

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

PARLIER UNIFIED SCHOOL DISTRICT.

OAH Case No. 2016080347

NON-EXPEDITED DECISION

Student filed a due process hearing request with the Office of Administrative Hearings on August 4, 2016, naming Parlier Unified School District. The complaint contained both expedited and non-expedited issues. The hearing on the expedited issues was held on August 30, 31, and September 1, 2016, and an Expedited Decision was issued by OAH on September 16, 2016.¹ A request to continue the non-expedited portion of the hearing was granted for good cause by OAH on September 2, 2016.

Administrative Law Judge Rebecca Freie heard the non-expedited issues in Parlier, California on October 11, 12, and 13, 2016.

Alfonso Padron, a parent advocate, represented Student. Juan Sandoval, another parent advocate was also present each day. Mother was present every day of the hearing, with the exception of a small portion of the last day of hearing. Student was not present at the hearing.

¹ Official notice is taken of the factual findings in that Expedited Decision.

Carlos Gonzalez, Attorney at Law, represented Parlier Unified School District. Antonio Aguilar, Director of Student Services for Parlier, was present throughout the hearing.

At the parties' request, then on-expedited matter was continued to October 31, 2016, to allow the parties to submit written closing arguments, which were timely received. The record was then closed and the matter was submitted for decision.

ISSUES²

1) Did Parlier commit a procedural violation resulting in the denial of a free appropriate public education to Student by failing to develop measurable goals to address social skill deficits, and off-task behaviors in Student's individualized educational programs after August 5, 2014?³

2) Did Parlier deny Student a FAPE after February 16, 2016, by failing to design an appropriate behavior intervention plan at Student's February 16, 2016 IEP team meeting, and/or failing to implement the behavior intervention plan develop at that meeting?

² The issues, as stated here, are the issues the parties agreed to following a ruling denying Student's request to extend the statute of limitations back to 2010-2011 school year, which is discussed in the following section of this Decision entitled "Procedural Matter." For the sake of clarity, the issues have been slightly reworded and reordered, compared to how they were read into the record on the second day of hearing. 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.)

³ Student's complaint was filed August 4, 2016, so the applicable time period at issue begins two years prior to the filing of the complaint, which was August 5, 2014.

3) Did Parlier commit a procedural violation resulting in the denial of a FAPE to Student by failing to provide Mother with a copy of the functional behavior assessment report following Parent's request in 2016?

PROCEDURAL MATTER

Student's complaint contained claims for time periods that preceded the two-year statute of limitations for special education due process hearings. Parlier claimed there were no facts that established recognized exceptions to the two-year statute of limitations for special education due process complaints.

The first day of hearing consisted of testimony from witnesses, including Mother and Mr. Aguilar, concerning the events surrounding Parlier's alleged failure to assess Student and hold an individualized educational program team meeting prior to September 5, 2013. On that date, an IEP team meeting was held to review an assessment performed at the end of the previous school year. At this IEP team meeting, Student was found eligible for special education under the categories of specific learning disability and other health impairment.

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).) There are two exceptions which may require an extension of the time for filing a complaint. One is a misrepresentation by a school district which leads the complaining party to believe disputed issues had been resolved. (20 U.S.C. § 1415(f)(3)(D)(i); Ed. Code § 56505, subd. (l)(1).) The second exception is withholding information from the parent that the district is required to provide. (20 U.S.C. § 1415(f)(3)(D)(ii); Ed. Code § 56505, subd. (l)(2).)

When a Parlier student exhibits learning delays and/or maladaptive behaviors, it is Parlier's policy to hold an initial student study team meeting to discuss strategies and

interventions to deal with the learning delays and/or maladaptive behaviors. After that initial meeting, the team waits six to eight weeks before meeting again to see the effect of the strategies and interventions. Only after a third student study team meeting does the team refer the student for a special education assessment because previous strategies and interventions have been ineffective.⁴ An exception will be made to this process if the student's parent files a written request for a special education assessment either before the process starts, or during the process.

Student exhibited behavioral issues and learning delays at the beginning of the 2010-2011 school year. Parlier began holding student study team meetings concerning Student during the 2011-2012 school year to determine which strategies might be implemented to decrease maladaptive behaviors and learning delays. The first student study team meeting occurred in the spring of the 2011-2012 school year. There were gaps exceeding six to eight weeks between later student study team meetings. Finally, in the spring of 2013, Mother asked that Student be assessed for special education. Student was then assessed, and an IEP team meeting was held on September 5, 2013, to review the assessment and determine whether he was eligible for special education. At that meeting, Mother was given the procedural safeguards document.

Mother's testimony concerning the student study team meetings, and the September 5, 2013 IEP team meeting, was very confusing. She could not articulate facts that would explain what, if any, misrepresentations were made by Parlier staff that led her to believe Parlier was addressing Student's maladaptive behaviors and learning delays to such an extent that the statute of limitations could be extended to a date prior to the September 5, 2013 IEP team meeting. Nor could she articulate facts that established misrepresentations that occurred after that date that would serve to extend

⁴ No finding is made as to whether this process is legally compliant.

the statute of limitations. Finally, the evidence established that at the September 5, 2013 IEP team meeting, Mother was given the procedural safeguards form and she had no questions concerning the safeguards. There was no evidence that Parlier withheld information from Mother that it was required to give to such an extent that the statute of limitations could be extended. Accordingly, Student's request to extend the statute of limitations for more than two years before the filing of the complaint in August 2016 was denied on the record following the conclusion of testimony on the first day of hearing.

