

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. 2015100421

DECISION

On October 7, 2015, Parent filed a due process hearing request on Student's behalf with the Office of Administrative Hearings naming Parlier Unified School District as respondent. On October 22, 2015, Parlier's notice of insufficiency regarding the complaint was granted with leave to amend. Parent filed an amended complaint on November 2, 2015. On December 3, 2015, the matter was continued for good cause.

Administrative Law Judge Joy Redmon heard this matter in Parlier, California, on February 2, 3, and 4, 2016. One of Student's proffered exhibits was in Spanish and required translation before the record closed. A continuance was granted until March 1, 2016, for the document to be translated, an English version provided to the parties, and to give Parlier the option to call witnesses in response to the document.

On February 16, 2016, OAH served the translated document to the parties. On February 23, 2016, Parlier provided written notice that it waived the right for an additional witness to be called in response to Student's translated exhibit. The translated document was entered into the record. The record remained open until March 15, 2016, 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.

Advocate Alfonso Padron represented Student. Also present on Student's behalf

were Mother, and advocates Elinda Padron and Juan Sandoval.¹ Maricela Solario-Taylor was present throughout the due process hearing and provided English to Spanish and Spanish to English translation for Mother. Attorneys Anahid Hoonanian and Amanda Ruiz represented Parlier. Also present on Parlier's behalf was Antonio Aguilar, Parlier's director of student support services.

ISSUES²

Issue 1: Did Parlier deny Student a free appropriate public education during the 2014-2015 school year by failing to offer and provide an appropriate disciplinary strategy that met Student's needs?

Issue 2: Did Parlier significantly impede Mother's opportunity to participate in the decision-making process to formulate Student's IEP that resulted in a denial of FAPE during the 2015-2016 school year by removing consent for Mother to enter the school site on October 1, 2015, for 28 days?

Issue 3: Did Parlier deny Student a FAPE during the 2015-2016 school year through the date of hearing by failing to:

¹ No notice of representation was filed in this matter. Mother confirmed on the record that Mr. Padron, accompanied by Ms. Padron and Mr. Sandoval, would assist her throughout the due process hearing by presenting her case but was not filing a notice of representation. On the final day of hearing, Mr. Padron confirmed that all documents would continue to be served on Mother.

² 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.)

- a. offer and provide an appropriate disciplinary strategy that meets Student's needs;
- b. offer and provide Student an instructional aide during math and English language arts in the general education classroom;
- c. offer and provide dedicated staff monitoring during morning and lunch recess;
- d. implement Student's November 2015 IEP, specifically regarding:
 - i. the accommodation of short breaks between assignments or when Student is overwhelmed;
 - ii. permitting Student to participate in physical education and other classes due to continuous referrals to the office; and
 - iii. specialized academic instruction of 450 minutes per week?

PROCEDURAL MATTERS

Student's closing brief contained arguments regarding numerous issues not raised in this due process hearing. These include allegations that:

- Parlier failed in its child find obligation to Student;
- Parlier retaliated against Mother for filing a complaint with the California Department of Education regarding the Local Control Funding Formula's parental participation component, for protesting at a school site, and testifying in a grand jury investigation;
- Mother was denied meaningful participation in the IEP development process because Parlier had attorneys attend IEP team meetings and imposed tactics during IEP team meetings such as a "parking lot" designed to ignore Mother's concerns;
- Student was denied a FAPE by failing to make academic progress and meet academic IEP goals;

- Student was inappropriately exited from speech and language services; and
- Parlier failed to report accurate California English Language Development Test scores (2014).

A party has the right to present a complaint “with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.” (20 U.S.C. § 1415(b)(6); Ed. Code, § 56501, subd. (a).) OAH’s jurisdiction, however, is limited to these matters. (*Wyner v. Manhattan Beach Unified Sch. Dist.* (9th Cir. 2000) 223 F.3d 1026, 1028-1029.) Some of the issues alleged in Student’s closing brief are outside of OAH’s jurisdiction, such as Mother’s retaliation claims and issues regarding Student’s CELDT scores.

Additionally, a party who requests a due process hearing may not raise issues at the hearing that were not raised in his complaint, unless the opposing party agrees. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1465.) Student’s issues were clarified at length during a telephonic prehearing conference held on January 22, 2016. Student’s issues were reviewed with the parties on the first day of the due process hearing. Student did not seek further clarification or to augment the issues identified in the Order Following Prehearing Conference. Parlier did not agree to include the issues contained in Student’s closing brief in this due process hearing. Accordingly, this Decision is limited to those issues specified in the Order Following Prehearing Conference. Nothing in this Decision limits Student’s right to file a due process complaint alleging issues separate from those adjudicated herein. (20 U.S.C. § 1415(o); 34 C.F.R. § 300.513(c); Ed. Code, § 56509.)

SUMMARY OF DECISION

This Decision holds that Parlier denied Student a FAPE during the 2014-2015 school year by failing to provide the disciplinary strategies contained in Student’s IEP

during his physical education class. Student failed to establish a denial of FAPE regarding the remaining issues.

FACTUAL FINDINGS

JURISDICTION

1. Student was an 11-year-old male at the time of hearing who resides with his Mother and siblings within Parlier's jurisdictional boundaries. Student attends 6th grade at Benavidez Elementary School. Student is eligible for special education and related services under the category of specific learning disability.

STUDENT'S EARLY SCHOOL YEARS

2. Student is bilingual with Spanish designated as his native language. Spanish is the primary language spoken at home. He attended kindergarten through second grade at John C. Martinez Elementary School before transferring to Benavidez.

3. Throughout early elementary school, Student struggled academically, primarily with reading and writing. In kindergarten and first grade, Student was also disruptive, made noises, and had difficulty sitting still and attending to tasks. At times he was physically aggressive with peers. Mother was particularly concerned about the reported behaviors and sought help for Student from physicians and therapists.

4. In January 2010, Student was evaluated and qualified for special education services under the category of speech and language impairment. At that time, Student's IEP team determined he did not qualify under the categories of specific learning disability or other health impairment.

5. Student was diagnosed with Attention Deficit Hyperactivity Disorder in approximately 2011. Student was reevaluated for a specific learning disability and his IEP team added it as an additional eligibility category in January 2012, when Student was in

third grade. At that time, resource program specialist services were added to Student's IEP.

6. In January 2013 Student's IEP team determined Student's communication difficulty was the result of his English language skills, as opposed to a speech and language impairment. At that time, speech and language services were discontinued.

7. During the 2013-2014 school year, Student continued having difficulty with focus, attention, and impulsivity that negatively impacted his ability to complete tasks. Student also became physically aggressive with peers on two occasions when provoked. Student's IEP team drafted a behavior support plan to address his attention difficulties and incidents of physical aggression. Mother consented to the IEP, including the behavior support plan in January 2014.

