and attorney Gabrielle Ortiz were present at various times throughout the hearing on Brentwood's behalf.

ISSUES[1]

1. From May 6, 2013, to May 5, 2015, did Brentwood deny Student a free appropriate public education by failing to assess Student in the areas of functional behavior and social behavior, and by failing to conduct an educationally related mental health assessment?[2]

2. Did Brentwood deny Student a FAPE from May 6, 2013, through May 5, 2015, by failing to offer and implement a behavior intervention plan?

3. Did Brentwood deny Student a FAPE from May 6, 2013, through February 19, 2015, by failing to offer Student school-based counseling?

4. In August 2013, did Brentwood commit a procedural violation that resulted in a denial of a FAPE by administering Student the Wechsler Intelligence Scale for Children-IV, thereby violating *Larry P. v. Riles*, (9th Cir. 1984, as amended en banc 1986) 793 F.2d 969 (*Larry P.*)?

5. Did Brentwood's failure to provide Parents with all documents from Student's file in response to Student's April 7, 2015 request, made pursuant to Education Code section 56504, constitute a procedural violation that denied Student a FAPE?

6. Did Brentwood commit the procedural violation of holding an IEP team meeting in Parents' absence on August 29, 2013, which resulted in a denial of FAPE?

SUMMARY OF DECISION

This Decision holds that Student was not denied a FAPE from May 5, 2013, through February 18, 2015. From February 19, 2015, to May 5, 2015, Brentwood denied him a FAPE by failing to conduct a functional behavior assessment and offer and provide Student a behavior plan. From the end of March 2015 through May 5, 2015, Brentwood denied Student a FAPE by failing to offer to conduct an educationally related mental health assessment.

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[1] The issues have been reworded for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

[2] Student dismissed his issue on the record regarding the need for a neuropsychological assessment.

Brentwood denied Student a FAPE by including the results of the Wechsler Intelligence Scale for Children-Fourth Edition (Wechsler-IV) given in 2013, into the psychoeducational assessment conducted in 2015. Brentwood also failed to provide Student with assessment protocols from the 2015 psychoeducational assessment, and a copy of the "hit list" discovered on March 5, 2015, that formed the basis for Student's school suspension the day after the list was discovered. These violations constituted a denial of FAPE because they denied Parents meaningful participation in the IEP development process. It is also determined herein that Brentwood committed a procedural violation by holding an IEP team meeting in August 2013 without Parents present. While this constituted a procedural violation of the Individuals with Disabilities Education Act, it did not constitute a denial of a FAPE because Student did not allege he was eligible for special education and related services at that time. Brentwood prevailed on all other issues heard and decided.

FACTUAL FINDINGS

Jurisdiction

1. Student is a 13-year-old male who is resides with his parents and younger brother within the jurisdictional boundaries of Brentwood. Student is eligible for special education and related services under the category of autism.

Student's Early Life through 2011-2012 School Year

2. Student was adopted at birth by Parents. Student's biological father had a history of bipolar disorder, epilepsy, and learning problems. As a young child, Student was difficult to soothe and experienced daily tantrums at home.

3. Mother completed Brentwood's enrollment packet for Student in March 2008, the spring prior to his kindergarten year at Krey Elementary School. Mother checked his ethnicity as Hispanic/Latino and Black/African American.

4. In January 2009 Student was diagnosed with multiple conditions including attention deficit hyperactivity disorder, anxiety, behavioral, and mood problems by his private physicians. In January 2010 Student was prescribed medication to treat the symptoms of impulsivity, distractibility, and mild hyperactivity. This information was timely disclosed to Brentwood.

5. In August 2010, when Student was in first grade, Brentwood implemented a 504 plan for Student to address the manifestations of his ADHD which included difficulty following directions, staying on task, focusing, taking tests in a large group, and managing

frustration.[3] The accommodations provided included permitting him to chew gum in class, allowing him a single rather than two-person desk, providing choices, allowing a cool-down period if needed, and frequent breaks during testing. At the recommendation of Student's private therapist, the teachers also implemented strategies from a specific program used by Parents at home, which called for natural consequences to be delivered with empathy yet firmness. According to Brentwood staff, these strategies were successful and Student met grade level expectations.

6. In May 2011 Student was diagnosed with Autistic Disorder. Following that diagnosis, Parents requested that Brentwood evaluate Student for special education eligibility. At that time, Mother was concerned about Student's behavior and social skills, particularly as they presented in the home environment.

7. A multidisciplinary special education evaluation was conducted and an IEP team meeting held on September 1, 2011, when Student was in third grade. The Brentwood members of the IEP team determined that Student did not qualify for special education and related services. This determination was based, in part, on Student's academic achievement in second grade and continued success in third. Both his second and third grade teachers reported that although Student struggled with focus, distractibility, and mild socially atypical behavior (e.g. misreading social cues, literal thinking, and difficulty with inference or figurative language), Student's 504 plan adequately addressed his needs such that he continued to make educational progress and access the general education curriculum without the need for special education and related services.

8. Parents disagreed with the determination that Student did not qualify for special education and expressed concern that the behaviors they saw in the home environment, including anger, frustration, and tantruming, would transfer to the school environment and negatively impact his education. The Brentwood members of Student's IEP team offered to include a social skills group run by a school psychologist in Student's 504 plan to which Parents agreed. Parent's did not challenge the District's determination that Student was not eligible for special education.

9. Brentwood staff and Parents communicated regularly to discuss Student's behavior and progress throughout third grade. Student continued to meet grade level academic expectations and according to school staff, maintained appropriate peer relationships, and did not present with significant behavior or emotional issues in the school setting.

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[3] A 504 plan is an accommodation plan created pursuant to section 504 of the Rehabilitation Act of 1973. (29 U.S.C. § 794; see 34 C.F.R. § 104.1 et. seq. (2000).) Generally, the law requires a district to provide program modifications and accommodations to children with physical or mental impairments that substantially limit a major life activity such as learning.

2012-2013 School Year (Fourth grade)

10. Student attended Marceline Brown's general education fourth grade class at Krey. Ms. Brown's class was designated as an inclusion class wherein Students with IEP's were placed in that class. To meet those students' needs, resource specialist program teacher, Lori Leach, or her instructional assistant, were also in the classroom part of each day.

BEHAVIORAL NEEDS

11. Mother established that by fourth grade, Student continued to exhibit maladaptive behaviors in the home environment including defiance, anger, and aggression primarily toward Mother and Student's younger brother.

12. Mother also testified that these and other maladaptive behaviors were present in the school environment. The school staff who interacted with Student, including Ms. Brown, Ms. Leach, and Brian Jones (school principal) disputed Mother's contention regarding Student exhibiting maladaptive behaviors in the school setting. The disagreement on this point was not whether or not the underlying behaviors occurred; rather the dispute involved how the behaviors were viewed and the degree to which they needed to be addressed in the school setting. As described below, the school staff was more persuasive on this point.

13. Mother was very sensitive to how Student's behavior impacted, and was perceived by, others. She explained that she had an obligation to keep her younger son and "the community" safe by addressing Student's behavior. She described his behaviors as "sneaky, defiant, argumentative," and characterized him as "stealing" from teachers and peers and "hoarding" items. Some examples included attempting to photocopy Coyote Cash (school's currency) without permission, having extra classroom and student school supplies in his backpack and desk, and having a disorganized backpack and desk to the extent that he occasionally did not turn in assignments that were actually complete.

14. Ms. Brown established that fourth grade students are frequently disorganized and often end up with each other's school supplies in their desks and backpacks. She did not observe Student taking items from peers nor did any of his peers complain that Student took items from them. She explained that on one occasion, Student took sticky notes from the supply closet without permission. The consequence for this behavior was that Student was not able to access the supply closet unattended thereafter. Student abided by the consequence and Ms. Brown did not have another issue with Student taking supplies without permission. Additionally, Ms. Brown did not consider Student's desk or backpack organization to be outside of the norm for fourth graders. The specific behaviors exhibited by Student during the fourth grade did not rise to the level of "stealing" or "hoarding" within the school environment.

15. When Parents discovered Student attempting to photocopy Coyote Cash at home and notified the school, Student was sent to the vice principal and a consequence was provided for the behavior. On occasion, when Student engaged in behavior not acceptable in the school environment, the behavior was appropriately addressed by Brentwood staff. Student's behaviors did not impede his access to his education and Ms. Brown, Ms. Leach, and Mr. Jones established that Student's overall behavior was within the range of typical behaviors for a fourth grade student.

SOCIAL EMOTIONAL AND MENTAL HEALTH NEEDS

16. By the time Student was in fourth grade, he developed an aversion to being singled out by adults in front of his peers to receive negative or positive attention including asking for or receiving extra help. Ms. Brown explained that when unexpected attention was focused on him, Student would tense up, avert his gaze, and sometimes not respond. Student also continued to have difficulty maintaining attention and focus in the school setting. He was off task approximately 20 percent of the time, but was easily redirected by Ms. Brown.

17. Student's 504 plan was revised during the 4th grade. The accommodations in the plan were to: allow Student access to a workspace away from peers as needed; have his teacher check in after a test to ensure completeness; allow for a cool-down period if agitated; phrase requests with choices but require completion if non-compliant; provide consequences with empathy yet firmness; provide a stress ball; provide purposeful placement in the classroom; consultation if needed between psychologist and teacher regarding social skills; and permission for homework completion to be adjusted by teacher or parent.

