

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

TEHACHAPI UNIFIED SCHOOL DISTRICT.

OAH Case No. 2015120968

DECISION

Student filed a due process hearing request with the Office of Administrative Hearing on December 18, 2015, naming Tehachapi Unified School District. The parties filed a joint request for a continuance on February 4, 2016. OAH granted the continuance on February 4, 2016.

Administrative Law Judge Sabrina Kong heard this matter in Van Nuys, California, on May 31, June 1, 2, and 7, 2016.

Andrea Marcus and Kelly Kaeser, Attorneys at Law, represented Student. Mother attended the hearing on the first day, the morning of the second day, and the fourth day of the hearing.

Darren Bogié and Elizabet Rodriguez, Attorneys at Law, represented District. Dennis Ferrell, District's Director of Programs, attended the hearing on all days.

The matter was continued to June 28, 2016, for the parties to file written closing arguments. Upon timely receipt of the written closing arguments, the record was closed and the matter was submitted for decision.

ISSUES¹

1. Whether District denied Student a free and appropriate public education from December 18, 2013 to December 18, 2015, by failing to: (a) provide an appropriate behavior intervention plan; (b) administer behavior interventions in a manner that respects human dignity and personal privacy; and (c) initiate a due process hearing within a reasonable time after Parent failed to consent to the services offered under the August 29, 2014 individualized education program team meeting?

SUMMARY OF DECISION

Student demonstrated that District did not provide him with an appropriate behavior intervention plan from August 13, 2014 to September 10, 2014. District was not required to provide Student with a behavior intervention plan when Student did not attend a District school from September 11, 2014 to February 8, 2016. Student did not demonstrate that District administered behavior interventions in a manner that disrespected his human dignity and personal privacy. Further, Student did not demonstrate that District was required to initiate a due process hearing after the August 29, 2014 IEP team meeting. To remedy District's failure to provide an appropriate behavior intervention plan, District is ordered to provide a total of 12 hours of services from a Board Certified Behavior Analyst from a non-public agency.

FACTUAL FINDINGS

1. Student is a seven-year-old male who resided with Mother in the District's

¹ The issues have been rephrased and reorganized 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.)

boundaries at all relevant times. He was eligible for special education under the category of other health impairment because of his extensive health and orthopedic needs.²

2. Student was placed in a pre-school, special day class at Tompkins Elementary School during the 2013-2014 school year. Student did not attend school from October 11, 2013 to December 11, 2013, because he had surgery.

3. On December 12, 2013, Mother consented to a functional behavior assessment. Shortly thereafter, District had a two-week winter break. Student was absent the first week after winter break, and returned to school around January 14, 2014.

4. District psychologist Sharon Owen conducted the functional behavior assessment. The assessment was based on recorded data of Student's behaviors from August 19, 2013 to October 8, 2013, in Amanda Vidal's special day pre-school classroom, Ms. Owen's classroom observations during the period from January 14, 2014 to January 30, 2014, and interviews with Mother and Ms. Vidal. Student exhibited maladaptive behaviors including hitting (13 times), kicking (six times), pushing (once), head butting (six times), spitting (three times), profanity usage (six times) and yelling (19 times) with all adults and children throughout the day. However, Ms. Owen only identified yelling as a target behavior in the functional behavior assessment. She did not analyze why the other maladaptive behaviors were not identified as target behaviors when they also negatively impacted Student's education enough for Ms. Owen to note that they occurred repeatedly.

² Student has spina bifida, hydrocephalus, Arnold–Chiari malformation, and bilateral club foot. He has a ventriculo-peritoneal shunt to relieve fluid pressure on his brain. Student uses foot orthoses, derotational straps, and a posterior posture "reverse" walker to ambulate.