DISCIPLINARY STRATEGY 2014-2015

8. Student raised two contentions regarding the appropriateness of Parlier's disciplinary strategy. The primary contention during the 2014-2015 school year is that the school wide disciplinary system incorporated into Student's IEP was punitive, failed to meet his needs, and resulted in anxiety. Student also asserted that the disciplinary strategy was not implemented with fidelity. As discussed below, the evidence established that the disciplinary strategy incorporated into Student's IEP was not punitive, met his needs, and was implemented with fidelity throughout the school day except for in Student's physical education class.

Appropriateness-December 2013 Behavior Support Plan

BEHAVIOR NEEDS

9. Student's operative IEP at the beginning of the 2014-2015 school year was drafted the prior school year in December 2013 and consented to in January 2014.

Connie Prieto was Student's fifth grade general education teacher during the 2014-2015

school year. Ms. Prieto testified at hearing and was knowledgeable about Student's needs, his IEP, and the services he received throughout the 2014-2015 school year.

10. School psychologist Kaitlyn Kelly also testified regarding Student's behavior needs, his individual behavior support plan, and the school wide positive behavior system implemented at Benavidez. Ms. Kelly was a member of Student's IEP team, was familiar with his behavior needs during the 2014-2015 school year, and was knowledgeable about the school's Positive Behavior Interventions and Supports (PBIS) program.

11. Ms. Kelly's duties include training staff and assisting the staff to implement the school's PBIS program. According to Ms. Kelly, PBIS is not a specific program but a broad set of strategies designed to improve social, behavioral, and academic student outcomes by employing non-punitive, proactive techniques in a school environment.

12. Ms. Prieto described Student's behavior needs in the school environment. She established that at the beginning of the 2014-2015 school year Student was easily distracted and frequently off task. This occurred throughout the school day; in particular when Student was asked to complete non-preferred academic tasks, such as reading aloud or writing. When that occurred Student would either verbally protest, fail to complete the task, or "escape" by walking around the room or crawling under his desk. Ms. Prieto also established that Student was generally compliant when redirected, respectful, and participated fully in preferred activities involving group work and math. Student was not referred to the office or disciplined for his off task behavior. This behavior did impede his learning and to a lesser degree the learning of others.

13. According to Ms. Prieto, Student was accepted by his peers. If he was teased or provoked, however, he had a quick temper and could become physically aggressive. Ms. Prieto established that although this reaction was infrequent, approximately two times per year, the intensity was to a degree that Student had a need

in this area. Although it did not occur often, when it did, these behaviors impeded Student's learning and his peers' learning.

BEHAVIOR SUPPORT PLAN

14. Student's operative IEP at the beginning of the 2014-2015 school year contained the behavior support plan drafted in December 2013. The plan addressed off task behavior including talking, arguing, grabbing/throwing objects, and not completing assignments. It also addressed physical aggression including hitting peers or threatening with objects such as scissors. This behavior support plan addressed each of Student's behaviors that interfered with his ability to learn or that of his peers.

15. Student's IEP team rated his need for a behavior support plan as moderate on a four point scale consisting of: early stage intervention; moderate; serious; and extreme. The behavior support plan included an analysis of environmental factors that contributed to the targeted behaviors. It also described the necessary changes, and the supports that were needed to help Student replace the off task and physically aggressive behavior with more appropriate behaviors. The alternative or replacement on task behaviors included completing assigned work, working quietly and requesting breaks when distracted or overwhelmed, and asking for help to complete difficult tasks. Regarding physical aggression, the plan called for Student to express frustration by engaging in appropriate social behaviors such as taking with a peer or adult, rather than physically acting out.

16. To assist Student in learning the replacement behaviors, the behavior support plan included measurable annual goals. The behavior support plan was monitored by Ms. Prieto, Ms. Kelly, and Kelly Gazaway, Student's resource specialist program teacher. Student's IEP included the related service of counseling sessions with Ms. Kelly to work on progress toward his behavior goals and help learn appropriate replacement behaviors.

17. Student's behavior support plan also integrated portions of the school-wide PBIS program. Ms. Kelly established that each PBIS school develops a matrix consisting of school-wide goals and strategies for achieving those goals. At Benavidez, the students are divided into three levels of need based upon their behaviors. Approximately 80 percent of students are in tier one and only require occasional behavior support.

18. Students exhibiting more frequent behavioral needs and students with IEP's that include behavior support plans are assigned to tier two. Approximately 10-15 percent of students are in tier two.³ Student was assigned to tier two by his IEP team for the 2014-2015 school year via his behavior support plan. At Benavidez, tier two students participated in a "check in-check out" program where they met with a designated adult at the beginning of the day and end of the day. Student's behavior support plan incorporated the "check in-check out" system.

19. Student's designated adult for "check in-check out" was his resource teacher, Ms. Gazaway. In the morning, daily goals were reviewed and Student kept his chart with him; asking each teacher to initial whether or not his daily goals were met during each period. The intent behind "check in-check out" is for students to have positive staff interaction at least twice per day. When Student met his daily behavior goals, he could earn a prize or bank points and save up for a more desirable prize. On most days, Student met his daily behavior goals.

20. The daily behavior chart was also used to keep Mother updated on Student's behavior. At the end of the day, Ms. Gazaway or Ms. Prieto wrote a statement in Spanish summarizing important information from the day. Student took the form

³ Tier three was for students with intense behavior needs. Approximately five to 10 percent of students at Benavidez were designated as tier three.

home to show Mother. Mother was to sign the form and Student was to return it the following day. Frequently, Student did not return the form. Ms. Prieto established that he was not penalized if he did not return the form. According to Ms. Kelly and Ms. Prieto, punishing Student for not returning the form would have been inconsistent with the underlying purpose of PBIS. If Mother needed to be notified of something particularly important regarding Student, it would be communicated outside the PBIS chart.

21. Mother asserted that the PBIS portion of Student's behavior support plan was not appropriate because the "check in-check out" system was punitive if Student did not earn the maximum number of points in a day. She also alleged that it produced anxiety. Mother also asserted that Dr. Rene Rosas, Benavidez's principal did not like Student and was unnecessarily punitive in his interactions with Student. These contentions were not supported by the evidence.

22. Ms. Prieto and Ms. Kelly established that Student's behavior support plan, including the PBIS components were not implemented in a punitive manner. Ms. Prieto credibly testified that Student was motivated to earn points and was disappointed, but behaved appropriately, when he did not. He did not display anxiety related to Parlier's disciplinary strategy in the school environment. No medical records were provided establishing that Student was diagnosed by any professional with anxiety. Additionally, Mother did not observe Student at school participating in the "check in-check out" system. The information she had was communicated by Student and through the daily behavior charts, the vast majority of the ones entered into evidence reported positive behavioral interactions. These documents were offered by Student.