18. To avoid making Student anxious or singling him out, Ms. Brown and Ms. Leach approached Student individually while walking around the classroom if he appeared off task rather than calling out to him in front of his peers. Ms. Brown established that Student participated in class discussions, was easily re-directed when approached, and did not require the accommodation of a cool-down period during the year. She also established that although Student was intellectually capable of even higher grades, Student met or exceeded grade level expectations throughout the year. Student still exhibited atypical behavior such as rigid thinking or perseveration on a topic, but he was socially accepted by his peers and played with peers during lunch and recess. Student did not exhibit the need for either social, emotional, or a mental health assessment, nor counseling to address his needs within the school environment from May 6, 2013, through the end of the 2012-2013 school year.

2013-2014 School Year (Fifth grade)

19. Student attended Christine Vanderheid's general education fifth grade class. Ms. Vanderheid's class was also designated as an inclusion class and Ms. Leach or her instructional assistant were in the classroom part of each day.

20. Student continued to exhibit maladaptive behaviors in the home environment. Homework completion became particularly stressful with Student resisting, taking an excessive amount of time to complete, and exhibiting anger toward Mother. The stressors continued and Parents again requested that Student be assessed for special education.

SPECIAL EDUCATION ASSESSMENT AND IEP TEAM MEETINGS

21. At the beginning of fifth grade, Brentwood provided parents an assessment plan seeking only to assess in the area of academics to which Parents provided consent on July 2, 2013. Parents wanted a more comprehensive assessment and Brentwood provided a second assessment plan seeking to assess in academic achievement, intellectual development, social/emotional, and also to conduct a file review and observe Student. Parents consented on August 12, 2013.[4]

LARRY P. VIOLATION

22. A multidisciplinary team completed the assessments. Crystal Penning, school psychologist, conducted a records review during her assessment but did not notice that Mother identified Student as African American and Hispanic in his original enrollment packet. Brentwood's computerized data tracking system did not identify Student as African American. The reason for the discrepancy between the computerized record and handwritten record is unknown. Crystal Penning, unaware that Student was African American, administered the Wechsler-IV.

23. Ms. Penning attempted to minimize the impact of this violation by asserting that it may not even violate *Larry P*. because Student was adopted at birth and raised by Hispanic rather than African American parents. Ms. Penning was able to provide no authority or training she attended proffering this position. This argument is unsupported and unpersuasive.

24. Ms. Penning was not a reliable witness on this point. First, her demeanor while testifying undermined her reliability. At times, a witness can be nervous and that nervousness can manifest in different ways such as rushed speech or repeating oneself. Ms. Penning's behavior was not consistent with nerves. Rather, she appeared disinterested and put out by having to testify as a witness. She frequently rolled her eyes, and even had to be directed by the ALJ to pay attention and actually answer Student's counsel's questions. Her testimony that she was not convinced administering the Wechsler-IV to Student even violated *Larry P*. was an extension of her cavalier demeanor. Further, if this position was in fact correct, it would stand to reason that children of any other ethnicity adopted by African

[4] Student argues in the closing brief that these assessment plans were provided beyond the statutory period; however, no issue regarding the assessment plan's timeliness was pled in this case and will not be addressed in this Decision.

American parents at birth would not be permitted to be given an I.Q. test without violating *Larry P*. That is not the case. Although she did not administer the Wechsler-IV knowing that Student was African American, it was impermissible nonetheless.[5]

ASSESSMENT OF STUDENT'S SOCIAL EMOTIONAL NEEDS

25. Ms. Penning administered additional assessment instruments including the Behavior Assessment Scale for Children Second Edition (Behavior Assessment II). The Behavior Assessment II is a survey completed by Parents and teachers who respond to a questionnaire, with responses then scored. The Behavior Assessment II measures numerous behavior and personality aspects including both positive and negative behaviors. The Behavior Assessment II was designed to assess clinical problems in the broad domains of externalizing problems, internalizing problems, school problems, and adaptive behavior.

26. Ms. Penning explained that the scale includes validity checks. Mother's ratings were to be interpreted cautiously based on the validity check. Her answers rated Student in the clinically significant range in the broad domains and in all subparts except for somatization. These scores were significantly different than those obtained by Ms. Brown and Ms. Vanderheid who rated Student in the average range in externalizing and internalizing problems, at risk and average respectively in behavioral symptoms, and at risk in adaptive skills. It was established that the ratings by Ms. Brown and Ms. Vanderheid were consistent with Student's diagnosis of both ADHD and Autistic Disorder and were reliable because they were more consistent with Student's behavior in the school environment than the scores obtained on Mother's report.

IEP TEAM MEETING WITHOUT PARENTS

27. An IEP team meeting notice was sent to Parents scheduling the meeting for August 29, 2013, at which time Brentwood's multidisciplinary assessment would be reviewed. On August 21, 2013, Mother sent an email to Mr. Jones letting him know that Parents were not available to meet on August 29, but they could meet on August 26, 2013, September 3, 2013, or September 4, 2013.

[5] In his closing brief, Student argued that because the Wechsler-IV likely underreported his actual IQ, a severe discrepancy may have existed between his ability and achievement thereby meeting one criterion for eligibility under the specific learning disability category. Student placed at issue in this case a procedural violation of the IDEA based upon Brentwood's administration of the Wechsler-IV. Student *did not* place at issue the validity of the psycho-educational assessment nor the IEP team's non-eligibility determination. This Decision is limited to the issues specifically pled and does not address the validity of Student's Wechsler-IV scores nor potential eligibility as a student with a specific learning disability.

28. Mr. Jones replied to Mother informing her that due to legally mandated timelines, the meeting would have two parts and part one would proceed as scheduled and a second meeting would be held so that Parents could attend. Mr. Jones did not provide an explanation for why the meeting could not be held earlier as offered by Mother. Ultimately, Mother disagreed with the offer of a two part IEP team meetings and requested that a single meeting be scheduled and sent back the meeting notice specifically requesting the IEP team meeting be held on September 6, 2013.

29. The Brentwood members of Student's IEP team convened an IEP team meeting on August 29, 2013, to meet what they believed was their statutory obligation. No substantive information was discussed and the meeting was continued to September 6, 2013.

30. Student's IEP team reconvened on September 6, 2013, including Parents. The team reviewed the multidisciplinary assessment results. Parents shared that Student attended private therapeutic counseling. He also had a home behavior plan and received home-based applied behavior analysis therapy. It was theorized by Student's therapist that he "held it together" during the school day but "fell apart" when he returned home.

31. Ms. Vanderheid reported her belief that homework should not cause distress to any family. Ms. Vanderheid permitted families to adjust the amount of homework to best suit their needs. Additionally, Student's 504 plan specifically provided for reduced homework at Parents' election. The team agreed the focus should be on quality and not quantity.

32. The Brentwood members of Student's IEP team determined that Student did not meet eligibility criteria under the categories of specific learning disability, other health impairment, or autism. This determination was based, in part, on the assessment results, observations of Student in class, and his fourth and fifth grade teachers' reports regarding his behavior, social interactions, and academic performance. Parents signed the IEP indicating their agreement. Student did not challenge the eligibility findings from this meeting in this hearing.

BEHAVIOR, SOCIAL EMOTIONAL, AND MENTAL HEALTH NEEDS

33. Student underwent several medication adjustments to treat his ADHD and anxiety throughout fifth grade. Parents requested that Ms. Vanderheid provide weekly emails regarding Student's behavior and work habits throughout the school year. Ms. Vanderheid agreed and provided these reports.

34. At hearing, Mother testified that Student had an ongoing pattern of maladaptive behaviors in the school environment (defiance, work refusal, stealing, and hoarding) throughout fifth grade that required further assessments of his behavior, social emotional, and mental health needs. She also believed he needed a behavior plan and individual counseling to address these needs as they presented in the school setting. She pointed to various portions of the weekly emails that included descriptions of unacceptable

school behavior. Additionally, Mother pointed to a specific behavior incident during fifth grade where Student vandalized the bathroom (described in detail below) as independently triggering the need for assessment.

35. Ms. Vanderheid countered this testimony. She contended that despite the need for redirection, and occasional behavioral incidents, Student was generally compliant, not verbally disrespectful, and while he struggled with social skills, he did not have emotional outbursts in the classroom, or incidents on the playground. Ms. Vanderheid's testimony was corroborated by Ms. Leach, Mr. Jones, and a review of the weekly emails.

36. The weekly emails documented Student's positive and negative behaviors including when Student was off task or had an occasional argument with a peer. In order to provide weekly updates regarding Student's behavior, Ms. Vanderheid established that she was hyper-focused on Student's behavior. The emails were specifically intended to have Ms. Vanderheid provide valuable information to Student's medical treatment team. Ms. Vanderheid established that Student's overall behavior was consistent with that of a typical fifth grader. Were it not for the special request to provide weekly updates, she would not have contacted Parents so frequently about Student's behavior because she did not have consistent concerns regarding his behavior or mental health needs in the school environment.

37. At the end of fifth grade, Student received a one-day suspension for vandalizing the boy's bathroom. Over the course of a few days the custodian found wadded up toilet paper on the ceiling and walls of the bathroom. The school was investigating which boy(s) were responsible. On approximately the third day it was discovered that in addition to the wadded paper, Student left a sealed plastic baggie containing urine in the sink. This incident was addressed by Mr. Jones and the vice principal Meghan Balderas.

38. According to Mr. Jones, who has been the principal of Kray for 11 years, vandalizing the boy's bathroom is unacceptable and warranted a suspension; however, it is not novel for 5th grade boys. He acknowledged that this is the first time he has seen urine left in a sealed plastic baggie. Mr. Jones explained that in the spring before the fifth graders matriculate to middle school there have been incidents where boys urinate on the bathroom walls or floor and more frequently throw wadded up toilet paper on the walls and ceiling. He persuasively established that for Student this was an isolated incident and that Student understood the behavior was unacceptable, was contrite, and accepted the consequence.