5. In February 2014, the IEP team used the results of Ms. Owen's functional behavior assessment to develop a behavior intervention plan for Student. The behavioral intervention plan noted that Student's yelling episodes could last up to 45 minutes, and that he had most difficulty during transitions. Ms. Owen recommended a picture schedule as a reminder of upcoming transitions, and teaching Student to use scripted phrases in a quiet voice, instead of yelling, to communicate his desires and frustrations. The script would be taught by modeling behavior, role-playing, performance feedback, generalizing and maintaining the script, and providing forced choice options.

6. The primary technique identified in the behavior intervention plan was known as the Tucker the Turtle technique. Student would be taught to: recognize his feelings; stop and think about his actions; tuck inside his proverbial "shell" and take three deep breaths; and come out of his "shell" when calm so he could think of a solution. The suggested strategies for staff to employ at school were redirection with a functional equivalent of a replacement behavior which Ms. Owens identified as Tucker the Turtle technique, and ignoring Student when he engaged in maladaptive behaviors. If those strategies did not work in reducing the maladaptive behaviors, the next strategy was for staff to remove other students away from Student and have Student supervised by his aide or a teacher in a time-out. The time-out would be for one minute, with the aide or teacher returning after each minute to ask if Student was ready to rejoin the rest of the students. Mother reported that Student loved music, going to the library, books on tape, and finding things with his flashlight. Student reported that he loved crafts, stickers, coloring books, and high fives. Ms. Vidal reported that Student enjoyed crafts and being a leader in class activities. Mother consented to the behavior intervention plan on February 27, 2014. District implemented the behavior intervention plan.

7. By April 3, 2014, Student's maladaptive behaviors improved. He no longer

hit, kicked, spat, used profanity, or head butted.

8. At the May 5, 2014 IEP team meeting, District offered transitional kindergarten, a general education placement for the 2014-2015 school year, extended school year for summer 2014, bus transportation, a full-time aide to assist with toileting and mobility needs, physical therapy, counseling, and social and behavioral intervention services. Mother consented to the May 5, 2014 IEP.

9. Student was placed in Shelley Marks' general education transitional kindergarten class on August 13, 2014, his first day of the 2014-2015 school year. District continued to implement the February 27, 2014 behavior intervention plan during the 2014-2015 school year. Student did well during the first week of the 2014-2015 school year. On August 15, 2014, Student had two minor yelling incidents. Around 8:30 a.m., Student yelled at Ms. Marks to communicate his displeasure with a sticker that was on his folder. When told to apologize and use nicer words to communicate his desires, Student refused. Student was told to sit outside with his aide until he was ready to apologize and used nicer words. After 10 minutes, he apologized and returned to class. Around 10:30 a.m., when Ms. Marks instructed all the students to trace a star with either a crayon or pencil, Student refused and demanded a marker for the activity. When told that a marker was not an option, Student threw the paper and star on the ground. After telling Ms. Marks that she hurt his feelings by helping other students and by not allowing him to use a marker, Student allowed Ms. Marks to help him trace the star. The second incident lasted a few minutes. However, Student's maladaptive behaviors escalated during the second week of school.

10. On August 19, 2014, when Student could not sit next to a particular student because the classroom seats were changed, he screamed, and tantrumed. Ms. Owen came to the class and walked Student to her office to calm him. Student lost over two hours of academic instruction that day because of his maladaptive behaviors.

11. On August 21, 2014, Student refused to leave the bus area after he got off the bus. District staff was concerned for Student's safety and, for 35 minutes, unsuccessfully tried to coax him to move to a safer area inside the gate. During this time, Student hit himself in the head with his hand and attempted to scratch a teacher who was trying to persuade him to move to a safer area. Student agreed to go to class by 9:00 a.m. At 9:15 a.m., Student started hitting himself in the head with his hand because he was upset when he was asked to use a pencil, instead of his preference of using a marker, in completing a worksheet. This persisted for 10 minutes until he was allowed to use a marker.