23. Mother's assertion regarding the interaction between Dr. Rosas and Student primarily involved an incident that occurred during recess. A campus supervisor contacted Dr. Rosas and informed him that Student was playing on the playground

equipment in a dangerous manner. Dr. Rosas was speaking with Student when Student's sister came up to intervene. According to Dr. Rosas, he asked Sister to leave and Sister refused. Dr. Rosas said he put his hand on Sister's shoulder and guided her away. There is a factual dispute about this incident with Sister as Sister reported to Mother that it was more of an aggressive altercation.⁴ Mother reported the incident and a formal investigation was launched. Mother also asserted that Dr. Rosas did not like Student because Student asked Dr. Rosas if he was fired from a previous position. Mother believes that these two incidents led Dr. Rosas to dislike Student and actively discipline him in a demeaning way. Dr. Rosas disputes this contention. He credibly testified that he infrequently interacted with Student as Student was not in trouble and only referred to the office twice for disciplinary reasons during the 2014-2015 school year. Neither incident resulted in suspension.

24. The weight given to Mother's testimony in this regard is considered in light of the extremely acrimonious relationship existing between the parties. This due process hearing was unique in some respects; the acknowledgment of which provides context for some conclusions reached herein. This matter was designated as an open hearing. That is not unique; however, throughout this hearing there were upwards of 20 observers at any given time. It was clear as early as Mr. Padron's passionate opening statement directed toward the audience, as opposed to the undersigned ALJ, that the parties, Student's advocates, and members of the public observing the hearing are engaged in disputes far broader than this due process hearing. The hearing remained focused on the due process issues litigated, but vague references to a grand jury investigation, the termination of one of Student's advocates who was a long term Parlier

⁴ The factual dispute need not be resolved in this Decision and no findings are made about what occurred between Dr. Rosas and Sister.

employee, and allegations of physical abuse by Student's former principal toward Student's relative crystalized that this dispute is but one small piece of the complex puzzle that exists among the parties, representatives, and the broader community.

25. The description of Student's behavior by all witnesses made clear that he is struggling to understand the very adult concerns swirling around him and that he tries to please who he is with at any given time. At school, Student attempts to comply with behavioral expectations in academic and nonacademic classes. At home, Student reports to Mother that he is perpetually in trouble at school, even if that is not accurate. This is not an overt intent to lie as much as a desire to please or meet the narrative put forth by the adults around Student who are at odds with one another.

26. Student likely did tell Mother that he was continually in trouble at school by Dr. Rosas and others and that he expressed frustration with the "check in-check out" process. Those reports, however, were not reliable. It defies logic that Ms. Prieto, Ms. Gazaway, and Ms. Kelly would have contemporaneously underreported Student's behavior on the forms. This was not a situation where history was rewritten in testimony. The documents generated at the time, and offered into evidence by Student, confirmed primarily positive behavior reports. If Student was acting out or exhibiting anxiety at school to the degree reported by Mother, it could be argued that school personnel had an interest in accurately reporting such to drive more services, not fewer, or a change in placement. Additionally, Mother did not testify to observing negative interactions among Student, staff, and administrators, including Dr. Rosas. Rather, the information was provided by Student and Sister. For the forgoing reasons, less weight was given this testimony and Student failed to meet his burden that Parlier's disciplinary strategy was not appropriate, punitive, or produced anxiety.

27. Student's IEP team accurately identified Student's behaviors that impeded his learning; namely off task and physically aggressive behavior. His IEP team considered

strategies and supports to address those behaviors. The team drafted a detailed behavior plan that coupled with counseling services was appropriate. Ms. Prieto and Ms. Kelly established that the behavior support plan initially implemented in January 2014 remained appropriate at the beginning of the 2014-2015 school year because Student still exhibited behavior needs identified and addressed in his behavior support plan.

Appropriateness-Behavior Plan November 2014 Through End of 2015
School Year

28. Student's annual IEP team meeting was held on November 20, 2014, and also served as the review of Student's triennial assessments. There was a high degree of acrimony among the Parlier members of Student's IEP team and Mother and her advocates. Six IEP team meetings were held between November 20, 2014, and May 29, 2015, while Student was in the fifth grade. Student's behavior was addressed during some of these meetings. Student's behavior needs, specifically daily off task behavior and occasional aggressive behavior toward peers remained the two areas of behavior that impeded Student's learning throughout the entire school year.

29. As a component of the November 20, 2014, IEP, the Parlier members of Student's IEP team offered a behavior plan now entitled behavior intervention plan. The plan addressed the same two areas as the prior behavior support plan. It was equally as descriptive as the prior plan regarding environmental factors contributing to Student's behaviors, the functional factors and desired replacement behaviors, as well as the goals, strategies, and supports necessary to achieve those changes. In this case, the change from a behavior support plan to a behavior intervention plan was due to external changes not specifically related to Student. The name change was ministerial and did not represent a substantive change in the plan or IEP.

30. The new behavior plan also incorporated components of the PBIS program including continuing with the "check in-check out" system. Ms. Prieto established that

the plan continued to be appropriate for Student and that he was motivated to meet his daily behavior goals and earn rewards such as Pokémon Cards. There were other aspects of the IEP to which Mother did not agree and she did not provide consent to any components of the IEP during the November team meeting; however, the team agreed to meet again. The offered behavior intervention plan was appropriate.

31. Student's IEP team met again on February 25, 2015, during which the behavior intervention plan was reviewed again. Ms. Prieto and Ms. Kelly established that the offered plan continued to be appropriate and he was making progress at that time including becoming more engaged and focused in the classroom. The team discussed that Student had more behavior challenges during unstructured time, where he exhibited some impulsivity, for example on the playground. Mr. Sandoval, one of Student's advocates, suggested revising the behavior plan to include more interventions for Student outside such as speaking with a teacher if, for example, he was getting too daring on the monkey bars or appeared hyperactive. Additionally, Mother requested that Student be allowed to take breaks and go outside to release energy if needed. The Parlier members of Student's IEP team agreed to revise the plan and another IEP team meeting was scheduled for March 12, 2015.

32. On March 12, 2015, the team met again and reviewed Student's IEP including the behavior intervention plan. Again, Ms. Prieto discussed that Student's behavior continued to improve, although he still had needs in the area of off task behavior. Even though he had no incidents of physical aggression since the last IEP team meeting, the team agreed that it remained appropriate to continue offering counseling services and behavior goals to address physical aggression. The behavior intervention plan was revised to include additional breaks outside and more specificity on the "check in-check out" form if Student were given any consequences throughout the day for behavioral incidents. Although Mother did not provide consent at that time for

Student's IEP including the behavior plan, the offered plan remained appropriate to meet Student's needs.

33. Student's IEP team met again on March 24, 2015. They briefly discussed Student's behavior plan. Mother objected to the term "physical aggression" as Student exhibited such behavior very infrequently. The Parlier members of Student's IEP team agreed to modify the behavior plan to specify that Student exhibited "physical aggression when provoked." The change was made and the offered plan continued to be appropriate.

34. Student's IEP team met on March 27, 2015, and again on May 29, 2015. Minor adjustments were made to Student's behavior plan, such as including the ability to go to a trusted adult when he felt frustrated or overly excited and formalizing a reward for meeting daily behavior goals. The plan, with these minor adjustments, continued to be appropriate to meet Student's behavior needs. Mother did not consent to the IEP.