SUMMARY OF DECISION

In his complaint Student contended that Parlier denied him a FAPE because his IEP's for the time period at issue did not contain measurable goals to address off-task behavior and social skills deficits. Further, Student claimed a behavior intervention plan developed on February 16, 2016, was inappropriate, and in any case it was never implemented. Finally, Student claimed that Parlier did not give Mother a copy of a functional behavior assessment report after she requested it.

This Decision finds that Student was denied a FAPE during the 2014-2015 and 2015-2016 school years, because he was not provided with measurable goals to address his off-task behaviors and social skills deficits. After Mother signed an IEP on September 5, 2013, Parlier failed to obtain consent to any other proposed IEP's until April 13, 2016. The IEP's that were proffered from August 2014 through the date of filing did not contain specific measurable goals to address off-task behavior and social skills deficits. It was not necessary to reach Student's argument that Parlier failed to file for hearing to overcome Mother's lack of consent, because the IEP's in question failed to offer Student a FAPE.

In regards to the claim that Parlier failed to provide Student with an appropriate behavior intervention plan following an IEP team meeting of February 16, 2016, and

failed to implement the behavior intervention plan developed at that IEP team meeting, Student failed to meet his burden of proof. The behavior intervention plan was appropriate at the time it was developed, and it could not be implemented until Mother signed consent to that IEP, which did not occur until April 13, 2016. The behavior intervention plan was implemented after that date, although it could not be implemented after May 9, 2016, because Student was suspended from school and did not return for the remainder of the 2015-2016 school year.

A functional behavior assessment had begun after the February 16, 2016 IEP team meeting. The written report was completed in June 2016, but an IEP team meeting was not held to review it until August 2016. At this time, the report was reviewed and a copy was given to Mother as required. Student did not raise claims concerning the timeliness of the report or the IEP team meeting where it was reviewed. There was no evidence that Mother requested a copy of the report before the IEP team meeting in August 2016.

FACTUAL FINDINGS

JURISDICTION

1. Student resides with Mother within Parlier's boundaries, and has done so at all times at issue in this matter. He is now 11 years of age. Student was diagnosed with attention deficit hyperactivity disorder by a physician in approximately April of 2013. Student was assessed by Parlier before the end of the 2012-2013 school year and found to be eligible for special education on September 5, 2013, by an IEP team that met on that date, under the primary category of specific learning disability. The team determined that the attention deficit hyperactivity disorder did affect his ability to access the curriculum, resulting in the secondary eligibility category of other health impairment.

SEPTEMBER 5, 2013 IEP

2. The IEP of September 5, 2013, was Student's initial IEP, and was based, in part, on the findings in the psycho educational assessment completed towards the end of the previous school year. Student had deficits in reading and mathematics. Student was reading at a level that was beginning kindergarten, although he was now beginning third grade. He could perform mathematical calculations of addition and subtraction of single digit numbers, but could only add two digit numbers without regrouping, and struggled with problems that required more than one-step to solve. However, he had average cognition, based on the cognitive testing reported in the psycho educational assessment.

3. The IEP team developed three academic goals. Two reading goals were developed, one for phonemic awareness, the other for letter recognition. A math goal called for Student to add and subtract three digit numbers.⁵

4. The IEP team agreed that Student had difficulty remaining on task in the classroom. He was disruptive, interrupted the teacher during instruction, and talked to other students. He was disrespectful towards many adults, used profanity often, and was physically aggressive both in the classroom and on the playground. This information was contained in the "Academic Performance and Functional Behavior" section of that IEP. This was his first year at this particular school, Benevides Elementary School, and Student was having trouble making friends. Therefore, a goal was developed for on-task behavior, and another in the area of social skills. The behavior goal called for Student to remain on-task for one period with only one prompt. This goal was not measurable because it did not describe what constituted a prompt, nor did it describe the length of a period. (Student was not in a classroom setting that had firm periods with a finite

⁵ These goals are not analyzed in this Decision since they are not at issue.

beginning and end time, as students have in middle or high school) The social skills goal contained no baseline. It called for him to demonstrate recognition of the personal space of others and keep his hands to himself 80 percent of the time in two out of three sessions. This goal is not measurable due to the lack of a baseline, no definition of the length of a "session," and no real clarity about what is meant by recognizing the personal space of others and keeping his hands to himself.

5. In the area of behavior, the IEP team discussed at length Student's current behavior at the meeting, but a behavior intervention plan was not developed. The IEP reflected that one would be developed if it was found to be necessary. In addition to various accommodations and modifications recommended to address Student's deficits in the general education setting, Student was to be provided with four 90-minute sessions in a resource specialist classroom each week.

6. Mother consented to the IEP of September 5, 2013, on the same date. This was the last IEP she consented to until she signed another IEP on April 13, 2016. Although IEP team meetings were held at the end of 2013-2014 and 2014-2015 school years, Mother did not consent to those proposed IEP's.

IEP TEAM MEETING MAY 28, 2014

7. An IEP team meeting was held on May 28, 2014, to develop an IEP for the upcoming school year. Student was behaving better at recess and now had friends. He was receiving mental health services outside the school setting.