12. On August 22, 2014, Student refused to place a paper circle in a square on the carpet. When Ms. Marks told Student that he would not be allowed to participate in a playdough activity until he complied, Student hit Ms. Marks' hand with the circle and yelled "no." The rest of the class engaged in the playdough activity in another part of the classroom while Student sat on the carpet where he became more upset, kicked the wall, and banged his head against the wall. He was suspended one day, the following Monday on August 25, 2014, for this behavior.

13. On August 28, 2014, Student refused to perform an exercise during his physical therapy session, yelled at his aide and continued to hit the exercise mat when the aide attempted to provide choices to redirect him. When the aide took Student by the hand to escort him outside to the playground because other students were entering the room, Student hit his aide in the leg several times, hit the glass door, yelled and attempted to bite his aide. Ms. Vidal, the principal, and other staff were also summoned to assist the aide in calming Student, which included holding his hands to prevent Student from hurting himself or others. During this tantrum, Student hit the principal and the other staff while they tried to calm him. Student missed approximately 80 minutes of instructional time on that day because of his maladaptive behaviors.

14. Ms. Marks called an IEP team meeting to review Student's behavior intervention plan and discuss more effective strategies for handling Student's maladaptive behaviors. On August 29, 2014, the IEP team met and discussed Student's maladaptive behavioral incidents, considered removing Student from the classroom when he tantrumed, and agreed that Student's maladaptive behaviors required more behavioral enforcement strategies. The IEP team also discussed changing Student's general education placement back to a special day class, with which Mother disagreed. Mother agreed that Student could be removed from the classroom when he tantrumed and for staff to use a stroller to remove Student if he were disruptive. The IEP team agreed that Student's behavior intervention plan needed to be revised, and agreed to take the data needed for revising and developing more effective strategies in eliciting appropriate behaviors from Student. This IEP team meeting was not concluded. The first page of the August 29, 2014 IEP document contained conflicting information as to Student's placement, stating both that 18 percent of Student's day was in general education, and that Student's special day class placement ended on June 24, 2014. Despite this conflicting information, District did not make any new placement or services offer to Student. Student continued with the same placement in Ms. Marks' class and continued to receive all services under the operative May 5, 2014 IEP. District and Mother thereafter made attempts to schedule another meeting to continue discussions about how to address Student's behaviors.

15. On September 3, 2014, Student refused to return to class after recess; hit another student in response to the other student gently poking Student in the arm, and refused to apologize to the other student; yelled when Ms. Marks wrote his name on the board when Student refused to apologize to the other student; kicked the classroom cubbies; and when removed to the playground area, Student hit Ms. Vidal, the teacher who was supervising him. Student did not receive academic instruction for

approximately an hour that day because of his maladaptive behaviors.

16. On September 8, 2014, Student arrived by bus at school hitting, kicking and screaming because he was not allowed to sit next to a particular student on the bus because Student refused to stop poking this other student. When the other student was moved, Student got upset and could not be calmed when he arrived at school. When both the bus driver and Ms. Vidal tried to unbuckle Student from his seat on the bus, Student hit the bus driver. As a result, when Student got off the bus, staff placed him in a stroller, and took him to the "break room," a room where Ms. Vidal assisted Student's aide in redirecting and calming Student because his behaviors were too disruptive for class. When Ms. Vidal asked if he was ready to go to class, Student screamed, attempted to hit her and rocked back and forth in his stroller, which his aide had to hold to prevent it from tipping. Student continued yelling at the aide and when neither Ms. Vidal nor his aide was able to calm him, they escorted him to the principal's office where he was eventually calmed at around 10:00 a.m. Staff also held Student's hands to prevent him from hurting himself and others when he tantrumed. He missed approximately an hour and 40 minutes of academic instruction on that day because of his maladaptive behaviors.

17. Although Mother had agreed to permit District to place Student in the stroller in emergency situations, she did not believe the September 8, 2014 incident was an emergency situation that warranted Student's placement in the stroller. Mother was not present during the September 8, 2014 incident. Mother opined that the stroller was too small for Student which caused Student to sit awkwardly in it.