Implementation of Behavior Support Plan 2014-2015

35. The only agreed upon and implemented behavior plan throughout the 2014-2015 school year was the one consented to in January 2014 when Student was in the fourth grade. Student contends that the plan was not implemented with fidelity throughout the fifth grade.

36. Ms. Prieto established that the plan was consistently implemented when Student was in her class, outside on the playground, and when Student was receiving services from Ms. Gazaway in the resource room. Ms. Kelly established that she provided counseling services and worked diligently with Student and staff to implement his behavior plan. The one glaring exception to the plan's consistent implementation was during physical education.

37. Jason Ban was Student's physical education teacher during the 2014-2015

school year. That year was his first year as a credentialed teacher. Mr. Ban testified that he never saw Student's IEP and was unaware of any components of his IEP including Student's behavior support plan. Parlier argued that even though Mr. Ban was unaware of Student's specific IEP, he implemented the plan via that school-wide PBIS program. This argument was not persuasive.

38. When questioned, some Parlier witnesses struggled to recite the specific words for the acronym PBIS. With the limited exception of Mr. Ban, however, those same witnesses were able to articulate the components of the PBIS program, its intended purpose, and how it was implemented in their respective classes or school wide. Mr. Ban was unable to explain the program, its tiered system, or the specifics he implemented in his class except for a vague description of reflection questions. Under PBIS at Benavidez, when a student exhibits behavior requiring more than redirection but less than a referral to the office, that student is given reflection questions to answer. Mr. Ban was not able to recall the questions.

39. Mr. Ban did not refer Student to the office. He did, however, explain that on occasion Student attempted to leave the outside physical education area without permission or would not follow Mr. Ban's instructions. On several occasions, Mr. Ban asked Student to complete the reflection questions. Mr. Ban was not aware that Student had significant written language needs that impacted Student's ability to respond appropriately to the reflection questions, and that he was entitled to frequent breaks pursuant to his IEP.

40. Mr. Ban did not implement the behavior plan included in Student's IEP during physical education. That failure was material and not a minimal deviation from Student's IEP. Mr. Ban lacked any knowledge about Student's unique needs, Student's IEP including his behavior plan, and only marginally understood the school's PBIS program. Overall, Student spent the vast majority of his time at school outside of the

physical education program where his IEP was implemented with fidelity.

2015-2016 SCHOOL YEAR

41. On June 18, 2015, following the 2014-2015 school year, Mother sent a letter to Parlier's director of special education informing him she agreed to the November 20, 2014, IEP, as amended during the multiple meetings held that year contingent upon Parlier meeting certain conditions. Those conditions included Parlier inserting Mother's contentions regarding numerous disputed allegations in the IEP as factual statements. Mr. Aguilar, the director of special education, correctly did not consider this consent to the IEP. Mr. Aguilar informed Mother that he would include the statements as parental concerns but not include them as factual statements. Mother did not agree and did not sign the IEP. At the beginning of the 2015-2016 school year, Parlier continued to implement the IEP consented to in January 2014.

42. Ms. Prieto accepted a new position at Benavidez as a sixth grade general education teacher for the 2015-2016 school year. At the beginning of the school year in August 2015, Student was assigned to her class. Ms. Gazaway, Mr. Ban, and Dr. Rosas, left Benavidez before the 2015-2016 school year. Student's resource teacher for sixth grade was Beatriz Flores, his physical education teacher was Priscilla Uresti, and Courtney Jimenez became principal.

43. According to Ms. Flores and Ms. Uresti, Student generally transitioned well to sixth grade but pushed the boundaries in both classes at the beginning of the school year. Student's behaviors included being off task, sometimes wandering around and leaving the resource room without permission, and not complying with Ms. Uresti's instructions in physical education. Ms. Prieto was not surprised by Student's behavior as Student had also exhibited more maladaptive behaviors at the beginning of fifth until he became familiar with the routine and expectations.

44. At the same time that Student was transitioning to sixth grade, the

contentious relationship between Mother and the Parlier staff (beyond Student's IEP team) hit a new peak. In September 2015, for reasons not at issue in this case, Parlier revoked consent for Mother to enter the three school sites where her children attended school for 14 days. Mother established that this was difficult for Student because he felt partially responsible, due to the ongoing disputes over his education and that, up to that point, she delivered a homemade hot lunch to him daily and was frequently on campus. Student's behavior was negatively impacted by this tension.

Mother's Ability to Participate in IEP Development

45. By mid to late September, Student had successfully transitioned to sixth grade and his behavior returned to a level consistent with that seen at the end of fifth grade until October 1, 2015. On that day, Student was referred to the office three times; twice for physical altercations with peers and once he was sent by Ms. Uresti for failing to follow instructions in her class.

46. Student was counseled regarding the first two incidents, assigned detention, and sent back to class. The third time Student was sent to the office he walked in the back door, did not stop, walked out the front door and off campus where his mother was standing. Ms. Jimenez confirmed with office staff that Student had not been checked out of school by Mother and she went to speak with Mother and Student. There is a factual dispute about what ensued between Mother and Ms. Jimenez. That dispute need not be resolved to address the issues in this case. Ultimately, Student was suspended for one day (October 2, 2015) and Mother was again served with a Notice of Withdrawal of Consent to Enter Benavidez Elementary School Campus for a period of 14 calendar days.⁵ The notice is dated October 2, 2015, but it was not established when

⁵ The stay-away notice removing consent for Mother to enter campus following the incident on October 1, 2015, was for 14 days and not 28 days as alleged in the issue.

Mother received the notice. Additionally, the notice did not indicate the specific date it expired.

47. The notice to Mother removing consent was an official written document that included legal citations and references to Parlier's board policies. It also stated that security was alerted to the matter and that, "[s]hould you attempt to enter upon the Benavidez Elementary School campus, you will be arrested. If convicted, you will be subject to a fine of up to \$500.00, imprisonment in county jail for up to six (6) months, or both."

48. Mother testified that she requested an IEP team meeting but did not indicate when or how the request was made. While Mother's consent to enter campus was removed, Parlier attempted to schedule that IEP team meeting.⁶ A meeting notice was sent on October 4, 2015, scheduling a meeting for October 16, 2015, at Benavidez which was after the stay-away notice was served but prior to its expiration. Mother informed the staff that she would not attend because of the stay-away notice.

49. Ms. Jimenez testified that Mother could have come to the scheduled IEP team meeting because the stay-away notice did not extend to legitimate school business such as attending IEP team meetings. Ms. Jimenez's opinion regarding

There were references to an earlier 14 day stay-away notice; however, it was not introduced into evidence and no specific information was provided regarding the notice or when it was operative. Accordingly, only the notice removing consent for Mother to enter campus for 14 days following the October 1, 2015, incident is considered in this Decision.

⁶ A parent conference was scheduled for October 6, 2015, to discuss the suspension. Mother did not attend that meeting due to the notice. That conference was a general education function and her participation is not analyzed herein.