39. The evidence established that Student did not require additional assessments regarding his behavior, social emotional or mental health needs during the 2013-2014 school year. Student achieved all passing grades throughout fifth grade. Additionally, Student's 504 plan continued to be implemented and adequately addressed his needs, such that a behavior intervention plan or individual counseling was not needed for Student to access his general education curriculum. Moreover, Student did not establish that he needed any specialized instruction at this time.

2014-2015 School Year (Sixth grade)

40. Parents sought and were granted an intra-district transfer for Student to attend Edna Hill Middle School. One reason for the request was that Parents heard positive things about a husband and wife teaching team, Traci and Mike Kemper, who they believed would be a good fit for Student. Student was placed in Ms. Kemper's English language arts and social studies classes and Mr. Kemper's math and science classes. Both Kempers, but especially Ms. Kemper, developed a trusting relationship with Student.

41. Shortly after the school year started, a meeting was held with Parents, the Kempers, Daniel Hawley (vice principal), and Saraina Silva (counselor), to review and revise Student's 504 plan. Parents informed the Brentwood members present about Student's challenges at home including being verbally abusive and physically aggressive, homework struggles, and his home ABA therapy and behavior plan. Regarding homework, Parents were informed that Edna Hill operated homework clubs before school, at lunch, and after school to help reduce what students were expected to complete at home. Student's 504 plan was revised to include meetings with the school counselor for social, emotional, and academic support, to address concerns raised by Parents, not because the school staff had observed a need for these services in the school environment. Parents consented and Ms. Silva began meeting with Student one time a week.

42. Over the course of the next few months, Student continued to struggle with organization and distractibility. These challenges were exacerbated because he was now attending multiple classes in a single day. Ms. Kemper established that Student's off-task time increased to approximately 50 percent of the time by November. She was able to redirect him, but she had to be very diligent to ensure Student followed along with his peers.

43. Student also started to seek peer attention by engaging in what he considered to be pranks. This was a difference from elementary school where he actively avoided attention. For example, Student put a peer's backpack in the classroom trash twice in the same day. When Ms. Kemper asked who did it, Student immediately acknowledged he was responsible. At Ms. Kemper's request, he apologized to the other student but stated that believed the peer also thought it was a joke. Student struggled to understand others' points of view.

44. Another peer-related incident occurred in the band room during advisory period. Advisory is a daily shortened period similar to a homeroom where the teacher checks the students' homework and provides organizational and study strategies. It was reported that Student was pushed by a boy when the advisory teacher was out of the classroom. Student perseverated over the incident for days becoming hyper-focused on being wronged by this classmate. After that incident, and in light of Student's organizational challenges, it was agreed between Ms. Silva and Parents that Student would transfer into the "administrative advisory" that is co-taught by Ms. Silva and the school administrators. Most often students are placed in administrative advisory for a period of time until they have

"earned their way out." This was not the case for Student as he was placed in this class specifically so that Ms. Silva could work daily with Student to help support his organizational needs as well as work with him on peer interactions.

45. In November, Parents requested another special education evaluation. Parents specifically requested that a functional behavioral assessment be completed and that a behavior support plan be drafted for Student.

46. An assessment plan dated December 18, 2014, was given to Parents proposing a comprehensive multidisciplinary assessment in several areas including conducting a "functional behavioral analysis."[6] The assessment plan was signed on December 19, 2014.

ASSESSMENT AND ELIGIBILITY

47. Richard Young, school psychologist, took the lead on coordinating the assessments. He reviewed records, observed Student on several occasions, conducted multiple assessments, and interviewed Student's teachers.

48. Unbeknownst to Brentwood personnel, at some time in December, Student allegedly engaged in an act described as "sexually acting out" toward the four-year-old daughter of Parents' friends. The details are sparse but it appears to have involved digital penetration. Parents contacted the police who opened an investigation regarding the incident. At one point Student told Parents that he may have also inappropriately touched his younger brother. Brother denied it, but the information was also communicated to the police and became part of the investigation. The investigation continued over the course of several months during the time Student was being evaluated for special education. Student and Parents did not reveal this information to his teachers or assessors. The ongoing investigation placed extreme stress on the family, including Student. At school, Student became very concerned about "getting in trouble."

49. Student was assessed primarily in February 2015. Mr. Young, after conducting a records review, discovered that Student was African American and utilized alternate methods to assess Student's intellectual ability. Despite that, Mr. Young included in his report the ranges Student achieved during Ms. Penning's 2013 Wechsler-IV administration. Mr. Young established that he included them in his report for historical reasons and did not rely on the Wechsler-IV test scores in making his recommendations, and considered them likely an underrepresentation of Student's ability. Although persuasive in his testimony, Mr. Young did not include such a caveat in his written report.

[6] Student again asserted in his closing brief that the assessment plan was provided late; however, no such issue was plead in this case. Accordingly, no finding about the plan's timeliness is made in this Decision.

SOCIAL, EMOTIONAL NEEDS

50. The 2015 assessment report description of Student is markedly different than in prior reports. For example, Mr. Young indicated that during testing, Student was, "expressive and defensive, very concerned with being in trouble." He also noted that when talking about personal things, Student "would mumble asides that seemed important but unspeakable, which he refused to repeat." This behavior is understandable knowing that a criminal investigation was pending and at that point, Student and his family were unaware of its outcome.

51. Father and both Kempers completed the Behavior Assessment-II to help assess Student's social and emotional development at that time. He was rated by all three as at risk or clinically significant in the areas of aggression, hyperactivity, attention problems, atypicality, adaptability, functional communication, and conduct problems. At least two rated Student as at risk or clinically significant in anxiety, depression, withdrawal, social skills, and leadership.

52. Mr. and Ms. Kemper only saw the results of their Behavior Assessment-2 scores for the first time during the due process hearing in this matter. Both, but in particular Ms. Kemper, were surprised at how elevated their scores were in the area of Student's social emotional needs. Ms. Kemper did not think that the scores were consistent with Student's overall behavior. She characterized Student as a bright, caring student who wanted to perform well academically and wanted to fit in socially with his peers. Ms. Kemper's characterization was genuine; however, her testimony established that to meet Student's needs she provided a great deal of extra time and attention, beyond that of what a typical student required, to allow Student to access his education. This conclusion was further supported by Mr. Young's testimony and actions before the IEP team meeting was held.

53. After completing his assessments, Mr. Young determined that Student would likely qualify for special education and related services under the category of autism. Prior to the scheduled IEP team meeting, Mr. Young met with Ms. Kemper to share his findings. During their conversation, Ms. Kemper shared her concern that if Student qualified for special education he would be moved out of her core classes because her class was not designated as an inclusion class. All students at Edna Hill with IEP's that called for them to attend general education classes were placed in inclusion classes because those classes had additional staff assigned such as a resource specialist program teacher or an instructional assistant. It was Ms. Kemper's commitment to continuing to teach Student and not wanting him to move from her class that caused her to underestimate the severity of Student's needs at that time.

BEHAVIORAL FUNCTIONING

54. Student's assessment plan indicated that a "functional behavioral analysis" would be completed. The multidisciplinary assessment report did not contain anything described as such. Initially, upon questioning by Brentwood's counsel, Mr. Young testified

that the assessment that was conducted, while not including a formal assessment of the functions of Student's behaviors, garnered enough information to draft a behavior support plan such that a more formal assessment was not necessary.[7] Mr. Young contradicted himself, however, by stating that the reason he did not draft a proposed behavior support plan was that more observations of Student in the classroom were necessary. When questioned about the contradiction, Mr. Young acknowledged that he originally intended to conduct a "functional behavioral analysis" but simply ran out of time before the scheduled IEP team meeting. This latter explanation was persuasive and it is determined that an assessment of Student's functional behavior was necessary, offered, and not conducted.

MENTAL HEALTH NEEDS

55. Student asserted that in addition to the psychoeducational assessment conducted by Brentwood, Student required an educationally related mental health assessment. Student called Malaca Jones in support of his position. Ms. Jones formerly conducted educationally related mental health assessments and provided counseling services for the Oakland Unified School District at a non-public school in which Oakland IEP teams placed emotionally disturbed students.

56. The population that Ms. Jones assessed and counseled was significantly different from Student. For example, she indicated that their "acting out" included extreme defiance using profanity and physical aggression such as throwing desks. She testified that Student also had a history of "acting out" behavior at school, specifically stealing and hoarding. This was a mischaracterization of Student's behavior. Additionally, her testimony was confusing and difficult to follow. For example, she indicated that an educationally related mental health assessment team would necessarily include a psychiatrist to help prescribe and monitor medication. She also explained that all children eligible for special education services should have a mental health assessment under the federal No Child Left Behind Act. This is not a requirement under either the IDEA or NCLB. For the forgoing reasons, her opinion was given little weight.

57. Student's behaviors were consistent with ADHD and autism and had, by this point, risen to the level where they impacted his education. The majority of those behaviors included increased distractibility, and misreading social cues to the extent that he did not recognize the impact his "pranks" had on his peers. As discussed previously, the behaviors did not include "stealing" or "hoarding" in the school setting.

58. As is described below, Brentwood offered Student counseling services to help Student improve both his organization and social interactions. Brentwood was not aware that there might be an underlying mental health need that impacted his ability to access his

[7] In this case, both parties used the term behavior support plan and behavior intervention plan at varying times. Mr. Young was specifically asked to clarify the difference and he indicated that he used the terms interchangeably. For the purpose of this hearing the terms are considered synonymous, although their formal definitions differ.

education such that it required additional assessments. Brentwood staff was also not aware of the alleged molestation incident or pending criminal investigation. In light of the information available to Brentwood at that time, it was not established that an additional mental health assessment should have been offered or conducted.