18. On September 10, 2014, Student started kicking book shelves causing books to fall off the shelves. When Ms. Marks tried to calm him, Student hit Ms. Marks on the arm with a closed fist. When Ms. Owen arrived and attempted to stop Student from hitting the glass window on the door, Student hit her arms, legs, and hands for

over an hour. District staff called Mother to pick Student up from school when Student could not be calmed. When Mother went to pick up Student, she observed Ms. Owen telling Student that he could go outside to have his snack when he changed his behavior only to have Ms. Marks deny Student the right to do so. Mother also believed that Student was inappropriately singled out for his maladaptive behaviors by being denied snacks when all the other students in Ms. Marks' class received snacks.

19. Ms. Marks distinguished the two types of snacks that were available to the students in her class: one was the snack each student brought from home which was typically consumed during recess and/or lunch; and the other was a snack which Ms. Marks gave to some students as a reward. Ms. Marks explained that she never withheld the snack from home as discipline, but withheld the "reward snack" for noncompliant behavior because such "reward snack" was only given those students who earned it, and not available to all students. She explained that because of the September 10, 2014 incident, she did not allow Student to go to recess for the first five minutes because he misbehaved, but did not recall if Student went to recess after the first five minutes passed on that particular day. Ms. Marks also explained that she typically withheld the first five minutes of recess when students in her class misbehaved, but allowed them to have recess after the five minutes passed.

20. Student was suspended for one day, September 11, 2014, as a result of the September 10, 2014 incident.

21. Mother opined that both the August 22, 2014 and September 10, 2014 suspensions were unwarranted, and that they were too attenuated to be an effective strategy for dealing with Student's maladaptive behaviors. Ms. Marks opined that Student was appropriately suspended for both of the August 22, 2014 and September 10, 2014 incidences, and believed that any general education student would have been suspended under the same circumstances.

22. Mother opined that Student was treated inappropriately by staff, specifically when staff used a variation of the phrase “making your Mother happy” as incentive to elicit appropriate behavior from Student when Student engaged in maladaptive behaviors.

23. Student did not attend school from September 11, 2014 to February 7, 2016 both because Mother did not believe District could provide appropriate behavioral supports to Student and because of his health/medical needs. During the 2014-2015 school year, Student attended 15 days of school.³

24. Districts psychologist Michelle Flores conducted a psycho-educational assessment of Student and prepared a report dated January 27, 2016. She assessed Student at home and did not observe Student in the classroom environment because Student was not attending any school at the time. Ms. Flores had a school psychology credential and a master’s degree in pupil and personnel services, and was a clinical coordinator for a non-public agency before beginning to work for District in August 2015. She received board certified behavior analyst coursework, but was not a Board Certified Behavior Analyst. Ms. Flores noted that Student argued with her and refused to answer questions during the assessment. She identified Student’s difficulty with maintaining attention, inflexibility to routine changes, and difficulty in engaging in non-preferred activities as behaviors that might adversely impact his educational performance. She did not recommend a functional behavior assessment because Student was not in school and Student needed to be assessed in school where strategies and interventions could be developed as a part of a behavior intervention

³ Student’s other FAPE issues, including home hospital instruction, was addressed in *Student v. Tehachapi Unified School District*, (2016), Cal.Offc.Admin.Hrngs. Case No. 2015060035.

plan that would meaningfully address any maladaptive behaviors Student might manifest in the school environment.