Mother's ability to enter campus was contrary to the express language in the notice. Additionally, Parlier did not send anything to Mother in writing indicating that she could enter campus with permission of the principal for legitimate business during the stay-away period. In light of the extremely clear language in the notice, and no written permission contradicting the notice, it was reasonable for Mother to refuse to enter the campus for an IEP team meeting during that time.

50. Mother was not offered an alternative such as participating telephonically in the IEP team meeting or holding it in a location not subject to the stay-away notice. The IEP team meeting during the stay-away period was cancelled. Parlier scheduled another IEP team meeting for October 21, 2015. Student's annual IEP team meeting was held on November 6, 2015.

Beginning of 2015-2016 School Year Through November 6, 2015

STUDENT'S NEEDS

51. At the beginning of the 2015-2016 school year, Student was in the sixth grade. He had behavior needs in the area of off task behavior and physical aggression. Student interacted well with his peers but had more challenges with both impulsivity and social interaction during unstructured time such as recess and lunch. Regarding academics, Ms. Prieto established that Student was below grade level and had needs in reading, English language arts, writing, and to a lesser degree in math.

52. As discussed above, Student's IEP team met multiple times throughout the 2014-2015 school year and Parlier adjusted its offer of FAPE throughout this process. Mother did not formally consent to any of these offers. Parlier's FAPE offer at the beginning of the 2015-2016 school year up to November 6, 2015, was the culmination of these meetings. Student's IEP offered in relevant part 450 minutes weekly of pull out specialized academic instruction; 90 minutes per day of push-in aide support during math and English language arts to be provided in the general education classroom;

adult supervision during morning and lunch recess to monitor Student from a distance to ensure he was not engaging in dangerous activities (such as jumping off the top of the monkey bars) or having negative peer interactions that could be a precursor to a physical altercation. Parlier also continued to offer the behavior intervention plan described above. Student's IEP included numerous accommodations including taking short breaks between assignments, among others.⁷

APPROPRIATENESS OF DISCIPLINARY STRATEGY

53. Student continued to have behavior needs in the same areas as he did during the 2014-2015 school year. Although he pushed the boundaries at the beginning of sixth grade in both his resource and physical education classes, Ms. Flores and Ms. Uresti established that Student's offered behavior plan remained appropriate to meet his needs.

54. Student transitioned well in his general education sixth grade class and did not display increased maladaptive behaviors, as he was already familiar with and had established a positive relationship with Ms. Prieto.

55. The events of October 1, 2015, were not typical for Student and resulted in a one day suspension. The isolated incident of that day does not impact the overall appropriateness of Student's behavior plan. Additionally, following his return, Student had a marked improvement in his behavior. He consistently met his daily behavior goals using the "check in-check out" component of PBIS. Student was not referred to the office for additional disciplinary intervention following his suspension.

56. The disciplinary strategy offered by Parlier was appropriate to meet

⁷ Student's IEP also included several other components not at issue in this case such as annual goals and additional services. The appropriateness of these is not analyzed herein as they are outside the scope of this hearing.

Student's needs, was not punitive, and did not produce additional anxiety in the school environment.

INSTRUCTIONAL AIDE GENERAL EDUCATION AND UNSTRUCTURED TIME

57. Parlier offered Student 90 minutes daily of instructional aide support during math and English language arts in his general education classroom. Ms. Preto established that this was an appropriate level of support to assist Student in these two academic areas. Although Mother did not accept the services, from the beginning of the school year in August through November 6, 2015, Parlier offered appropriate instructional aide support.

58. In addition to aide support, Parlier offered Student dedicated staff monitoring during morning and lunch recess. Mother was concerned that on the occasions Student was physically aggressive toward peers, it was only in response to their provocation occurring on the playground. To help intervene prior to an incident of physical aggression, if needed, Parlier offered an adult staff member to observe Student from a reasonable distance during recess and lunch. Although the incidents of physical aggression were infrequent, the evidence established that having dedicated adult supervision during recess and lunch was appropriate for Student. The staff monitoring was offered from the beginning of the school year through November 6, 2015, but not accepted at that time. The level and configuration of service was appropriate.

November 6, 2015, Through the Due Process Hearing

59. Student's annual IEP team meeting was held on November 6, 2015, and November 13, 2015. Student's needs changed somewhat over the previous year. Regarding academics, Ms. Prieto established that Student continued to have needs in reading, English language arts, and math. Ms. Flores and Ms. Prieto both concurred that due to the added academic demands in sixth grade coupled with Student's limited

English proficiency, writing and English language arts required more intensive intervention than the prior year. Both, however, saw continued improvement in math such that Student was now more participatory and exhibited confidence in this area. The evidence established that with aide support, Student was able to work in math almost exclusively in his general education class with minimal support from Ms. Flores during resource. The primary focus of the time Student spent in resource would shift to reading and English language arts, including writing. Student's IEP team accurately identified his areas of academic need.

60. Student's behavior also improved but the areas of concern were identified as not following directions when prompted by his teacher (a component of off-task behavior); physical aggression when provoked; and elopement. Regarding the latter, Student's IEP team correctly determined that because Student attempted to leave his resource class without permission at the beginning of the school year and walked off campus on October 1, 2015, to meet Mother in the parking lot, elopement emerged as a new area of need. Student's consistent behavior no longer required daily monitoring through the "check in-check out" portion of PBIS. Student's IEP team accurately identified his areas of behavior need.

61. Parlier offered Student 600 minutes per week of pull-out specialized academic instruction in the resource room; 45 minutes of push-in aide support in his general education math class; and staff monitoring during recess and lunch. Student's IEP also included numerous accommodations including short breaks between assignments when Student was overwhelmed. Student's IEP contained other provisions, such as goals, and related services not at issue in this case.

62. Student's IEP team also drafted a new behavior intervention plan. As noted above, the plan identified three behaviors that impeded learning: not following directions within 30 seconds of teacher request, physical aggression when provoked,

and elopement. The need for a behavior plan was identified at the second or moderate level on the four point scale. The behavior plan was thorough in that it contained an analysis of environmental factors; necessary changes; how to remove the problem behaviors; and desired alternative behaviors. The plan also included behavioral goals to teach replacement behavior.

63. The components of Student's IEP discussed above were appropriate to meet his needs. The evidence established that it was appropriate for Student to have additional aide support during his general education math class so that his resource time could be more focused on reading, writing, and English language arts. This was appropriate based on Student's continued improvement in math. Additionally, although Student rarely engaged in physical aggression, having a dedicated staff member to observe Student during unstructured time such as recess and lunch provided a person for Student to go to if Student felt frustrated and also to intervene, if needed, to avoid a physical altercation. Finally, Student's behavior intervention plan was appropriate. It was comprehensive, and addressed both his improved behavior by eliminating the daily "check in-check out" process and represented a thoughtful and measured shift by including a focus on teaching alternatives to elopement. The behavior intervention plan was an appropriate disciplinary strategy. Mother consented to Student's IEP on November 17, 2015.