IEP TEAM MEETING (FEBRUARY 19, 2015)

59. An IEP team meeting was held on February 19, 2015, during which Student was found eligible for special education under the category of autism. A behavior goal was proposed that called for Student to control his impulses when excited or agitated. The team also determined that the goal itself was not sufficient to meet his needs and that Student required a behavior support plan. The Brentwood members of Student's IEP team informed Parents that a second IEP team meeting would be scheduled to present an organizational goal and a behavior support plan. Before the meeting concluded, Student was offered four 47-minute periods of inclusion support (English language arts, social studies, math, and science) in the general education setting, and 30 minutes per week of individual counseling.

60. At the time the IEP team meeting was held, however, Brentwood staff acknowledged that Student required a behavior support plan and none was drafted. This was a significant defect in its offer. This is particularly true given that the Brentwood members of the team recommended that Student transfer out of four of his general education classes that were taught by the Kempers with whom Student established a special connection. In light of his increasing maladaptive behaviors in what Student considered to be a positive environment, it was not reasonable to propose a change to four new classes without the support of a behavior plan.

"HIT LIST" AND BEHAVIOR ESCALATION

61. A second IEP team meeting had been scheduled for March 10, 2015, to complete the IEP but Mr. Young was ill and not expected to return by that date so the meeting was postponed.

62. On the morning of March 5, 2015, Student told Ms. Kemper that he did not get his homework finished because he was thinking about something he should not have been thinking about. Shortly thereafter, Ms. Kemper's class was getting ready to walk to the theater to practice for an upcoming show. As the students were milling about, Ms. Kemper overheard Student ask a peer if he wanted to see a list of people he wanted to see "hurt or killed." Putting these two things together, Ms. Kemper immediately emailed the school administrators informing them that Student may have drafted a "hit list." She did not see the list.

63. Maria Gonzalez, vice principal, and Michael Rucker, student resource officer assigned to Edna Hill by the county sheriff's department, went to the theater and retrieved Student. On the way to the office, Officer Rucker asked Student about the hit list. Ms. Gonzalez established that Student became very nervous and apologetic. He appeared

scared. She asked if he wanted to hurt anyone, and Student emphatically stated that he would never do anything to hurt anyone and denied knowing the meaning of a "hit list."

64. When they arrived at Ms. Gonzalez' office, she found the list in his backpack. It contained what appeared to be 26 first names and descriptions of two people such as "Jiu Jitsu mom" with many names misspelled. Ms. Gonzalez also noticed that some names, such as "Stieggirreg's" and "Aoyonoddal" appeared fictitious. She asked Student who the names were on the list and he said he made them up. Thereafter, Ms. Gonzalez took the list and attempted to correlate the non-fictitious first names with students in Student's classes.

65. While Ms. Gonzalez was correlating the names, Officer Rucker interviewed Student to determine if he posed a credible threat. Officer Rucker utilized a scale that was developed to determine if children under 14 know right from wrong. Student answered "I don't know" in response to each question. Officer Rucker then conferred with Ms. Gonzalez regarding what he considered to be odd responses. Ms. Gonzalez informed Officer Rucker that Student had been diagnosed with autism and that may account for some of his responses.

66. Ms. Gonzalez determined that two of the names on the list may have been students in Student's class. Other than that, she could not identify the other names on the list.

67. Officer Rucker called Parents and informed them about the hit list. As part of his investigation, Officer Rucker confirmed that Student did not have access to weapons in the home. He and Ms. Gonzalez concluded that Student did not pose a credible risk of harm to anyone on campus. Ms. Gonzalez notified Parents that Student would be suspended for one day for the incident and Officer Rucker took Student home.

68. Ms. Gonzalez said she could not recall what happened to the actual hit list document but that she thought Officer Rucker took it with him for his investigation. Officer Rucker, however, established that he left the original with Ms. Gonzalez and that he took a photocopy of the hit list with him to complete his investigative report. A copy of the list was not provided to Parents or the other members of Student's IEP team.

69. After Student left, Ms. Gonzalez interviewed the two students she identified as potentially being on the list to find out if they were aware of the list or were fearful of Student. They were neither aware of the list nor fearful of Student. Ms. Gonzalez then sent them back to class.

70. The following day, Mother emailed Ms. Gonzalez to clarify the incident further. According to Mother, she had spoken with Student's at-home ABA therapist. The therapist informed Mother that prior to the incident Student asked his in-home ABA therapist what a "hit list" was. She told him that it is a list of names of people someone would want to

hurt (neither Student nor the therapist used the term kill). Student also told Mother that he heard the term from a girl at school and thought he was making a list of people he felt he needed protection from but not to harm. Mother further informed Ms. Gonzalez that she was aware of the seriousness of the incident but, "unfortunately, we do not think Student was." The weight of the evidence established that Student did not pose a credible threat to anyone on campus. He did not fully understand the concept of a hit list. Further, he had no formal intent to harm anyone, nor was he able to articulate a plan to do so. Moreover, Parents established that Student had no access to any weapons that could have actually been used to harm people on campus.

71. That same day, a police officer parent of one of the two students who had been interviewed by Ms. Gonzalez came to campus to find out what occurred. The officer's child came home saying he was interviewed by the vice principal but was not entirely sure why. Ms. Gonzalez acknowledged that she should have contacted the parents of both children she interviewed and informed them about the investigation but she had not. She informed the father that both she and Officer Rucker determined that it was not a credible threat. The parent seemed satisfied with the outcome. Ms. Gonzalez did not hear from any other parents regarding the situation.

72. The parent of the interviewed child also called Mother to discuss the incident. According to Mother this was very upsetting and Mother again explained that she felt a sense of obligation to keep the community safe.

73. The same week that the hit list incident occurred, Parents were notified that the police completed their investigation regarding the potential molestation charges. They did not find evidence to support the allegation regarding Brother and declined to prosecute Student for the allegations regarding the four-year-old girl. Part of that determination was based on their belief that Student was not able to formulate the requisite intent.

74. Student returned to school following a one-day suspension. On March 13, 2015, the day before spring break, Student and a peer put a girl's computer tablet into the backpack of another girl and watched as the girls attempted to figure out what happened. Student and the peer were sent to the office and apologized for the incident that they perceived as a joke. Parents were notified. Mother perceived this as another act of stealing. The boys did not receive additional punishment for the conduct.

75. Later that same day, while working on a written assignment for language arts, Student appeared agitated. Ms. Kemper informed him that he could complete the assignment following spring break. Student told Ms. Kemper that he was afraid he would not be coming back after spring break. Ms. Kemper was confused by the comment but did not follow up with Student.

STUDENT REMOVED FROM EDNA HILL AND EDUCATIONALLY RELATED MENTAL HEALTH ASSESSMENT

76. The transferring of the electronic device seemed to be the proverbial last straw for Parents. From that point on, despite her email to Ms. Gonzalez indicating that Student meant no harm, Mother characterized the hit list as Student displaying homicidal tendencies. She contacted his therapist and psychiatrist and informed them about the hit list without providing the school and officer's conclusion that Student did not pose a credible threat. Based upon the information provided, without meeting with Student, the mental health professionals advised Mother to take Student to a hospital that provided mental health services. Parents also contacted Brentwood's special education administration (not Student's teachers) and asked that they "come to the table" with an offer for a residential treatment facility to address Student's mental health needs.

77. The hit list was not a credible threat of harm. The hit list, the involuntary mental health hold, and the knowledge that Parents were seeking a residential placement for Student, coupled with the increase in his maladaptive behaviors in the school environment were sufficient to trigger the need for an educationally related mental health assessment by the end of March. By that time, Student's behaviors interfered with his ability to access his educational curriculum because it caused him to be removed from school during his suspension and it interfered with his ability to interact with is peers. Such an assessment should have been but was not offered at that time.

PLACEMENT FOLLOWING EDNA HILL

78. During spring break Parents took Student to John Muir Behavioral Hospital where he was initially placed on a 72-hour mental health hold (commonly referred to as a 5150 hold, based on Health and Safety Code section 5150). The documents from the hospitalization confirm that the hold was placed because Student was determined to be a danger to himself and others based on Mother's report of the hit list. The hospital staff did not review any documentation from the school nor hear that the Brentwood staff, including a sworn police officer trained in administering a threat assessment, determined Student did not pose a credible threat.

79. It is unclear how Mother went from characterizing Student's conduct just a week before as lacking intention and insight, to reporting it as homicidal ideation. Mother's concern as expressed at hearing seemed genuine; however, it is also consistent with her history of casting Student's behavior in an extreme light. Regardless, the hospital placed great weight on the report of the hit list. Shortly thereafter, John Muir staff recommended that Student be placed in a residential treatment facility.

80. Parents placed Student in a residential treatment program called Provo Canyon in Utah for what Mother described as "medical reasons." Student remained at Provo Canyon through the end of May 2015. While at Provo Canyon, Student's behavior spiraled downward. He was returned to California following the time period at issue in this case.