25. Student returned to school on February 8, 2016, during the 2015-2016 school year. He attended the general education class kindergarten class at Cummings Valley Elementary School. Student attended 62 days of school from February 8, 2016 to May 20, 2016. During the first week of school, general education teacher Leslie Damian reported that Student had difficulty following rules and his behaviors were disruptive. At one point, Ms. Damian had to clear her classroom of other students because of Student's maladaptive behaviors. By the second week of school, Ms. Damian reported that Student's behavior improved in class, that Student had adapted very well to the kindergarten class routines, and did well academically. By the fourth quarter report card for the 2015-2016 school year, Student was performing at grade level and received mostly threes on his report card, indicating that he had either completed correctly or mastered all the tasks required by kindergarteners. While during the period from February 8, 2016 to May 2016 Student received good grades, he still engaged in maladaptive behaviors such as kicking cabinets, throwing things from shelves, yelling, screaming, and refusing to follow instructions during non-academic times, *e.g.* transitions to physical therapy sessions and diaper changes.

DR. JEFFREY HAYDEN

26. Dr. Hayden conducted an independent functional behavior assessment of Student when Student returned to school in 2016, and was Student's expert at hearing. Dr. Hayden had a doctorate and master's degrees with emphasis in special education, disability and risk. He is also a Board Certified Behavior Analyst. He was the president of Hayden Consultation Services, Inc., since 2003, an organization which provides behavioral services funded by regional centers, insurance companies and private clients. Dr. Hayden had experience conducting hundreds of functional behavior analysis

assessments. He was not a school psychologist and did not have any special education teaching credentials.

27. Dr. Hayden reviewed the February 27, 2014 behavior intervention plan and opined that it was confusing and inadequate for the following reasons. First, yelling was the only targeted behavior when Student exhibited other maladaptive behaviors, including hitting, kicking, pushing, head butting, spitting, and profanity use. Second, yelling was selected without a determination of why it was an appropriate target behavior, or what the functions of the target behavior were. Functions for behaviors could be to escape or avoid a task or activity, get a tangible item, get attention, and for automatic reinforcement, e.g. something done for its intrinsic pleasure. Specifically, if the function of Student's yelling was to avoid a task, and Student received timeout each time Student yelled, then District would be reinforcing the maladaptive behavior of yelling because it allowed Student to avoid a non-preferred task by yelling.

28. Third, the behavior intervention plan District developed was based on behavioral data that was approximately seven months old between the time the data was first collected on August 19, 2013, and February 27, 2014, the date Mother consented to the implementation of the plan. During this period, the functions of Student's behaviors could have changed. Fourth, there was no data on Student's antecedent behaviors. Such data was needed to help understand the context in which the behaviors occurred, which was needed to understand what triggered various behaviors, which, in turn, was needed to determine appropriate ways to modify the behavior. Fifth, there were no data on the functional equivalent of replacement behavior, which is the substitution of an appropriate behavior as an alternative to the targeted behavior. While Dr. Hayden was not familiar with District's Tucker the Turtle Technique, he persuasively opined that although Tucker the Turtle Technique was listed as a replacement behavior, it was not a replacement behavior because using Tucker the

Turtle Technique did not allow Student to escape a non-preferred activity. A functional equivalent of replacement behavior would allow a student to escape a non-preferred activity when he used the replacement behavior in lieu of a maladaptive behavior.

29. Sixth, Dr. Hayden found there was no data on consequence strategies for the target behaviors, such as rewarding Student when such behaviors were not exhibited or denying Student a preferred activity when the target behaviors occurred. Data would need to be taken as to what were Student's specific likes and dislikes. Although Students' likes were recorded in the behavior intervention plan, there was no data on what Student disliked, or how Student's likes and dislikes were integrated into the behavioral intervention plan. Dr. Hayden opined that the February 27, 2014 behavior intervention plan did not have the necessary contextual data to support effective intervention behavioral strategies. Because Dr. Hayden's opinion as to the inadequacies of the February 27, 2014 behavior intervention plan was not directly contradicted by any of District's experts, Dr. Hayden's opinion was persuasive as to this issue.