November 2015 IEP Implementation Through Due Process Hearing

64. Student generally alleged that Parlier failed to provide an appropriate disciplinary strategy, dedicated staff monitoring, and instructional aide support throughout the entire 2015-2016 school year up to the time of hearing. That portion of Student's issues is construed as an allegation that Parlier failed to implement those components after Mother consented to the IEP on November 17, 2015. Student also alleged that Parlier did not implement his IEP after Mother provided consent by failing

to give Student short breaks between assignments when he is overwhelmed; not permitting Student to participate in his physical education class and other classes due to continuous referrals to the office; and failing to implement his specialized academic instruction.⁸ The evidence did not support these contentions.

65. Student's behavior intervention plan was partially developed by Ms. Prieto and Ms. Flores and they were familiar with its components. Additionally, Ms. Uresti established that she received a copy of Student's IEP after Mother signed consent and that she was familiar with the disciplinary strategy contained therein. All three testified convincingly that they implemented Student's behavior intervention plan with fidelity. There was no evidence presented to the contrary.

66. Following Mother's consent, Mr. Ochoa was assigned as Student's instructional aide. He was also identified as the staff member responsible for monitoring Student during recess and lunch. Student argued that Mr. Ochoa was absent for one week and that Parlier failed to provide aide services or monitoring during that time. Ms. Prieto testified that a substitute aide was obtained by Parlier and provided aide services to Student in her class as well as staff monitoring during Mr. Ochoa's absence. No other evidence was presented to the contrary. Ms. Prieto was credible on this point and established that Parlier did implement the aide services and staff monitoring as identified in Student's IEP.

67. Ms. Prieto, Ms. Flores, and Ms. Uresti all testified unequivocally and convincingly that Student is permitted to take breaks between assignments if

⁸ Student alleged that Parlier failed to implement 450 minutes of weekly specialized academic instruction; however, Student's accepted IEP actually provided for 600 minutes of weekly specialized academic instruction and is analyzed according to the IEP.

overwhelmed. Both Ms. Prieto and Ms. Flores established that Student's preferred break is to go to the bathroom and get a drink of water. Ms. Uresti established that physical education class does not include traditional assignments requiring breaks, but that she liberally permits Student to use the bathroom if requested. Student failed to meet his burden that he is not permitted to take breaks between assignments if overwhelmed.

68. Student also alleged that he is not permitted to attend physical education due to continuous referrals to the office. This contention was not supported by the evidence. Ms. Uresti testified that prior to the November IEP, she sent Student to the office on three occasions for behavior. From November 2015 through the time of hearing, Student had no referrals to the office in physical education or any other class. This testimony was also supported by Ms. Jiminez who testified that she is notified and requested to meet with students being referred to the office and had no such requests for Student. Additionally, she reviewed the school's discipline report system prior to hearing and also confirmed that no referrals had been logged into the system for Student. Accordingly, Student failed to meet his burden that his IEP was not implemented such that he was referred to the office and missed physical education or other classes.

69. Student also asserted that Parlier failed to implement his IEP regarding specialized academic instruction. Ms. Flores credibly and unequivocally testified that Student has received pull-out specialized academic instruction at the level identified in his IEP. Ms. Prieto also established that Student attends his resource services consistent with his IEP.

70. During hearing it appeared that Student was asserting that Parlier failed to implement these services during Ms. Flores' three day absence. Ms. Flores testified that she was sick for three days but it was in September, two months prior to the time alleged in this issue. Additionally, she established that during her absence, her

instructional aide provided additional push-in support to Student in his general education class and that she made up all missed minutes when she returned after her brief illness. Student did not establish that Parlier failed to implement Student's IEP regarding specialized academic instruction.

LEGAL CONCLUSIONS

INTRODUCTION: LEGAL FRAMEWORK UNDER THE IDEA⁹

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

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.

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 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.

DISCIPLINARY STRATEGY 2014-2015

Appropriateness

6. When a special education student’s behavior impedes the child's learning or that of others, a district must consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. (20 U.S.C. § 1414(d)(3)(B)(i);

34 C.F.R. § 300.324(a)(2)(i); Ed. Code, § 56341.1, subd. (b)(1).) This consideration frequently results in a behavior support plan, though no statute or regulation uses that term. 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.)

7. Student argued generally that his behavior support plan was not appropriate because, among other things, it was not based on a formal functional analysis assessment. For more serious behavioral problems, California law formerly required a behavior intervention plan based on a functional analysis assessment, both of which were subject to many detailed regulatory requirements. (*See former* Cal. Code Regs., tit. 5, §§ 3001, subds. (e)-(g), (ab), 3052.)

8. There was no evidence presented in this case establishing that Student had behavior needs that rose to the level of requiring a formal functional analysis assessment to create an appropriate behavior plan. That aside, in July 2013, the law repealing these regulations went into effect and on October 16, 2013, the California Office of Administrative Law approved the repeal of the code of regulations setting forth the requirement to conduct such an assessment. Therefore, even if Student established that he had severe behavioral needs that formerly would have required a functional analysis assessment, that law was not in effect during the 2014-2015 school year. Accordingly, Parlier was not required by law to conduct a functional analysis assessment to develop an appropriate behavior plan for Student.

9. In this case, Parlier established that for the entire 2014-2015 school year, it offered an appropriate disciplinary strategy that met Student's needs. Specifically, Student exhibited off task behavior and, on an infrequent basis, was physically aggressive toward his peers. Student's IEP team developed a behavior support plan that

included a detailed analysis of these behaviors, why they occurred, and the desirable replacement behaviors. This plan also incorporated components of the school wide PBIS program. The offered plan was reviewed but only slightly revised (such as adding the words "when provoked" as a qualifier to physical aggression) and remained appropriate throughout the 2014-2015 school year.

10. The implemented behavior plan was positive and effective at meeting Student's behavior needs. The offered behavior plan that Mother did not consent to was nearly identical to the one implemented and was also positive and could have been effective in meeting Student's behavior needs. The evidence established that over the course of the school year, Student's behavior continued to improve in both Ms. Prieto's general education class and in Ms. Gazaway's resource class. Student failed to meet his burden that the plan was punitive, or that it produced anxiety. Student also failed to establish that Dr. Rosas had disciplined Student inconsistent with the plan or in a way that was punitive or anxiety producing.

Implementation

11. A failure to implement an IEP may deny a child a FAPE and thereby give rise to a claim under the IDEA. (*Van Duyn v. Baker Sch. Dist. 5J* (9th Cir. 2007) 502 F.3d 811 (*Van Duyn*)). Minor implementation failures are not actionable given that special education and related services need only "conform" to the IEP. A school district is not statutorily required to maintain perfect adherence to the IEP. When a school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the child's IEP. A material failure occurs "when there is more than a minor discrepancy between the service a school provides to a disabled child and the service required by the child's IEP." (*Id.* at pp. 815, 821-822.) *Van Duyn* specifically rejected a "per se" standard whereby any failure to implement the IEP as written gave rise to an automatic IDEA violation. Instead, when

implementation failures occur, it requires analysis of the nature, extent and impact of the failure. (*Id.* at pp. 824-825.)