8. Student had met his two reading goals from the September 5, 2013 IEP, and partially met his math goal since he could not yet subtract three-digit numbers without regrouping. New academic goals were developed for Student at the May 28, 2014 IEP team meeting.

9. It was reported that Student had met his social skills goal from the September 5, 2013 IEP, which required him to keep his hands to himself 80 percent of

the time. It was also reported that he had met his on-task behavior goal, which required him to actively work on assignments with no more than one prompt each period. However, behavior was still a concern, in that the IEP reflected that he still needed to work on anger control.

10. Mother believed that Student was frustrated because he was placed in a third grade class, but was not working at that grade level academically. She wanted him to be placed in a special day class, but it was explained by the Parlier team members that students in that class were at a much lower level than her son, and he needed to be with same-age peers due to least restrictive environment requirements. However, the IEP team agreed to increase Student's participation in the resource specialist classroom to five 120-minute sessions per week.

11. The IEP of May 28, 2014, had neither an on-task behavior goal, nor a social skills goal. However, a behavior intervention plan was part of the May 28, 2014 IEP, which seemed to have a goal embedded within it. The behavior intervention plan addressed work refusal behaviors that included protesting work as being "too hard," and refusing to complete work by putting his head down on his desk. This was a common behavior for him and it occurred several times a week. The behavior intervention plan allowed Student to take breaks during the school day. Redirection and counseling would also address this behavior. The goal was for Student to be on task 70 percent of the time when completing class work that he did not want to do. This undermined the assertion at the end of the 2013-2014 school year that Student had met the on-task behavior goal in the IEP of September 5, 2013.

12. The behavior intervention plan also attempted to address aggressive behaviors of arguing, pushing, hitting, kicking, and putting other students in headlocks. Aggressive behaviors usually occurred during unstructured time such as recess, and occurred approximately once per month. However, the behavior intervention plan was

unclear as to how Student's physical aggression was to be addressed, other than Student being redirected and receiving counseling, and utilizing a "check-in, check-out" system for both work refusal and aggression. Student's progress in decreasing aggressive behaviors would be determined by the number of referrals to the office Student received for these behaviors. However, there was nothing about the number of referrals that would indicate whether or not the goal was met.

13. With the check-in, check-out system, Student would check in each day with an adult mentor and choose four behaviors that would be addressed that day. These behaviors would be listed on a chart, and various teachers or aides would give Student a score of zero, one, or two for demonstrating the replacement behaviors during each class period of the day. Achieving a certain point level would result in an award specifically tailored for Student. The charts would be sent home weekly. The check-in, check-out system is a general education intervention in Parlier, and not limited to students with IEP's. In Student's behavior intervention plan the check-in, check-out system was used to measure Student's progress in meeting his work refusal goal.

14. At the end of the May 28, 2014 IEP team meeting, Mother asked to take the IEP home to review further. On June 3, 2014, Student's case manager called Mother and asked her to sign and return the IEP. Mother told her that she would consider signing the IEP at the beginning of the following school year.

2014-2015 SCHOOL YEAR

15. Parlier special education staff contacted Mother on August 19 and 20, September 19, October 1, and November 3, 2014, asking her to sign consent to the IEP of May 28, 2014, with the attached behavior intervention plan. An IEP team meeting was scheduled for November 3, 2014, so that the May 28, 2014 IEP, could be discussed and Mother would then be encouraged to sign it. Mother canceled this IEP team meeting at the last minute. On April 14, 2015, Mother was again contacted and asked to sign the

May 28, 2014 IEP, but this did not happen. Mother never signed consent to the May 28, 2014 IEP.

16. Student's resource specialist teacher was Kelly Gazaway (now Madden) for the 2014-2015 school year.⁶ Ms. Gazaway was also his resource specialist teacher for the previous school year. Ms. Gazaway received her special education credential in 2012 or 2013.

17. Because Student's IEP and behavior intervention plan for the 2014-2015 school year had not been signed by Mother, Student attended the resource specialist classroom for 90 minutes four times each week, as called for in the September 5, 2013 IEP. Student's work refusal and aggressive behavior occurred most often in the general education setting and on the playground. However, his behavior did improve as the school year progressed. Although Mother had not consented to the IEP and behavior intervention plan developed on May 28, 2014, the check-in, check-out system was still being used and had previously been consented to by Mother. The check-in, check-out system seemed to be relatively effective in controlling Student's maladaptive behaviors during the 2014-2015 school year.

18. An IEP team meeting was scheduled for May 12, 2015. Mother did not attend. The Parlier members of the IEP team reviewed a proposed new IEP, and discussed Student's academic progress. He was now reading at a beginning second grade level, an improvement of nearly a year since the previous year. Although Mother had not consented to the May 28, 2014 IEP, progress was reported on the five academic goals contained in that IEP, which apparently had been implemented on the basis of

⁶ This teacher is referred to as Ms. Gazaway in this Decision because that is the name used by other witnesses when they referred to her, and is the name reflected in various documents entered into evidence.

Mother's verbal consent during that May 2014 meeting. Student had met four of the five goals. He did not meet the reading fluency goal of reading 52 words per minute, but he was now reading 43 words per minute at the second grade level.

19. The draft IEP dated May 12, 2015, reported that Student still struggled with staying on task when frustrated in both the general education classroom and the resource classroom. Nevertheless, there was no goal to address this off-task behavior. Nor was there a behavior intervention plan to address this behavior.