30. Dr. Hayden conducted an independent functional behavior assessment of Student around April 2016.⁴ Dr. Hayden's assessment included observing Student for two days in late April 2016, approximately two to three hours each day, in Student's general education kindergarten class at Cummings Valley Elementary School, speaking with the teachers during the school observations, observing Student in the home setting, and speaking with Mother. Dr. Hayden also reviewed the results of the Questions About Behavioral Function Questionnaire filled out by Mother, Student's teacher, aide, and the principal, and reviewed various documents and prior assessments/reports provided by Mother and District. After the functional behavior

⁴ Evidence after December 18, 2015 was considered for determining an appropriate remedy.

assessment, Dr. Hayden prepared two reports, one dated May 1, 2016 and one dated May 19, 2016. The May 19, 2016 report included the Questions About Behavioral Function Questionnaire results filled out by Student's teacher, aide, and the principal, whereas the May 1, 2016 report did not because Mother was the only person who had provided her questionnaire results to Dr. Hayden by May 1, 2016. The Questions About Behavioral Function Questionnaire results showed that escape was the primary function of Student's maladaptive behaviors. Although Ms. Flores opined that the Questions About Behavioral Function Questionnaire needed to be paired with another tool (such as observations, interviews, systematic manipulation, or manipulating the environment to see if the behaviors related to a specific function) to accurately determine the functions of behavior, she did not dispute Dr. Hayden's conclusion that escape was the primary function of Student's maladaptive behaviors. Therefore, Dr. Hayden's opinion that escape was the primary function of Student's maladaptive behaviors was persuasive.

31. Dr. Hayden observed Student following class routine and activities without difficulty, and concluded that Student's productivity, attention to tasks, social interactions with classmates and adults were indistinguishable from his peers. Dr. Hayden did not observe Student engaging in any maladaptive behaviors, and aside from a health aide for mobility, Student did not require other assistance because of his special needs. However, the teacher reported to Dr. Hayden that Student's maladaptive behaviors usually occurred when substitute teachers or aides were supporting Student.

32. Dr. Hayden opined that the strategies used by the teacher and staff in late April 2016 in eliciting compliance from Student were effective. Dr. Hayden recommended that a behavior intervention plan setting forth specific support strategies utilized by the teacher and staff whom Dr. Hayden observed in late April 2016 was needed to ensure that all staff implemented the behavioral strategies in a consistent

manner. He also recommended that: all staff supporting Student should be trained to implement the behavior intervention plan and receive applied behavior analysis training; Student receive the services of a Board Certified Behavior Analyst; all staff supporting Student develop a supporting therapeutic relationship with Student; strategies be developed to reinforce appropriate behavior using the functional equivalent of replacement behavior model; Student be provided choices in activities where resistance typically occurred, announcing an activity in advance of an activity and providing the beginning and end times; Student be redirected with encouragement and praise rather than in a punitive manner; Student receive supports in a manner that would not cause him to be stigmatized or ostracized by his peers; and data be collected and analyzed so that appropriate modifications and supports could be provided to Student to reduce maladaptive behaviors. Dr. Hayden agreed that Student's needs were within those categorized as tier one generalized supports typically available to all general education students. Nonetheless, Dr. Hayden opined that even though he did not observe Student engaging in maladaptive behaviors, Student still engaged in those maladaptive behaviors and therefore required a behavior intervention plan.

DENNIS FERRELL

33. Mr. Ferrell, District's Director of Programs, was District's expert at hearing regarding District's level of available services and how they relate to Student's needs. Mr. Ferrell had a master's degree in special education and a special education credential, and had been a special education teacher for 16 years, and a general education teacher for nine years. He opined that Dr. Hayden's recommendations as to Student's needs in 2016 were tier one supports that could be implemented, and had been implemented since Student's return to school in February 2016, in the general education setting. Mr. Ferrell opined that because Dr. Hayden's recommendations were already implemented effectively in the general education setting in 2016, Student did not need a behavior