81. Student called psychiatrist Robert Hendren D.O. as an expert in autism spectrum disorders. Dr. Hendren was formerly the executive director of the University of California Davis MIND Institute and is a national expert on autism. Dr. Hendren assessed Student several months after the time period at issue in this case. The specific findings of his assessment were not relevant to the issues in this case because of the marked decline in Student's behaviors after he left Edna Hill. Dr. Hendren reviewed Student's records from the time he attended school in Brentwood and provided expert testimony regarding Student and his needs prior to and just following the hit list incident. Dr. Hendren, Student's expert, established that Provo Canyon was *not* an appropriate placement for Student. He explained that Provo Canyon is more suited for conduct disordered children. He explained that Provo Canyon's program is based on a disciplinary model that Student would not understand or be able to follow, since he is on the autism spectrum, and that Student required a placement with providers trained in meeting the needs of children on the spectrum. His testimony on this point was persuasive and reliable.

82. During his testimony, Dr. Hendren also expressed the belief that Student may have posed a credible threat when he drafted a hit list. This testimony, however, was less credible because Dr. Hendren relied heavily on Parents' reports, did not interview the school staff, and did not specifically review Mother's email wherein she gave her contemporaneous account of Student's lack of insight into his behavior.

BRENTWOOD'S OFFER FOLLOWING STUDENT'S REMOVAL FROM EDNA HILL

83. The Brentwood members of Student's IEP team were informed via email that Student was placed in a residential treatment facility. The Kempers believed that something must have happened at home during spring break to have necessitated the mental health hold and residential placement. They were unaware that the hit list was the basis for Student leaving Edna Hill.

84. The reconvened IEP team meeting was held on April 23, 2015. Brentwood requested a records release from Provo Canyon to which Parents originally consented and then withdrew consent two days later. Brentwood was not provided copies of the John Muir records regarding the 5150 hold until the due process hearing.

85. At the April 23, 2015, IEP team meeting Brentwood continued to offer the inclusion support program and individual counseling. Brentwood did not offer either a behavior support plan, or to conduct an educationally related mental health assessment. These were significant defects in Brentwood's offer. Despite these omissions, the evidence did not establish that Student required placement in a residential treatment facility to meet his needs. Dr. Hendren's testimony was particularly persuasive in proving that Provo Canyon was not appropriate. He went on to establish that he was unfamiliar with the programs available within Brentwood. He opined that Student could have been appropriately placed at

a non-public school located in the Bay Area that specializes in working with children on the autism spectrum. Dr. Hendren stopped short of stating that Brentwood could not have crafted a program to meet Student's needs.[8]

86. The final IEP team meeting conducted within the time period at issue in this case was held on May 5, 2015. At that meeting Student was not offered a behavior support plan or an educationally related mental health assessment.

RECORDS REQUEST

87. Student's counsel requested Student's records from Brentwood on April 7, 2015. Charlene Lawson, the assistant to Brentwood's director of special education, compiled Student's special education records housed at the Brentwood administrative offices, and also requested his records from both Krey and Edna Hill. On April 14, 2015, she sent the records from all three via facsimile to Student's counsel.

88. On May 29, 2015, a resolution session was held in this case and it was discovered that not all documents, including previous IEP's, assessment protocols, and emails, among other records, had been provided to Student's counsel. On June 15, 2015, during mediation, Brentwood's director of special education asked which records were allegedly missing. Three days later a supplemental disclosure was made that included Student's IEP's, the psychoeducational assessments (without protocols), and attendance logs.

89. On June 24, 2015, Student's counsel subpoenaed all records related to Student. Brentwood again provided a supplemental record's disclosure this time including documents not considered educational records such as emails among various staff members and Parents.

90. Marie Fajardo, paralegal to Student's counsel, testified that Parents were harmed by these late or missing documents because it was difficult for his counsel to put together the story of what occurred throughout the years. According to Ms. Fajardo, this also harmed Student's case because at the time the complaint was filed Student's counsel was unaware that various assessment plans were not timely provided to Parents.

91. Student did not establish that Parents were not provided with all requested documents at the time the documents (such as IEP's, meeting notices, and various communications among Parents and Brentwood staff members) were drafted with the exception of the hit list and assessment protocols. Student also did not establish that the lack of any documents other than the hit list and assessment protocols impeded Parents' ability to participate in the IEP process.

[8] Placement was not at issue in this case. The findings regarding Provo Canyon are included in this Decision based solely on Student's requested remedy of reimbursement for Provo Canyon.

92. The only exception to the above finding is the protocols and the hit list. Those were significant documents that could have assisted Parents and, specifically the hit list, could have also assisted the other members of Student's IEP team to develop or refine Student's IEP.

LEGAL CONCLUSIONS

Introduction: Legal Framework under the IDEA[9]

1. This hearing was held under the Individuals with Disabilities Education Act (IDEA), its regulations, and California statutes and their implementing regulations. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)[10] et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's individualized education program (IEP). (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are also called designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

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

[10] All subsequent references to the Code of Federal Regulations are to the 2006 version.

3. In *Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the FAPE definition articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.].) Although sometimes described in Ninth Circuit cases as "educational benefit," "some educational benefit" or "meaningful educational benefit," all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 951, fn. 10.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D); Ed. Code, § 56505, subd. (l).)

5. At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) In this case Student bears the burden of proof.

Procedural Matters

6. Student pled procedural violations of the IDEA and corresponding State law in this case covering a time period for which there can be no finding of a denial of a FAPE as a matter of law. Student asserted issues beginning May 6, 2013; however, he did not assert

during the pre-hearing conference or at the outset of the due process hearing when issues were again clarified, that he was actually *eligible* for special education and related services prior to the time Brentwood found him eligible on February 19, 2015.[11]

7. In *R.B. v. Napa Valley Unified School District* (9th Cir. 2007) 496 F.3d 932 (*R.B. v. Napa Valley*), the Ninth Circuit Court of Appeals held that a procedural violation did not result in a denial of a FAPE because the pupil was no longer eligible for special education. In that case, the school district committed a procedural violation by not including a special education teacher, or provider of services to the child, on the IEP team. The pupil had been found eligible for special education services in kindergarten. By fifth grade, the pupil's parents placed her in a residential treatment facility and filed a due process complaint. The court upheld the hearing officer's determination that Student no longer qualified for special education, despite her behavioral deficits. While the court recognized that procedural violations often result in a denial of a FAPE, the court distinguished those cases based on eligibility. It held that a procedural violation does not constitute a denial of a FAPE if the violation fails to result in a loss of educational opportunity: "A child ineligible for IDEA opportunities in the first instance cannot lose those opportunities merely because a procedural violation takes place." (*Ibid,* at 942.) (See *M.L. v. Fed. Way Sch. Dist.*, (9th Cir. 2005) 394 F.3d 634, 652.)

8. Student alleged that Brentwood was obligated to assess him in other areas of suspected disability (functional behavior, social behavior, and mental health) as far back as May 2013 and it failed to do so. An argument could generally be made that when a party asserts a failure to assess that they, by implication, are asserting that if the assessment had been completed, the student would have been eligible at the time the failure to assess commenced. That cannot be the case here. In this case, Student was assessed for special education eligibility in 2011, and again within the period of time at issue in this case, in 2013. Student did not challenge the completed 2013 psychoeducational assessment nor did he assert under which category he may have been eligible for special education prior to February 2015.

9. In 2013, Student's IEP team considered eligibility under three specific categories (SLD, OHI, and Autism). In order to establish that Student was eligible from May 6, 2013, through February 18, 2015, he would have had to have specifically plead eligibility and put Brentwood and this ALJ on notice of the basis for that purported eligibility. In light of *RB v. Napa Valley*, because it was neither asserted nor proven that Student was eligible for special education and related services prior to February 2015, it cannot be found as a matter of law that he was denied a FAPE during that time.

[11] Student asserted in his closing brief that he should have been found eligible for special education under the category of Autism in 2013 and also alleged defects with the 2013 psychoeducational assessments. These contentions were not raised until the closing brief and are not analyzed herein.

10. A significant amount of time and judicial resources, however, were expended litigating the entire case despite this fatal flaw. A procedural violation such as a school district's failure to conduct appropriate assessments, or to assess in all areas of suspected disability, may constitute a procedural violation of the IDEA. (*Park v. Anaheim Union High School District* (9th Cir. 2006), 464 F.3d 1025, 1031-1033.) In the event of a procedural violation, denial of a FAPE *may only* be found if that procedural violation impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a FAPE, or caused deprivation of educational benefits. (Ed. Code, § 56505, subd. (f)(2).) In this case, Student did not allege he had a right to a FAPE; however, a procedural violation of the IDEA could be found even if it does not rise to the level of a substantive denial of FAPE. As such, legal conclusions are reached in this Decision for the entire time period at issue even though violations of the IDEA, if proven, cannot be considered a denial of FAPE prior to February 19, 2015, and therefore cannot be a basis for compensatory services or reimbursement prior to that date.

Functional Behavior, Social Behavior, and Educationally Related Mental Health Assessment

FUNCTIONAL BEHAVIOR MAY 5, 2013, THROUGH ELEMENTARY SCHOOL

11. Student contends that Brentwood had sufficient information regarding his behavior challenges in the school environment to put it on notice that an assessment of Student's functional behavior was required as early as May 5, 2013. Brentwood asserted that Student did not display maladaptive behaviors in the school environment requiring an assessment of the underlying functions of his behavior. Brentwood further asserts that its August 2013 psychoeducational assessment sufficiently assessed Student's needs in relation to his ongoing behavior challenges primarily rooted in his ADHD that manifested as distractibility and inattention. Brentwood's argument was persuasive on this point.

12. 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.) The determination of what tests are required is made based on information known at the time. (See *Vasheresse v. Laguna Salada Union School Dist.* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment adequate despite not including speech/language testing where concern prompting assessment was deficit in reading skills].) Regarding a child's behavior needs, the educational agency must follow the IDEA which provides that IEP teams must address behavior when it impedes a student's or other students' access to education. (Ed. Code, § 56520, amended.)