12. The evidence established that Student's behavior plan was implemented with fidelity throughout his school day and across settings with the exception of during physical education. Mr. Ban, Student's physical education teacher throughout the 2014-2015 school year established that he never saw Student's IEP, was not familiar with his disability, and was not aware of the components of the IEP to be implemented in his class.

13. Education Code section 56347 requires that each district must ensure that the regular teacher or teachers, have access to the pupil's IEP, are knowledgeable about its content, and are informed of their specific responsibilities related to implementing a student's IEP. That includes being knowledgeable about the specific accommodations, modifications and supports that shall be provided in accordance with the IEP. Parlier failed to implement Student's IEP during physical education. This was more than a minor implementation failure. Mr. Ban required Student to complete reflection questions but was not aware of Student's challenges with written language. Mr. Ban also had no knowledge of the components of Student's behavior plan that included meeting daily behavior goals. This omission was significant and rose to the level of denying Student a FAPE throughout the 2014-2015 school year.

Mother's Participation in IEP Development

14. 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).) The court in *Doug C. v. Hawaii Dept. of Educ.* (9th Cir. 2013) 720 F.3d 1038, noted that protecting parental participation is among the most important procedural safeguards in the IDEA.

15. Mother asserted that Parlier denied her the right to participate in Student's IEP development process during the 2015-2016 school year by removing her consent to enter the school site for 14 days as a result of the incident that occurred on October 1, 2015. On October 4, 2015, Parlier scheduled an IEP team meeting to be held at Benavidez on October 16, 2015, during the time Mother was not permitted on campus. Mother notified Parlier that she refused to attend due to the stay-away notice. Parlier cancelled the October 16, 2015, meeting and rescheduled it for October 21, 2015, after the stay-away notice expired. No evidence was presented regarding whether an IEP team meeting was actually held on October 21, 2015.

16. The October meeting was scheduled pursuant to Mother's request. An IEP team meeting requested by a parent shall be held within 30 days, not counting days between the pupil's regular school session, terms, or days of school vacation in excess of five school days, from the date of receipt of the parent's written request. (Ed. Code, §56343.5.) There was no evidence presented regarding specifically when this request was made. Accordingly, Student failed to meet his burden that scheduling the meeting for October 21 as opposed to October 16 failed to comply with the requirement to hold a meeting within 30 days of parental request.

17. Additionally, a district must review the child's IEP at least once a year in order to determine whether the student's annual educational goals are being achieved, and make revisions if necessary. (20 U.S.C. § 1414(d)(4); Ed. Code, § 56341.1, subd. (d).) Student's annual IEP team meeting was due no later than November 20, 2015. Student's

annual IEP team meeting was timely held on November 6, 2015.

18. Parlier had options available to permit the October 16, 2015, IEP team meeting to proceed. It could have sent Mother written notice clarifying that the stay-away notice did not remove consent for her to enter campus for legitimate school business as testified to by Ms. Jimenez. Alternatively, the meeting could have been moved to a different location not on the Benavidez campus. Despite the availability of these alternatives, nothing in the law required Parlier to utilize them. Ultimately, the meeting was rescheduled to October 21, 2015, just five days later. The evidence established that no decisions regarding the identification, assessment, educational placement, and provisions of a FAPE to Student were made during the stay-away period. Additionally, Student did not meet his burden to establish that Parlier failed to hold a timely meeting either in response to parental request or as an annual IEP team meeting. Therefore, Student did not meet his burden that he was denied a FAPE based on lack of parental participation due to the stay-away notice imposed in October 2015.

DENIAL OF FAPE 2015-2016 SCHOOL YEAR UP TO DATE OF HEARING

Disciplinary Strategy and Implementation Beginning of School to November 6, 2015

19. As discussed above, a school district is obligated to consider the use of positive behavioral interventions and supports, and other strategies to address behavior that impedes the child's learning or that of others. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i); Ed. Code, § 56341.1, subd. (b)(1).) The evidence established that the behavior plan offered to Student from the beginning of the school year up through November 6, 2015, was appropriate to meet his needs. It addressed the behaviors that primarily impeded his learning, namely off task behavior and occasional physical aggression when provoked. The plan included positive interventions and strategies such as "check in-check out" with the opportunity to receive rewards for meeting daily

behavior goals.

20. The fact that Student pushed the boundaries in resource and physical education at the beginning of the year did not render the plan inappropriate. To the contrary, the plan was effective in that once Student developed relationships with Ms. Flores and Ms. Uresti, he began to comply with behavioral expectations as he learned the routine in each class. With the limited exception of October 1, 2015, where Student was sent to the office three times, Ms. Prieto established that overall Student's behavior was more consistent and better at the beginning of sixth grade than it had been in fifth grade. The fact that Student's behavior required three trips to the office on October 1, 2015, was isolated and had not occurred previously. Moreover, from the time Student returned from his one day suspension until the date of the due process hearing, four months later, Student was not referred to the office at all for behavioral reasons. Accordingly, Student did not meet his burden that the disciplinary strategy, including his behavior intervention plan, was not appropriate and denied him a FAPE.

21. Additionally, the evidence established that Student's behavior plan was implemented consistently during the 2015-2016 school year. Ms. Prieto, Ms. Flores, and Ms. Uresti credibly testified to the components of Student's IEP, including those related to behavior. Each one described with specificity how they implemented Student's IEP in their respective classes. Accordingly, Student did not meet his burden to establish that his IEP was not implemented regarding the disciplinary strategy from the beginning of the school year through Student's annual IEP on November 6, 2015.

Instructional Aide and Staff Monitoring

22. Student's issues include an allegation that Parlier failed to offer and provide the related services of an instructional aide during his general education class and dedicated staff monitoring during recess and lunch for the entire 2015-2016 school year up to the time of hearing. "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].) If a parent refuses to consent to services, the school district shall not provide special education and related services to the child and the school district shall not be considered to be in violation of the requirement to make available a free appropriate public education to the child for the failure to provide such child with special education and related services. (20 U.S.C. §1414(a)(1)(D)(i)(II).)

23. At the beginning of sixth grade, up to Student's annual IEP team meeting on November 6, 2015, Parlier's offer of FAPE was generated over the course of multiple meetings the prior school year and was clarified again in writing during the summer before sixth grade. Parlier established that during the 2014-2015 school year, the parties were actively engaged in IEP revisions, not specifically at issue in this case, rather than just continually meeting with a vague hope that they would reach agreement. Parlier established that by the end of the 2014-2015 school year, it offered Student both instructional aide services during his general education class and dedicated staff monitoring for recess and lunch but Mother did not accept the offer of services. No evidence was presented contradicting that this offer was made.