intervention plan to continue receiving those supports. He further opined that Student was capable of accessing the curriculum in 2016 because Student received good grades with the supports already in place and available to all general education students. Therefore, Student did not need the services of a Board Certified Behavior Analyst because a Board Certified Behavior Analyst would typically be used for students who had extreme behaviors and who could not access the curriculum. Mr. Ferrell's opinion was persuasive as to these two areas because: (a) Dr. Hayden agreed that Student's needs were within those categorized as tier one generalized supports typically available to all general education students; (b) Dr. Hayden's opinion that Student required a behavior intervention plan was conclusory and not as persuasive since he did not observe Student engaging in maladaptive behaviors; and (c) Dr. Hayden agreed that the strategies used by the teacher and staff in late April 2016 in eliciting compliance from Student were effective.

34. District staff received training in applied behavior analysis through online courses, and annual training modules through the Kern County Special Education Local Plan Area. Further, District also contracted with Autism Partnership, a non-public agency, to consult as to District's programs. If needed, Autism Partnership could provide direct services to Student, including aide training and providing a Board Certified Behavior Analyst for supervision of behavioral services.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA⁵

1. This hearing was held under the Individuals with Disabilities Education Act,

⁵ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

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)⁶ 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 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 IEP. (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 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).)

⁶ All subsequent references to the Code of Federal Regulations are to the 2006 version.

3. In *Board of Education of the Hendrick Hudson Central School District 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).) 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).) 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, the Student has the burden of proof.

ISSUES 1(A) AND 1(B): INAPPROPRIATE BEHAVIOR INTERVENTIONS

5. Student contends that District did not provide an appropriate behavior intervention plan and that it did not administer behavior interventions in a manner that respected Student's human dignity and personal privacy. District contends that it developed a behavior intervention plan which was appropriately administered from the date Mother consented to it, on February 27, 2014.

6. When a child's behavior impedes the child's learning or that of others, the IEP team must consider strategies, including positive behavioral interventions, and supports to address that behavior. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i) & (b); Ed. Code, § 56341.1, subd. (b)(1).) It is the intent of the Legislature that children with serious behavioral challenges receive timely and appropriate assessments and positive supports and interventions. (Ed. Code, § 56520, subd. (b)(1).) When behavioral interventions, supports, and other strategies are used, they have to be used in consideration of the student's physical freedom and social interaction, and be administered in a manner that respects human dignity and personal privacy. (Ed. Code, § 56520, subd. (b)(3).)

7. Emergency interventions may only be used to control unpredictable, spontaneous behavior that poses clear and present danger of serious physical harm to the individual with exceptional needs, or others, and that cannot be immediately

prevented by a response less restrictive than the temporary application of a technique used to contain the behavior. (Ed. Code, § 56521.1, subd. (a).) Emergency interventions shall not be used as a substitute for the systematic behavioral intervention plan that is designed to change, replace, modify, or eliminate a targeted behavior. (Ed. Code, § 56521.1, subd. (b).) No emergency intervention shall be employed for longer than is necessary to contain the behavior. (Ed. Code, § 56521.1, subd. (c).) Emergency interventions shall not include: (1) Locked seclusion, unless it is in a facility otherwise licensed or permitted by state law to use a locked room; (2) Employment of a device, material, or objects that simultaneously immobilize all four extremities, with the exception of the use of prone containment by staff trained in using those procedures; (3) An amount of force that exceeds that which is reasonable and necessary under the circumstances. (Ed. Code, § 56521.1, subd. (d)(1)(2) and (3).)

8. 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; *County of San Diego v. California Special Educ. Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467-68.) An IEP is a "snapshot" and must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)

9. A person recognized by the National Behavior Analyst Certification Board as a Board Certified Behavior Analyst may, but is not required to, conduct behavior assessments and provide behavior intervention services for individuals with exceptional needs. (Ed. Code, § 56525, subds. (a) and (b).)