20. Student's social skills had improved, but he still got into physical altercations with other students on the playground. The draft IEP of May 12, 2015, contained no specific social skills goal. Nor was there a behavior intervention plan to address this behavior. The draft IEP was mailed to Mother. It was never signed or returned.

2015-2016 SCHOOL YEAR

21. Student began the school year in a fifth grade general education classroom. On October 8, 2015, he was transferred from this classroom into another general education classroom taught by Jackie De La Cruz. Ms. De La Cruz began teaching in 2010, and has a multiple subject teaching credential. When Ms. De La Cruz began studying for her teaching credential she was in a "dual program" which, if completed, would have allowed her to receive both a special education credential and a multiple subject teaching credential. In the dual program Ms. De La Cruz took many special education classes. The 2015-2016 school year was her first year with Parlier.

22. When the school year began, Student was reading at a second grade level, although he was able, when willing, to read more difficult material. At the beginning of the school year there were days when Student was cooperative, and others when he was not. Behaviors included disrespect towards adults and peers, including bad language (swearing), and some physical aggression. These behaviors often occurred when Student

was frustrated. At times he would complain that the work was too hard and refuse to do it. However, despite his behavior issues, Student was often charming and personable, and it was apparent during her candid testimony that Ms. De La Cruz was fond of him.

23. Student's resource specialist teacher was Beatriz Flores. She has been employed by Parlier for approximately eight years, beginning as an aide. As she began working towards obtaining a teaching credential she worked as a substitute teacher. She has been working towards obtaining a special education credential for approximately three years, and is an intern teacher.

24. Student was sometimes willing to work in the resource classroom, and sometimes not. As was the case in his general education classroom, there were days when he was cooperative, and days when he was not. Initially Student told Ms. Flores that he did not want to work in the resource classroom with her because she did not have a credential. He was willing, however, to work with the aide, Edelber to Ochoa. Mr. Ochoa has been employed by Parlier for three years, first as a custodian, then as an instructional aide. He is currently working towards receiving his associate of arts degree from West hills Community College.

25. Ms. Flores's greatest difficulty with Student was keeping him on task. Often he would rather socialize with other students than work. Some days he required multiple prompts to do assigned work from Ms. Flores, and other days he did not. When the school year began Student only wanted to work with Mr. Ochoa, but then he began asking only to work with Ms. Flores. As was the case in the general education classroom, there were times when Student became angry and would engage in verbal and physical aggression.

26. Student was in a social skills group with Katelyn Kelly, school psychologist. Ms. Kelly holds a pupil personnel services credential which she obtained in 2010, and began working for Parlier as an intern during the 2009-2010 school year. She left Parlier

at the end of the 2015-2016 school year for employment with the Fresno County Office of Education. Ms. Kelly became aware of Student during his second grade year, and worked with him during both the 2014-2015 and 2015-2016 school years. Student liked the social skills group work, but had difficulty generalizing what he learned in it.

27. Because there was no behavior intervention plan in effect, the positive behavioral interventions and support system, used for all students throughout the Parlier schools, was the behavior program used with Student. The major component of the program when a student had behavioral issues that needed to be addressed was the check-in, check-out system previously discussed. As the school year progressed, it became apparent that many of Student's acting out behaviors were attempts to gain one-to-one attention from school staff.

28. Courtney Jimenez, the Benevides principal, was Student's case manager for the check-in, check-out system. Ms. Jimenez was also someone that Student would come to see if he needed a break. Student received periodic rewards of his choice when he received sufficient points using this behavior system. Rewards were tailored for each student using the system, and Student enjoyed at least one pizza party, and on other occasions was able to engage in some activity with an adult that he liked. Ms. Jimenez was a straightforward witness who responded to questioning openly. Ms. Jimenez believes Student liked the check-in, check-out system. However, on at least one occasion Student told her Mother did not like the check-in, check-out system. Again, as with Ms. De La Cruz, it was apparent that Ms. Jimenez was fond of Student, in spite of his behavioral issues.

29. Although there were challenges with Student during the fall of 2015, his behavior became increasingly difficult following winter break. Student told Mr. Ochoa that during that time he had visited his biological father, with whom he had previously had little contact, in Mexico.

IEP TEAM MEETING FEBRUARY 16, 2016

30. An IEP team meeting was held on February 16, 2016. Mother attended, and Student attended for a portion of the meeting. Mr. Aguilar, Ms. Flores, Ms. De La Cruz, Ms. Kelly, Ms. Jimenez, and Jessica Coughlin, the Benevides guided independent specialist attended the meeting.⁷

31. After discussing Student's current progress and maladaptive behaviors in the general education classroom, the resource classroom, and during unstructured time, Mother asked that Student be brought into the meeting. Mother questioned Student about what she had been told. Although this is not directly reflected in the IEP notes, several witnesses including Ms. De La Cruz, Ms. Flores, and Ms. Jimenez, credibly testified that at this time Mother told Student he did not have to comply with Parlier staff requests. After the IEP team meeting of February 16, 2016, Student's maladaptive behaviors increased significantly. Often he would refuse to comply with adult requests by saying "My mother tells me I don't have to do what you say."