13. Ms. Brown, Student's fourth grade teacher during the 2012-2013 school year, established that Student was distracted and off task at times, but was easily redirected. Student's behavior was within the range of the other students in that class. Ms. Brown believed that Student was intellectually capable of obtaining higher grades with greater effort. That belief does not diminish the fact that Student obtained all passing grades throughout fourth grade and met grade level standards. Additionally, Student did not have emotional outbursts or require cool down periods and it was established that his behavior did not interfere with his peers' ability to access their education.

14. Ms. Vanderheid, Student's fifth grade teacher during the 2013-2014 school year, established that Student's behavior was consistent with his behavior during the prior school year. The psychoeducational assessment conducted in August 2013 showed that Student did display some maladaptive behaviors in the school environment but they did not rise to the level of impacting his ability to receive an education, or that of his peers.

15. Parents point to various reports of maladaptive behaviors, as described in the weekly emails from Ms. Vanderheid that year, as evidence that he required an additional behavior assessment. Ms. Vanderheid credibly established that she was particularly focused on Student's behavior because she had been asked to report on it weekly. Ms. Vanderheid established that a classroom of students engage in behaviors throughout a typical school week that require constant teacher supervision and correction. Had it not been for her agreement to provide weekly updates to help Student's medical team, the vast majority of the behaviors she described in the emails would not have been reported to Parents. They were generally consistent with the behaviors of the others in the class and did not warrant parental intervention. The behaviors did not impede Student's or his peers' ability to access their education.

16. The one exception to Student's general behavior throughout the school year was when he vandalized the bathroom at the end of fifth grade. The evidence established that it was an isolated incident for which Student took responsibility and was appropriately disciplined with a one-day suspension. This incident did not trigger the need for an assessment of Student's functional behavior.

FUNCTIONAL BEHAVIOR DURING EDNA HILL MIDDLE SCHOOL 2014-2015 SCHOOL YEAR

17. At the beginning of the 2014-2015 school year, Student initially transitioned smoothly. As the year progressed, the demands placed on Student by having to keep organized and move from class to class began to have a greater impact on his behaviors. Student was more frequently off task, as often as 50 percent of the time by Ms. Kemper's account, and required nearly constant redirection. In addition to the off task behavior Student engaged in behaviors that impacted his peers such as throwing a backpack in the trash and getting into a skirmish in his advisory class.

18. By December 2014 Brentwood was on notice that it needed to conduct an assessment of the functions of Student's behavior, because his behavior rose to such a level that it was impeding his ability to access his education. Brentwood agreed and provided an assessment plan to parents specifically indicating it would conduct a "functional behavioral analysis." The term itself was not defined at hearing but it was established that both Brentwood and Parents understood this assessment was to assess the underlying functions of Student's behaviors.

19. Brentwood's argument that the psychoeducational assessment Mr. Young conducted in February 2015 adequately assessed the functions of Student's behavior was not persuasive. Mr. Young acknowledged that he intended to conduct a more formal assessment of Student's behaviors but ran out of time. Additionally, Mr. Young acknowledged that he believed Student required a behavior support plan and that he intended to draft one after he conducted additional observations. This established the need for additional assessments beyond the one already conducted.

20. The evidence established that Brentwood was on notice in December 2014 that Student required an assessment of his functional behavior. That assessment was required to have been completed by February 19, 2015, to be presented at Student's IEP team meeting that date and was not. Thereafter, Student's behavior continued to deteriorate. As such, it was established that the failure rose to the level of denying Student a FAPE from February 19, 2015, and thereafter, since that was the date Student was found to be eligible for special education.

SOCIAL BEHAVIOR ASSESSMENT

21. Student attempts to define the term "social behavior" assessment for the first time in his closing brief as an assessment that "would consider Autism and its adverse impact on him in [sic] school setting." Student asserts in the brief that Brentwood was obligated to give an assessment such as the Gilliam Autism Rating Scale-III to assess his social behavior.

22. The term "social behavior assessment" does not appear in the IDEA or corresponding State law and no evidence was presented that it is a term of art. Throughout the due process hearing it appeared Student equated "social behavior" to an assessment of Student's social emotional needs. Further, Brentwood assessed Student's social emotional needs in both 2013 and again in 2015. There was no persuasive evidence presented that Brentwood was obligated to conduct further "social behavior" assessments at any time at issue in this case, be that an autism assessment such as the GARS-III, or additional social emotional assessments.

EDUCATIONALLY RELATED MENTAL HEALTH ASSESSMENTS

23. Student alleged that at all times at issue in this case Brentwood was required to conduct an educationally related mental health assessment because Parents informed Brentwood that Student had been diagnosed with a mood disorder. Brentwood counters that

prior to the hit list incident Student did not display mental health needs in the school setting that would have triggered its obligation to conduct a mental health assessment. Brentwood further asserts that it did offer to conduct a mental health assessment and provided Parents an assessment plan at the end of May 2015. Brentwood further asserts that it may have offered the plan sooner had Parent's not revoked consent for Brentwood to obtain records from Provo Canyon.

24. The responsible educational agency, including Brentwood in the instant case, is charged with assessing a student with special needs who is suspected of needing related services, such as mental health services, to benefit from his education. (Gov. Code § 7572, subd. (a).) Further, the local agency is statutorily required to provide related services that a student needs in order to receive a FAPE. (Gov. Code, § 7573.) A related service shall be added to a Student's IEP only upon recommendation of a qualified assessor. (Gov. Code, § 7572, subd. (c).)

25. In this case, the evidence established that from May 6, 2013, through the hit list incident, Student did not exhibit mental health concerns in the school setting that required further assessment. Up until that point, the behaviors he exhibited were consistent with both ADHD and autism and did not present at school as an independent need for a mental health assessment or services.

26. It was determined that the hit list did not pose a credible threat. That incident in and of itself was not enough to trigger the need for an educationally related mental health assessment. The hit list must be considered in light of the other information known to Brentwood in March of 2015. Following the hit list incident, Student engaged in the tablet switching incident, expressed concern to Ms. Kemper that he may not return to Edna Hill following spring break, was hospitalized on an involuntary mental health hold, and Parents requested Brentwood consider placing Student in a residential treatment center. By the end of March, Brentwood was on notice that Student may be exhibiting mental health needs in the school environment that were interfering with his ability to access his education. Brentwood conducted part I of Student's IEP team meeting on February 19, 2015, and had scheduled a follow-up meeting by the time the hit list incident occurred. Shortly following the incident, Brentwood was obligated to provide Parents an assessment plan.

27. The fact that Parents did not release the Provo Canyon records is of little consequence. Brentwood's obligation was based upon Student's behavior at Edna Hill, not his behavior at Provo Canyon. The failure to provide an assessment plan and conduct an educationally related mental health assessment constituted a denial of FAPE from the end of March 2015, through May 5, 2015, the concluding time period in this case.

28. Regarding Issue 1, Student established that he was denied a FAPE for Brentwood's failure to complete a functional behavior assessment from February 19, 2015, through May 5, 2015, and was denied a FAPE for Brentwood's failure to offer an educationally related mental health assessment from the end of March 2015 through May 5, 2015. Student did not establish additional violations regarding this issue.

Behavior Intervention Plan

29. When a child's behavior impedes the child's learning or that of others, the IEP team must consider strategies, including positive behavior interventions, and supports to address that behavior. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i) & (b); Ed. Code, § 56341.1, subd. (b)(1).) It is the intent of the Legislature that children with serious behavioral challenges receive timely and appropriate assessments and positive supports and interventions. (Ed. Code, § 56520, subd. (b)(1).) An IEP that does not appropriately address behaviors that impede a child's learning denies a student a FAPE. (*Neosho R-V School Dist. v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028-1029 (*Neosha R-V*); *County of San Diego v. California Special Educ. Hearing* Office (9th Cir. 1996) 93 F.3d 1458, 1467-68.)

30. Throughout the time at issue in this case, Student exhibited significant maladaptive behaviors in the home. He was physically and verbally aggressive and was the source of much family stress. These behaviors, however, were not present in the school environment throughout elementary school. Additionally, the maladaptive behaviors he did exhibit while at Krey did not impede his learning. Student met all benchmark and academic standards and generally had appropriate peer and adult interactions. Any incident beyond the scope of what was acceptable, (such as copying Coyote Cash, taking Ms. Brown's sticky notes from the supply closet, or vandalizing the boys' bathroom) were isolated and appropriately addressed by Krey teachers and administrators.

31. When Student matriculated to Edna Hill his behaviors started to change. By December, Brentwood was on notice of the need to conduct a functional behavior assessment. Mr. Young, through the assessments he did conduct, established that Student required a behavior support or intervention plan. No such plan was drafted or presented. The explanation that Mr. Young was ill and therefore could not complete the assessment but that Brentwood stood ready and willing to draft a plan upon Student's return is not persuasive. First, the assessment should have been completed and a draft plan proposed by February 19, 2015. Second, Mr. Young was only ill for approximately one week after that IEP team meeting. Student attended Edna Hill until March 13, 2015. Brentwood's justifications for why the plan was not proposed are not persuasive.

32. Having a behavior plan in place was particularly important for Student in this case. Brentwood's IEP offer of February 19, 2015, had Parents accepted, would have required Student to transfer into four new classes with unfamiliar teachers, peers, and routines. He needed a plan in place to facilitate such a transition. The failure to offer Student a behavior plan (be it called a behavior intervention plan or a behavior support plan) constituted a denial of FAPE from February 19, 2015, through May 5, 2015.