24. California Education Code section 56346(f) requires school districts to initiate a due process hearing if the school district determines that a portion of an IEP to which a parent does not consent is necessary to provide a FAPE. (See, *I.R. by E.N. v. Los Angeles Unified School Dist.* 805 F.3d 1164 holding that a district's decision to wait a year and a half without filing for a special education due process hearing following parent's failure to consent to services necessary to provide a FAPE considered an unreasonable delay.) In this case, Parent filed for due process on October 7, 2015, less than two months into the 2015-2016 school year. Accordingly, under the facts of this

case, Parlier was not required to file for due process sooner during the 2014-2015 school year.¹¹

25. The related services of an instructional aide during Student's general education class and dedicated staff monitoring were offered to Student at the beginning of the 2015-2016 school year. Parlier was precluded from implementing those services because Mother had not provided consent for the services. Additionally, as Student filed for due process just two months into the 2015-2016 school year, Parlier was not obligated to file sooner during the current school year to implement these services. Accordingly, Student failed to establish he was denied a FAPE for Parlier's failure to offer and provide aide services and dedicated staff monitoring during recess and lunch from the beginning of the school year up to his annual IEP team meeting on November 6, 2015.

Disciplinary Strategy and Implementation November 6, 2015, Through Hearing

26. Student's annual IEP team meeting was held on November 6, 2015, and November 13, 2015. Student's IEP team reviewed his then current behavior needs. Student's IEP team correctly determined that Student continued to exhibit off task behavior but refined the need further by clarifying that, when off task, Student needed to comply with teacher requests within 30 seconds. His IEP team also determined that Student continued to exhibit a need to refrain from physical aggression when provoked. Finally, Student's IEP team also determined that Student exhibited a need regarding elopement both in class (as exhibited on occasion in his resource class) and in leaving

¹¹ No legal conclusion is reached in this Decision regarding Parlier's obligation, if any, to file for due process during the 2014-2015 school year as that issue was not litigated herein.

campus as he did on October 1, 2015. Student's IEP team determined that his overall behavior had improved to the level where he no longer required daily behavioral goals or "check in-check out". Mother consented to the IEP on November 17, 2015. The disciplinary strategy offered to Student in his behavior intervention plan included appropriate positive behavior strategies and supports. Additionally, the plan has been effective in that Student had not received a single disciplinary referral to the office from the plan's implementation in November 2015 up to the time of hearing.

27. The evidence established that Student's behavior intervention plan as contained in his IEP consented to on November 17, 2015, was implemented in all classes. No evidence was presented to the contrary. Accordingly, Student did not meet his burden that Parlier failed to offer or provide an appropriate disciplinary strategy during the 2015-2016 school year from November 6, 2015, up to the time of hearing.

Instructional Aide and Staff Monitoring

28. Student's November 6, 2015, included an offer of instructional aide services during his general education math class and dedicated staff monitoring during recess and lunch. Mother accepted these services on November 17, 2015. Student did not argue at hearing that the services were not appropriate. Rather, Student argued that these services were inconsistently implemented up to the time of hearing.

29. Ms. Prieto established that Mr. Ochoa was assigned to provide both services to Student following Mother's consent. She also established that Mr. Ochoa was absent for one week but that a substitute aide was provided to Student during that week. No credible evidence was presented to the contrary. Accordingly, Student failed to meet his burden of establishing that Parlier failed to provide aide services and staff monitoring consistent with his IEP. Therefore, Student was not denied a FAPE in this respect.

Failure to Implement Student's November 2015 IEP

30. Student argued that Parlier failed to implement his November 2015 IEP after Mother provided consent regarding short breaks between assignments when Student is overwhelmed; permitting Student to participate in physical education and other classes due to continuous referrals to the office; and providing specialized academic instruction.

31. The evidence in this case did not support Student's contention. Ms. Prieto and Ms. Flores established that they do provide Student short breaks between assignments when he is overwhelmed. Ms. Uresti established that her class involves physical activities and she does not give assignments that make Student overwhelmed. Ms. Uresti, like the other teachers, established that they do permit Student to use the restroom and take water breaks liberally. Student did not present any contrary evidence and failed to establish that his IEP was not implemented regarding short breaks between assignments.

32. Regarding office referrals, all Parlier witnesses who spoke to this issue, including Ms. Jimenez, testified that Student had not been referred to the office for disciplinary reasons during physical education or any class from the time Student's IEP was consented to in November 2015 up through the time of hearing. The testimony was credible and no contrary evidence was presented. Therefore, Student failed to establish that Parlier failed to implement his IEP due to continuous office referrals.

33. Finally, Student argued that Parlier failed to consistently implement his specialized academic instruction. As noted previously, he asserted that his specialized academic instruction was at a level of 450 minutes per week but the November IEP consented to actually offered Student 600 minutes per week. Ms. Flores established that she has provided services consistent with Student's IEP since it was accepted. The only exception was during three days when she was ill in September 2015.

34. The three day lapse in services did not result in a denial of FAPE. It occurred prior to the time alleged in the issue. More importantly, Ms. Flores, whose testimony was corroborated by Ms. Prieto's, established that Ms. Flores made the services up upon her return. No contrary evidence was presented. Accordingly, Student failed to meet his burden that Parlier did not implement his IEP regarding specialized academic instruction.

REMEDIES

1. Student established that Parlier denied him a FAPE during the 2014-2015 school year by failing to provide the disciplinary strategy contained in Student's IEP during his physical education class.

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. Appropriate equitable relief, including compensatory education, can be awarded in a decision following a due process hearing. (*Burlington Sch. Committee v. Mass. Bd. of Ed.*, 471 U.S. 359 (1985) at p. 374; *Clyde K v. Puyallup School Dist. No 3 (9th Cir. 1994)*, 35 F.3d 1396 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.*)

4. Student's complaint sought a variety of remedies not appropriate for the denial of FAPE in relation to Student's physical education class. For example, he requested prospective placement at Riverview School; however, he provided no evidence or testimony regarding this school or how it may be appropriate for Student. In his closing brief Student sought compensatory education for any denial of FAPE but did not present any evidence regarding what compensatory services were needed or appropriate.

5. The undersigned ALJ gave careful consideration to an appropriate remedy. There was no evidence presented that Student suffered a loss of educational opportunity for which compensatory physical education would be an appropriate remedy. The failure to provide a teacher with a Student's IEP throughout the course of an entire school year is significant and will not be overlooked. Accordingly, it is determined that a two-hour training by a third party not employed by Parlier regarding procedural safeguards including the requirements related to providing teachers copies of IEP's is an appropriate remedy. All of Student's other claims for relief are denied.

ORDER

1. Within 30 days of the date of this Decision, Parlier will conduct a two-hour training for all Benavidez teachers, administrators, and service providers regarding special education procedural safeguards.

2. The training must include an emphasis on the obligation contained in Education Code section 56347 requiring, among other things, that teachers have access to their students' IEP's, be knowledgeable about its content, and informed of their specific responsibilities related to implementing IEP's.

3. The training must be conducted by a person or persons with expertise in

special education law that is not employed by Parlier.

4. 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. Student prevailed on Issue 1 to the extent that during the 2014-2015 school year Parlier failed to implement the disciplinary strategies in Student's IEP during his physical education class; Parlier prevailed on the other issues heard and decided.

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: April 22, 2016

/s/

JOY REDMON

Administrative Law Judge

Office of Administrative Hearings