32. At the February 16, 2016 IEP team meeting, several goals were developed: there were five academic goals, an on-task behavior goal, and a goal to address inappropriate language (swearing).⁸ The baseline for the on-task behavior goal stated that "Student can be redirected on task with three prompts if he feels he wants to do activities." The goal required Student to actively work on assigned tasks in class with no more than a single prompt in a class session. This goal was not measurable because it

⁷ It was unclear as to what this position entailed as Ms. Coughlin did not testify, and other witnesses did not supply testimony in this regard.

⁸ The goals in this IEP, other than the on-task behavior goal, are not addressed in this Decision since this IEP was not otherwise challenged by Student.

did not provide any specificity as to what constituted a prompt, nor did it define the length of a class session. There was no goal in the IEP specifically referred to as a social skills goal.

33. The IEP team developed a list of modifications and accommodations for Student, a proposed behavior intervention plan was discussed, and an offer of placement and services was made: placement in a general education classroom, and 480 total minutes each week in the resource classroom (120 minutes, four times per week). Time in the resource room was to occur during the time the general education classroom was being instructed in math and English language arts. Student was to be given direct instruction in reading and small group instruction in math during this time.

FEBRUARY 16, 2016 PROPOSED BEHAVIOR INTERVENTION PLAN

34. The February 16, 2016 IEP team, developed a behavior intervention plan. The proposed behavior intervention plan addressed aggressive behaviors including arguing, and physical aggression such as pushing, hitting, putting other students in a headlock, and kicking. Defiance was also addressed in the behavior intervention plan including not following adult directives, work refusal, and refusal to transition to another classroom. A single goal was included in the behavior plan: Student "will use socially appropriate communication and behaviors with staff and students . . . to receive attention instead of . . . engaging in aggressive and defiant behaviors . . . to receive attention . . . in all school settings . . . 70 % of the time as measured by . . . teacher and staff . . ."

35. Ms. Kelly prepared the draft of the behavior intervention plan reviewed at the IEP team meeting. It was determined that Student's maladaptive behaviors primarily occurred in large group settings, rather than when Student was alone or receiving one-to-one instruction. It was theorized in the behavior support plan that Student was unable to appropriately express frustration, which is why he acted out in the manner

described above. The behaviors occurred when Student was upset or felt threatened. Student often exhibited the maladaptive behaviors when he was frustrated working on assignments in class, but he had difficulty asking for help.

36. Strategies to prevent problematic behavior were included in the behavior intervention plan. These included instructing staff to remain calm, even when Student was angry, and "to use positive and encouraging language." Student would be allowed short breaks when frustrated, such as being allowed to put his head down on his desk or moving to a different classroom. Breaks would be no longer than 10 minutes, and it was suggested that they be limited to three to four times a day. In addition, the check-in, check-out system was continued. Staff was to redirect Student when escalating. Student was to receive weekly counseling.

37. The behavior intervention plan indicated that Student engaged in aggressive behavior and defiance to obtain peer and adult attention, and to express frustration or protest something he did not agree with. Replacement behaviors were suggested for Student. To encourage these replacement behaviors, the check-in, check-out chart was to be used, with a reinforcement system. The goal was for Student to demonstrate compliance 70 percent of the time, as reported by teachers. Student provided no evidence that the behavior intervention plan, at the time it was proposed, was not appropriate, and it is found to be appropriate as of the time it was developed.

EVENTS AFTER FEBRUARY 16, 2016

38. Mother took the unsigned IEP and behavior intervention plan with her after the meeting. Multiple efforts were made to have Mother sign consent for the IEP and behavior intervention plan. She finally did so after Ms. Kelly and Mr. Aguilar went to her home on April 13, 2016.

39. As previously discussed, Student became significantly more defiant and less cooperative after the IEP team meeting of February 16, 2016. Ms. De La Cruz

attempted to use some of the strategies discussed in the behavior intervention plan, but did not formally implement it until after Mother signed consent on April 13, 2016. Some of the behavioral incidents in the 2015-2016 school year resulted in suspensions, as adjudicated in the expedited hearing. Student presented no evidence that the behavior intervention plan was not properly implemented after Mother signed consent, although there may have been a few days of lag time before it was implemented since Ms. Kelly needed to instruct staff about the strategies they were to use as part of the behavior intervention plan. Parlier suspended Student from Benevides on May 9, 2016, after an incident in which he pushed Ms. De La Cruz into a cabinet in her classroom, and he did not return to Benevides after that date.

40. At some point in time, either at the February 16, 2016 IEP team meeting, or thereafter, Mother consented to Parlier conducting a functional behavior assessment. Student did not establish the date Mother consented to the assessment plan. Ms. Kelly conducted the assessment, which included two separate classroom observations of Student at the end of April 2016, and interviews with his teachers. The formal written report was not completed by Ms. Kelly until June 2, 2016. An attempt was made to schedule an IEP team meeting before the end of the 2015-2016 school year to review the report, but this did not occur. No findings are made regarding the timeliness of the assessment, the review of the assessment or the scheduling of the IEP team meeting.

41. Student no longer attends Benevides, but now attends another elementary school in Parlier. On August 25, 2016, an IEP team meeting was held at Student's new school with both Mother and Mr. Padron in attendance. The functional behavior assessment report was reviewed and a new behavior intervention plan based on that report was presented. Mother was presented with a copy of the functional behavior assessment report at that meeting. The following day she met with the school

psychologist at the new school, and they worked together to revise the behavioral intervention plan. Mother consented to the behavior plan and the IEP.