School-Based Counseling

33. Student argued that he required the related service of individual school-based counseling from May 6, 2013, through February 19, 2015, when Brentwood offered the service. The term "related services" (designated instruction and services (DIS) in California) includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from education. (20 U.S.C. § 1401(26); Ed. Code, § 56363.) Related services must be provided if they are required to assist the child in benefiting from special education. (Ed. Code, § 56363, subd. (a).) An educational agency satisfies the FAPE standard by providing adequate related services such that the child can take advantage of educational opportunities. (*Park v. Anaheim Union High School* (9th Cir. 2006) 464 F.3d 1025, 1033.)

34. Student did not require counseling services to benefit from his education while he attended Krey elementary school. Ms. Brown, Ms. Leach, and Ms. Vanderheid credibly established that throughout fourth and fifth grade, Student did not demonstrate the need for counseling services above those included at various times in his 504 plan.

35. As noted previously, Student initially transitioned well into Edna Hill but started to exhibit more maladaptive behaviors and social emotional issues in the school setting. Brentwood, recognizing this need, assessed in this area and offered Student individual counseling on February 19, 2015. Student did not meet his burden that Brentwood was obligated to offer such services earlier. Accordingly, no denial of FAPE is established for this issue.

Larry P. v. Riles Violation in 2013

36. In *Larry P. v. Riles* the Ninth Circuit Court of Appeals enjoined California schools from using standardized intelligence tests for the purpose of identifying African-American students for special education and services. (*Larry P. v. Riles* (9th Cir. 1974) 502 F.2d 963.) The rationale behind the prohibition was that there appeared to be a disproportionate number of African-American students found eligible for special education services under the eligibility category of mental retardation based on intelligence testing.

37. The California Department of Education also issued a legal advisory prohibiting intelligence or I.Q. testing of African-American students. In 1984, the court expanded the original *Larry P.* injunction, where the parties stipulated to a settlement that provided a complete ban on the use of I.Q. testing on African-American students for any purpose. (*Larry P. v. Riles* (9th Cir. 1984) 793 F.2d 969.) Furthermore, the IDEA and the Education Code prohibit the use of discriminatory testing and evaluation materials. (34 C.F.R. § 300.532(a)(1)(i); Ed. Code, § 56320, subd. (a).)

38. It is undisputed that Mother identified Student as African American and Hispanic on his Brentwood enrollment packet prior to kindergarten. It is further undisputed that Ms. Penning administered the Wechsler-IV, an I.Q. test, to Student as part of the 2013 psychoeducational assessment.

39. Mr. Young was far more thoughtful than Ms. Penning in addressing the *Larry P*. violation. He asserted that some colleagues may believe that I.Q. tests are not necessarily culturally biased or that such a bias may be reduced when an African American child is adopted by parents of another ethnicity. He was emphatic, however, that he disagreed with this position and therefore did not rely on the I.Q. scores obtained by Ms. Penning.

40. Administering the Wechsler-IV in 2013 was a violation of the *Larry P*. injunction. Student did not argue that but for this violation he would have been found eligible for special education and related services. The violation, however, was of an ongoing nature because these scores were not isolated to the 2013 assessment. Even though Mr. Young did not rely upon them, he included the Wechsler-IV ratings in his 2015 evaluation for historical purposes. He was thoughtful in his testimony about why they were not relied upon but did not include such an explanation in his report. It is not appropriate to continue to risk having them included in future reports because others, such as Ms. Penning, do not share Mr. Young's concern. Accordingly, it is established that the *Larry P*. violation occurred and to prevent its continued use will be removed from Student's permanent records.

Record's Request on April 7, 2015

41. Student argued that he was not timely provided copies of records following his April 7, 2015, records request. Brentwood argued that it provided what it initially believed to be a complete set of records and when put on notice during the resolution session and mediation that additional school records may not have been provided it worked diligently to provide such records. Finally, Student argued that after these supplemental disclosures he still had to serve a subpoena in July 2015 to obtain records such as emails. Brentwood counters this contention by clarifying that some of the records produced in response to the subpoena are not school records within the meaning of the Education Code and that the reach of a subpoena is far broader.

42. Education Code section 56504 states in relevant part that, "[t]he parent shall have the right and opportunity to examine all school records of his or her child and to receive copies…within five business days after the request is made by the parent, either orally or in writing." Education Code section 49061(b) states that a "pupil record means any item of information directly related to an identifiable pupil, other than directory information, that is maintained by a school district or required to be maintained by an employee in the performance of his or her duties whether recorded by handwriting, print, tapes, film, microfilm, or other means."

43. A procedural violation does not constitute a denial of FAPE unless it impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the child, or deprived the Student educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii).) In this case, (with the exception of test protocols and the hit list as discussed separately below) even had Student established that particular documents were not produced; he would not have met the second prong of the analysis.

44. Student established that any perceived harm was not to Parents or Student but to his counsel in not receiving the documents under the theory that some documents may have established IDEA timeline violations. Parents were given the documents, specifically the assessment plans, at the time they were drafted as evidenced by their signed consent. There was no allegation that Parents did not receive notice of their procedural rights related to Student's IEP evaluation process in 2011, 2013, and 2015. Therefore, Parents were on notice of the potential timeline violations at the time the alleged violation occurred. Student did not establish that his Parents did not receive the documents at the time they were generated. Further, Student failed to meet his burden that any delay in providing records pursuant to Student's records request impeded Parents' opportunity to participate in the decision making process regarding the provision of FAPE to Student, or deprived him educational benefit.

45. The exception to the finding above is in relation to the specific documents of test protocols and the hit list. Parents established that prior to hearing they never received copies of either. Test protocols are student records under Education Code section 56504. (*Newport Mesa Unified School District v. State of California Department of Education*, (C.D.Cal. 2005) 371 F.Supp.2d 1170). Student's counsel specifically requested the test protocols from the 2015 assessments. They should have been provided to Parents. Multiple IEP team meetings were conducted following Student's records request and the protocols could contain information to help Parents participate in the decision-making process regarding Student's receipt of a FAPE. It is determined that failing to provide the test protocols from the 2015 psychoeducational assessment is a procedural violation that rose to the level of a denial of FAPE. Accordingly, the documents must be provided.

46. A photo copy of the hit list was produced by Officer Rucker at nearly the end of a 10-day hearing. The hit list was an item of information directly related to an identifiable pupil, specifically Student, and Officer Rucker established that it had been maintained by Ms. Gonzalez a Brentwood employee. She utilized the hit list in the performance of her duties when she suspended Student for drafting the hit list. Accordingly, the hit list is a pupil record. This document should have been made part of Student's school records. It was the basis for his disciplinary suspension and a key piece of information necessary and relevant to all members of Student's IEP team, including Parents. This document was necessary for the team to consider in crafting an appropriate IEP for Student. No explanation was given for why the document was not provided to Parents immediately following the incident, in response to their multiple records requests, and particularly in response to the subpoena. This constituted a procedural violation that led to a substantive denial of FAPE.

IEP Team Meeting Conducted Without Parents on August 29, 2013

47. Federal and state law require that parents of a child with a disability be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provisions of a FAPE to their child. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, §§ 56304, 56342.5.) A district must ensure that the parent of a student who is eligible for special education and related services is a member of any group making decisions on the educational placement of the student. (Ed. Code, § 56342.5.) An IEP team meeting may be conducted without a parent or guardian in attendance if the local educational agency is unable to convince the parent or guardian that he or she should attend. (Ed. Code, § 56341.5 subd. (h).)

48. Brentwood argues that had it not proceeded with the August 29, 2013, IEP team meeting it would have failed to meet the statutory timelines for holding an IEP team meeting after completing assessments. Brentwood argued that it never intended the meeting to be substantive but merely called and then continued to another time when Parents could attend. This position fundamentally misunderstands the purpose behind both the timelines and the need for parental participation.

49. The court in *Doug C. v. Hawaii Dept. of Educ.* (9th Cir. 2013) 720 F.3d 1038, concluded that "[w]hen confronted with the situation of complying with one procedural requirement of the IDEA or another, we hold that the agency must make a reasonable determination of which course of action promotes the purposes of the IDEA and is least likely to result in a denial of a FAPE. In reviewing an agency's action in such a scenario, we will allow the agency reasonable latitude in making that determination." (Id at p. 1046.) In that case the court concluded that the decision to prioritize strict deadline compliance over parental participation was clearly not reasonable. (Ibid). Protection of parental participation is "[a]mong the most important procedural safeguards" in the Act. (*Amanda J.*, *supra*, at p. 882.)

50. Here too, the IEP team meeting should not have been held when the Brentwood members of Student's IEP team had prior notice that Parents could not attend. It is even more egregious in this situation where Parents actually offered another day prior to Brentwood's deadline. Had the meeting been scheduled for that date, Brentwood would not have even confronted the issue presented in *Doug C. v. Hawaii*. That said, this was a procedural violation that occurred during a time when Student was not eligible for special education. Therefore, it cannot be a denial of FAPE.

REMEDIES

1. Student established that Brentwood denied him a FAPE by: failing to conduct an assessment of his functional behavior from February 19, 2015, through May 5, 2015; failing to conduct an educationally related mental health assessment from the end of March 2015 through May 5, 2015; failing to offer and provide him a behavior plan from February

19, 2015, through May 5, 2015; continuing to include Student's Wechsler-IV scores from Brentwood's 2013 psychoeducational assessment in subsequent assessments; and failing to provide Parents with test protocols from Brentwood's 2015 psychoeducational assessment and a copy of the hit list.