42. Two witnesses who work with Student at his new school testified at the hearing. Martha Scott, Student's resource teacher expressed little concern about Student's current behavior and reported that he is making progress. Rita Huerta, the school psychologist and counselor for Student testified at the hearing with great candor, and she reported that Student was doing very well. She credited this to developing positive tools for meeting Student's needs for attention in the school setting, thus diminishing off-task behavior and aggression. Student presented no evidence to refute these witnesses.

LEGAL CONCLUSIONS

INTRODUCTION: LEGAL FRAMEWORK UNDER THE IDEA⁹

1. This hearing was held under the IDEA, its regulations, and California statutes and regulations intended to implement it. (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 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

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.

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. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective 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).)

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 definition of a FAPE 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).) 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].) Here, Student bore the burden of persuasion.

ISSUE 1: FAILURE TO PROVIDE STUDENT WITH MEASURABLE GOALS TO ADDRESS OFF-TASK BEHAVIOR AND SOCIAL SKILLS DEFICITS

5. Student argues that he was denied a FAPE because he was not given measurable goals in the areas of on-task behaviors and social skills for both the 2014-2015, and 2015-2016 school years. Parlier argues that goals for on-task behavior and social skills were “embedded” in the behavior intervention plans of May 28, 2014, and February 16, 2016.

6. Student claims, in part, that there was also a denial of FAPE because Parlier failed to file for a due process hearing with OAH following Mother’s refusal to sign the respective IEP’s developed for both of these school years. Parlier claims that it made numerous attempts to obtain Mother’s consent to IEP’s for those school years, and therefore should not be penalized for failing to obtain consent.

Requirements for Goals

7. An IEP must contain annual goals that are measurable, meet the student’s unique needs, and allow him to make progress in the general education curriculum. (Ed. Code § 56345, subd. (a)(2)(A).) Goals may also meet other educational needs of the student. (Ed. Code § 56345, subd. (a)(2)(B).) “The IEP must show a direct relationship between the present levels of performance, the goals, and the educational services to be provided.” (Cal. Code Regs., tit. 5, § 3040, subd. (b).)

8. A procedural violation does not automatically require a finding that a FAPE was denied. A procedural violation results in a denial of a FAPE only if the violation: (1) impeded the child’s right to a FAPE; (2) significantly impeded the parent’s opportunity to participate in the decision-making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. §1415(f)(3)(E)(ii); see, Ed. Code, § 56505, subd. (f)(2); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479,1484 .)

9. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. An IEP is “a snapshot, not a retrospective.” (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir.1993) 993 F.2d 1031, 1041.)

Failure to Provide Student with a Current IEP

10. When a parent refuses to consent to the receipt of special education and services, after having consented in the past, California law requires that the school district seek resolution of the impasse by filing a request for a due process hearing. (Ed. Code, § 56346, subd. (d).) If a parent consents to some but not all of a proposed program, the district must implement only those portions to which the parent has agreed so as not to delay providing instruction and services to the child. (Ed. Code, § 56346, subd. (e).) If the local educational agency believes that the components of the IEP to which the parent will not consent are necessary to provide the student a FAPE, it must seek an order from an ALJ to that effect in accordance with title 20 United States Code section 1415(f). (Ed. Code, § 56346, subd. (f).) The mandatory duty of a California school district to seek a due process hearing when a parent refuses to consent to an IEP that the district believes offers a student a FAPE was recently confirmed by *I.R. v. Los Angeles Unified School Dist.* (9th Cir. 2015) 805 F.3d 1164, 1169-1170.

Analysis

11. The IEP of September 5, 2013, contained goals to address off-task behavior and social skills deficits, as evidenced by the testimony of witnesses, as well as the document itself. However, these goals were not measurable since the language in the on-task behavior goal was vague, and the social skills goal had no baseline. Student’s deficits in these areas were discussed by the IEP team at that meeting, and addressed in the “Academic Performance and Functional Behavior” section of that IEP.

Mother consented to this IEP. By the end of the 2013-2014 school year it was reported that Student had met both goals. However, at the IEP team meeting on May 28, 2014, members of the team discussed Student's frequent off-task behaviors and social difficulties with peers, which calls into question whether Student had really met the on-task behavior goal and the social skills goal contained in the IEP of September 5, 2013, as will be discussed below.

2014-2015 SCHOOL YEAR

12. The IEP of May 28, 2014, which was to be in effect for the 2014-2015 school year, contained a behavior intervention plan that was supposed to address Student's refusal to do work in class, and his aggressive behaviors, and Parlier argues that these constituted embedded on-task behavior and social skills goals. Student was reported as frequently refusing to work in class, often physically and verbally aggressive to his peers, and verbally aggressive to teachers and other adults. Parlier witnesses credibly testified about this behavior. There were goals in the behavior intervention plan concerning work refusal and physical aggression. However, there were no specific goals in the IEP that addressed off-task behavior or social skills deficits. And the behaviors supposedly addressed by the behavior intervention plan and language in parts of the plan suggested that Student did need specific goals to address off-task behavior and social skills deficits, in addition to a behavior intervention plan. The goals embedded in the behavior intervention plan were not sufficiently clear to constitute specific measurable goals in the areas of on-task behavior and social skills, and the IEP itself did not contain these goals.