2. ALJ's have broad discretion in crafting appropriate remedies for FAPE denials. The broad authority to grant relief extends to the administrative law judges and hearing officers who preside at administrative special education due process proceedings. (*Forest Grove School District v. T.A.* (2009) 129 S.Ct. 2484, 2494, fn. 11; 174 L.Ed.2d 168].)

3. As a remedy, Student seeks prospective placement at a residential facility or nonpublic school, including transportation. That request is denied. First, Student did not challenge any placements offered by Brentwood. Second, Student elected to limit the time period at issue in this case to conclude on May 5, 2015. At that time Brentwood had not yet made its offer for the 2015-2016 school year. Moreover, Student's counsel stated on the record multiple times that she reserved the right to litigate the offers made after May 5, 2015. Accordingly, prospective placement is not an appropriate remedy for the denials of FAPE proven in this case and will not be ordered herein.

4. Student also seeks reimbursement for all out-of-pocket expenses associated with his placements following his removal from Edna Hill, including the residential treatment center at Provo Canyon. A parent may be entitled to reimbursement for placing a student in a private placement without the agreement of the local school district if the parents prove at a due process hearing that the district had not made a FAPE available to the student in a timely manner prior to the placement, and the private placement was appropriate. (20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c); see also *School Committee of Town of Burlington, Mass. v. Department of Educ.* (1985) 471 U.S. 359, 369-370 [105 S. Ct. 1996, 85 L.Ed. 2d 385] (reimbursement for unilateral placement may be awarded under the IDEA where the district's proposed placement does not provide a FAPE).) The private school placement need not meet the state standards that apply to public agencies in order to be appropriate. (34 C.F.R. § 300.148(c); *Florence County School Dist. Four v. Carter* (1993) 510 U.S. 7, pp. 11 &14 [114 S.Ct. 361, 126 L.Ed.2d 284] [despite lacking state-credentialed instructors and not holding IEP team meetings, unilateral placement was found to be reimbursable where the unilateral placement had substantially complied with the IDEA by conducting quarterly evaluations of the student, having a plan that permitted the student to progress from grade to grade and where expert testimony showed that the student had made substantial progress].)

5. In this case, Student's expert Dr. Hendren established that Provo Canyon was not an appropriate placement for Student. Since the appropriateness of such a placement is a prerequisite to reimbursement, and cannot be established here, reimbursement is not ordered.

6. Student also seeks reimbursement for private therapy, summer therapeutic camps, treatment by his psychiatrist that included medication management, and various other expenses including ambulance transportation among treatment facilities. Some of these items are not reimbursable under the IDEA, such as ambulance and medication management services. The vast majority of services were procured for times during which Student was not denied a FAPE. Student did not meet his burden to establish even which of these requested amounts were for services reimbursable under the IDEA. After careful consideration, the ALJ declines to order reimbursement and instead orders Brentwood to provide independent educational evaluations and compensatory services to remedy its denials of FAPE.

Independent Educational Evaluations

7. The procedural safeguards of the IDEA provide that under certain conditions a student is entitled to obtain an independent educational evaluation at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1); Ed. Code, § 56329, subd. (b) [incorporating 34 C.F.R. § 300.502 by reference]; Ed. Code, § 56506, subd. (c) [parent has the right to an independent educational evaluation as set forth in Ed. Code, § 56329]; see also 20 U.S.C. § 1415(d)(2) [requiring procedural safeguards notice to parents to include information about obtaining an independent educational evaluation].) "Independent educational assessment means an assessment conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question." (34 C.F.R. § 300.502(a)(3)(i).) To obtain an independent educational evaluation, the student must disagree with an assessment obtained by the public agency and request an independent educational evaluation. (34 C.F.R. § 300.502(b)(1), (b)(2).)

8. If an independent educational evaluation is at public expense, the criteria under which the assessment is obtained, including the location, limitations for the assessment, minimum qualifications of the examiner, cost limits, and use of approved instruments, must be the same as the criteria that the public agency uses when it initiates an assessment, to the extent those criteria are consistent with the parent's right to an independent educational evaluation. (34 C.F.R. § 300.502(e)(1).)

9. In this case, Brentwood never conducted an assessment of Student's functional behavior despite offering to do so in its December 2014 assessment plan. This ALJ determines that an IEE at public expense is an appropriate remedy for this denial.

10. Brentwood also failed to offer to conduct a timely educationally related mental health assessment. One ultimately was conducted by Brentwood following the time period at issue in this case. The appropriateness of that assessment was not part of this Decision. Despite that, this ALJ determines that Student is entitled to an independent educationally related mental health assessment at public expense as a remedy for the failure to timely offer the assessment.

Compensatory Services

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

12. In this case, Brentwood failed to offer a behavior plan or services when Student's behavior began to impede his learning. It was required to offer such a plan and or services beginning in February 2015. Student did not establish the type of compensatory services that would have remedied such a denial. Despite that, evidence was presented at hearing to help guide the ALJ. In the February 19, 2015 IEP, Brentwood offered Student one 30 minute counseling session per week in part to help him address behavioral needs. It was disclosed at hearing that as of August 2015, Student was receiving services at home but the parties contemplated he would soon transition to a new school. Considering the approximate three-month denial, as well as the fact that Student will likely be transitioning into a new environment (which may have already occurred), it is determined that 20 hours with a mental health professional, or behaviorist of Parents' choosing, is an appropriate remedy for this denial of FAPE. The services will focus on Student's behavior needs as presented in the school setting.

Larry P. Violation

13. As a remedy for the continuing violation of incorporating Student's Wechsler-IV assessment results as obtained by Ms. Penning into Student's 2015 assessment report, and to ensure that it does not happen again, Brentwood is ordered to seal the test results and protocols. Brentwood must amend the 2013 and 2015 psychoeducational assessments to remove the references to the scores obtained by Ms. Penning.[12]

Student Records

14. Brentwood is ordered to provide Parents with protocols for all assessments conducted as part of the 2015 psychoeducational assessment. The records must be turned over within 15 days of the date of this Decision.

[12] This order does not apply to IQ scores provided to Brentwood by Parents that were conducted by private assessors.

15. The failure to provide the hit list to Parents until nearly the end of a 10-day hearing despite multiple records requests and a subpoena is of great concern to this ALJ. It was a critically important document that served as a backdrop for much of the disagreement among the parties throughout the spring and summer of 2015. Without the document itself, members of Student's IEP team were left to rely on second-hand reports of what it contained. Typically the remedy for the failure to provide records would be to order the records to be produced. In light of the seriousness of this failure, such an order is insufficient.

16. Brentwood is ordered to conduct a training session for the administrators at Edna Hill regarding what constitutes student records and when they are required to be turned over under Education Code section 56504. This training will also include the fact that documents underlying disciplinary action, such as the hit list, should be included in students' pupil records (subject to appropriate redaction as may be required under other state and federal laws intended to protect other students' confidential information) and provided to parents pursuant to a valid records request. This training will be no less than one hour and must be conducted within two months of the date of this Decision.

17. Student's other claims for relief are denied.

ORDER

1. Within 15 days of the date of this Order, Brentwood will provide Parents with its criteria for obtaining an independent educational evaluation at public expense.

2. Within 10 days of Parents providing Brentwood the name of their selected assessor(s) to assess Student's functional behavior and educationally related mental health needs, Brentwood will contact the provider(s) and expeditiously complete the contracting process.

3. Brentwood will pay for the independent functional behavior assessment and educationally related mental health assessment directly and ensure that a copy of the report(s) is provided to Parents. The assessment will also include the assessor(s) attending an IEP team meeting, either in person or via telephone at the assessor's election, during which the assessment(s) will be discussed.

4. Parents will identify a licensed mental health professional or certified behaviorist to provide Student with 20 hours of compensatory services to focus on helping Student with behavior related needs as they manifest in a school setting. Brentwood will pay the provider directly for the services.

5. Within 15 days of the date of this Decision, Brentwood will remove all references to the Wechsler-IV conducted by Brentwood in 2013 from Student's pupil records. The protocols will be kept in a separate sealed envelope attached to, but not part of,

Student's pupil records and will be designated as confidential. The psychoeducational assessment reports from both 2013 and 2015 will be amended to remove any and all reference to these particular Wechsler-IV scores.

6. Within 15 days of the date of this Decision, Brentwood is to provide Parents with copies of all assessment protocols from Student's 2015 psychoeducational assessment.

7. Brentwood is ordered to conduct a training of not less than one hour for all administrators assigned to Edna Hill regarding what constitutes, and how to maintain, student records. The training will specifically include a requirement that documents forming the basis for disciplinary action, such as a hit list, are to be made part of student records (subject to appropriate redaction as may be required under other state and federal laws intended to protect other students' confidential information) and are subject to disclosure pursuant to Education Code section 56504.

8. All of Student's other claims for relief are denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, the prevailing party determination is as follows:

Issue 1: Brentwood substantially prevailed from May 6, 2013, to February 18, 2015, and Student substantially prevailed thereafter.

Issue 2: Brentwood prevailed from May 6, 2013, through February 18, 2015, Student prevailed thereafter.

Issue 3: Brentwood prevailed on this issue.

Issue 4: Student prevailed on this issue.

Issue 5: Student partially prevailed on this issue regarding Brentwood's failure to provide access to assessment protocols and a copy of the hit list.

Issue 6: The parties equally prevailed on this issue as a procedural violation of the IDEA was established but not a denial of FAPE.

RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).

DATE: October 26, 2015

/s/

JOY REDMON
Administrative Law Judge
Office of Administrative Hearings