13. Parlier did not offer measurable IEP goals for the 2014-2015 school year addressing Student's deficits in the areas of on-task behavior and social skills. The September 3, 2013 IEP, had goals in the areas of on-task behavior, and social skills, although they were defective. Student was deemed to have met them when the IEP

team met at the end of the 2013-2014 school year. There was no evidence that anyone at Parlier worked on those goals for the 2014-2015 school year, and it is unlikely that anyone did since it was believed they had been met. The evidence established that even at the end of the 2014-2015 school year Student engaged in off-task behavior often, and also got into physical altercations with other students, resulting in disciplinary action. Failure of Parlier to have measurable IEP goals in place to address off-task behavior and social skills deficits denied Student a FAPE, and this is confirmed by continued and worsening maladaptive behaviors during the 2015-2016 school year. Because the IEP offer of May 28, 2014, did not contain these goals it was not an offer of a FAPE. Therefore there is no need to address Student's argument that Parlier should have filed a request for due process when it became obvious that Mother was not going to sign the IEP.

2015-2016 SCHOOL YEAR

14. Parlier attempted to hold an IEP team meeting on May 12, 2015, to develop an IEP that would serve Student for the 2015-2016 school year. However, Mother was not a part of this meeting, and there was no evidence Parlier complied with the legal requirements to hold an IEP team meeting without a parent being present. The IEP team developed an IEP without parental input. The IEP did not contain a behavior intervention plan, nor did it contain goals to address off-task behavior or social skills deficits. Parlier sent the proposed IEP to Mother, after the May 12, 2015 meeting, but Mother did not sign or return the IEP.

15. Once again, Student began a school year with a consented to but out of date IEP from September 5, 2013, no behavior intervention plan, and no current goals to address off-task behavior and social skills deficits. Parlier should have immediately begun the process for holding an IEP team meeting to develop an IEP for the 2015-2016 school year. Even if it was unable to procure Mother's attendance, an IEP team meeting

could have been held without her attendance if Parlier complied with section 300.322 of title 34 of the Code of Federal Regulations.

16. Parlier was finally able to hold an IEP team meeting that included Mother on February 16, 2016. There was no evidence of what, if any, attempts Parlier took to hold an IEP team meeting earlier in the school year. The IEP developed at the February 16, 2016 meeting, included a goal to address off-task behavior, calling for Student to work actively in class with only one prompt during a "class session." However, this goal was not measurable because it did not specify what constituted a prompt, nor did it define the length of a class session.

17. The IEP of February 16, 2016, also included a behavior intervention plan to address aggressive behavior and defiance with embedded goals in those areas. However, the behavior intervention plan with embedded goals in these areas does not mean that the IEP contained a specific social skills goal.

18. Multiple witnesses at hearing, including Ms. Gazaway, Ms. Jimenez, Mr. Ochoa, Ms. DeLaCruz, and Ms. Kelly, credibly testified that Student frequently demonstrated off-task behavior in the classroom during this school year, as well as verbal and physical aggression towards peers and staff. Student's behavior worsened as the school year progressed, particularly after winter break, and then after the IEP team meeting of February 16, 2016. Ultimately, in May 2016, Parlier sought to expel Student for physical aggression against Ms. De La Cruz.

19. Although the IEP of February 16, 2016, contained an on-task behavior goal, the goal was not measurable. Further, embedded goals in the behavior intervention plan to address work refusal and defiance did not constitute an IEP social skills goal. Student's behavior during the 2015-2016 school year, as credibly testified to by Parlier witnesses, established that Student required goals in the areas of on-task behavior and social skills even more this school year than in the past. Parlier denied

Student a FAPE for the 2015-2016 because there were no measurable goals in place to address Student's off-task behavior and social skills deficits. Because it has been established that Parlier did not make an IEP offer of a FAPE to Student for the 2015-2016 school year, there is no need to address Student's argument that Parlier should have filed a request for due process once it realized Mother was not going to consent to the IEP of May 12, 2015.

ISSUE 2: FAILURE TO IMPLEMENT THE BEHAVIOR INTERVENTION PLAN DATED FEBRUARY 16, 2016

20. Student contends that he was denied a FAPE because the behavior intervention plan attached to the February 16, 2016 IEP, was inappropriate. He also contends that Parlier did not ever implement the behavior intervention plan dated February 16, 2016. Parlier contends that it could not implement the plan until Mother signed consent on April 13, 2016, and after that date it did so until Student was suspended on May 9, 2016.

Failure to Implement an IEP

21. A school district must implement all components of a student's IEP. (20 U.S.C. § 1414(d)(2)(A); 34 C.F.R. § 300.323(c).) When a student alleges the denial of a FAPE based on the failure to implement an IEP, in order to prevail, the student must prove that any failure to implement the IEP was "material," which means that the services provided to a disabled child fall "significantly short of the services required by the child's IEP." (*Van Duyn v. Baker School Dist. 5J* (9th Cir. 2007) 502 F.3d 811, 822.) A minor discrepancy between the services provided and the services required in the IEP is not enough to amount to a denial of a FAPE. (*Ibid.*) "There is no statutory requirement of perfect adherence to the IEP, nor any reason rooted in the statutory text to view minor implementation failures as denials of a free appropriate public education." (*Ibid.*)

Analysis

22. As previously discussed, a behavior intervention plan was developed at the February 16, 2016 IEP team meeting. The purpose of this plan was to address Student's aggressive behavior and his defiance. Student presented no evidence to suggest the plan was inappropriate, and it is not found to be, notwithstanding his argument that it was so because it utilized the check-in, check-out system.

23. In regards to Student's claim that the behavior intervention plan was not implemented, Student again presented no evidence in this regard. The behavior intervention plan could not be implemented until it was consented to by Mother, and this did not occur until April 13, 2016. Although there was a short period of time thereafter when Ms. Kelly instructed the staff on how to implement the plan, this was not a material failure to implement the behavior intervention plan. Parlier could then only implement the plan for a few weeks. This is because Student was suspended on May 9, 2016, and did not return to school. Therefore, Parlier had little opportunity to implement the behavior support plan. Accordingly, Student did not meet his burden of proof for this issue, and it is determined that the behavior intervention plan was appropriate, and was implemented to the extent it could be.

ISSUE 3: FAILURE TO PROVIDE MOTHER WITH THE FUNCTIONAL BEHAVIOR ASSESSMENT REPORT

24. Student presented no evidence that Mother requested the functional behavior assessment report at any time prior to the IEP team meeting in August 2016. Mother did not testify after the first day of hearing at which time she only testified in regards to Student's request that the statute of limitations be extended. Education Code section 56329, subdivision (a)(1) requires the local educational agency to schedule an IEP meeting upon completion of an assessment to discuss the assessment, the educational recommendations and the reason for the recommendations. An assessment

report must be provided to the parent at the IEP team meeting regarding the assessment. (Ed. Code, § 56329, subd. (a)(3).) There was no testimony from any witness that Mother requested a copy of the report before it was given to her at the August 2016 IEP team meeting. All of the evidence established that Mother was provided with the report at that meeting. Student failed to meet his burden of proof in regards to this issue.

REMEDIES

1. Student did not suggest any remedies, if he prevailed, in either the complaint, or his closing argument. During the Prehearing Conference, Mr. Padron stated that he was seeking an unspecified amount of compensatory education should he prevail. Parlier asks that it be found to be the prevailing party, and that Student be awarded nothing.

2. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.) These are equitable remedies that courts may employ to craft "appropriate relief" for a party. (*Ibid.*) An award of compensatory education need not provide a "day-for-day compensation." (*Id.* at p. 1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid v. District of Columbia, supra*, 401 F.3d 516, 524.) The award must be fact-specific and be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Ibid.*)

3. Staff training can be an appropriate remedy for a student who was denied a FAPE; the IDEA does not require compensatory education services to be awarded

directly to a student. (*Park v. Anaheim Union High School Dist.*, *supra*, 464 F.3d 1025, 1034 [student, who was denied a FAPE due to failure to properly implement his IEP, could most benefit by having his teacher appropriately trained to do so].) Appropriate relief in light of the purposes of the IDEA may include an award that school staff be trained concerning areas in which violations were found, to benefit the specific pupil involved, or to remedy procedural violations that may benefit other pupils. (*Ibid*; *Student v. Reed Union School District*, (Cal. SEA 2008) 52 IDELR 240 [109 LRP 22923] [requiring training on predetermination and parental participation in IEP's].)

4. Student prevailed on one of the three issues adjudicated in this matter, specifically Parlier's failure to provide him with measurable on-task behavior goals and social skills goals in his IEP's during the time period at issue. However, although Student established that he was denied a FAPE due to the lack of goals in these areas from August 5, 2014, to April 13, 2016, he presented no evidence as to need for compensatory education, and what type, frequency, and duration of compensatory education he required. Further, Student was reported to be doing very well in his current placement in another Parlier school. Accordingly, no compensatory education is ordered.

5. Student clearly needed measurable goals in the areas of on-task behaviors and social skills deficits for both of the school years at issue in this matter. The on-task behavior and social skills goals in the IEP of September 5, 2013, were not measurable. In addition, the on-task behavior goal in the February 16, 2016 IEP, was not measurable. It is apparent that Parlier special education staff need to learn how to draft measurable goals for IEP's to address social skills deficits and off-task behaviors. If such goals are to be embedded in a behavior intervention plan, Parlier needs instruction as to how to ensure they are sufficiently clear and explicit as phrased, to constitute measurable goals in these areas of need, if necessary for a student to receive a FAPE. Accordingly, Parlier

special education staff shall receive training about how to draft measurable goals to address off-task behavior and social skills deficits. The training shall not be provided by any Parlier employee, or legal representative of Parlier.

6. There was no evidence that Student currently requires goals to address off-task behavior, or social skill deficits. If Mother believes he currently requires goals in these areas, she shall notify Parlier within 10 days of the date of this Decision. Parlier shall then convene an IEP team meeting within 15 days to draft measurable goals for Student in these areas.

ORDER

1. Parlier special education staff shall receive training about how to draft measurable goals to address off-task behavior and social skills deficits. The training shall not be provided by any Parlier employee, or legal representative of Parlier.

2. If Mother believes Student now requires goals in the areas of off-task behaviors and social skills deficits, she shall notify Parlier within 10 days of the date of this Decision. Parlier shall then convene an IEP team meeting within 15 days after the request to draft measurable goals for Student in these areas.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Student prevailed on Issue 1. Parlier prevailed on Issues 2, and 3.

RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to

a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

DATED: December 12, 2016

_____/s/_____

REBECCA FREIE

Administrative Law Judge

Office of Administrative Hearings