10. A school district's failure to conduct appropriate assessments or to assess in all areas of suspected disability may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High School District, et al.* (9th Cir. 2006) 464 F.3d 1025, 1031-1033.) 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, *superseded by statute on other grounds, as stated in R.B. v. Napa Valley Unified School Dist.* (9th Cir.2007) 496 F.3d 932, 939.)

11. The February 27, 2014 behavior intervention plan was incomplete and inappropriate. It only identified yelling as a target behavior when at the time the functional behavior assessment data was taken District was aware that Student engaged in a number of other maladaptive behaviors, including hitting, which Ms. Owen observed on 13 occasions, occurring almost as frequently as yelling, which Ms. Owen observed on 19 occasions. It also failed to identify antecedents, replacement behaviors, consequences and functions of Student's various maladaptive behaviors—information that was also available to District when it conducted its functional behavior assessment at the beginning of 2014. However, this was a procedural violation which did not substantively deny Student a FAPE in the Spring of 2014. During this period, Student's maladaptive behaviors had improved well enough for the IEP team to transition Student from a special day class to a general education environment, and there was no other evidence to support that the February 27, 2014 behavior intervention plan impeded Student's right to a FAPE, significantly impeded Mother's opportunity to participate in the decision-making process, or deprived Student's educational benefits. Because the February 27, 2014 behavior intervention plan lacked crucial information needed in formulating effective strategies to address all of Student's maladaptive behaviors, it was ineffective in dealing with these maladaptive behaviors when they resurfaced in the beginning of the 2014-2015 school year when Student moved to a general education

classroom from a special day class. As a result, Student missed instructional hours and was denied educational benefits he would otherwise accessed had an appropriate behavioral intervention plan been in place. Consequently, District's inappropriate February 27, 2014 behavior intervention plan was a procedural violation which resulted in a FAPE denial to Student from August 13, 2014 to September 2014.

12. Mother contended District placing Student in a stroller during what she deemed non-emergency situations, placing Student in a room segregated from other students when he tantrumed, holding Student's hands to prevent him from hurting himself and others when he tantrumed, having other students present while Student tantrumed, denying Student snacks in Ms. Marks' class, suspending Student for two days, and using the threat of Mother's displeasure to elicit compliant behaviors from Student as factors supporting her contention that District denied Student human dignity and personal privacy. However, this was unsupported by the evidence.

13. Mother was not present during the September 8, 2014 incident that resulted in staff transporting Student by a stroller from the bus to a private room, and also was not present during other incidents when Student needed to be removed to a separate room to calm, or when staff had to hold Student's hands to prevent him from hurting others and himself. Therefore, Mother's opinion on whether the totality of circumstances warranted Student's placement in a stroller and in a separate room when he tantrumed was not as persuasive as the three District staff who were present and determined that Student's maladaptive behaviors, which included hitting, kicking and screaming, warranted placement in the stroller both for his safety, and to transport Student to a separate room where he could calm before classroom reintegration. There was no evidence supporting Student's contention that use of the stroller itself, beyond Mother's opinion that it appeared awkward, was degrading to Student, or that Student was simultaneously immobilized in all four extremities, or that staff used force that was

unreasonable or unnecessary, or that Student was placed in locked seclusion. Further, holding Student's hands when he tantrumed and placing Student in a separate room until he calmed provided Student privacy and was necessary for both Student's and other students' safety and education even though it momentarily restricted Student's freedom and/or social interaction.

14. Further, Ms. Marks credibly distinguished the difference between the snacks from home which all students received regardless of behavior, and the reward snacks which were given to incentivize good behavior. Her un-contradicted explanation that only reward snacks were withheld from students for non-compliant behavior did not deprive Student of any sustenance that came from home, and thus did not constitute infringement of Student's dignity or personal privacy. Likewise, while suspending Student for two days, and using the threat of Mother's displeasure to elicit compliant behaviors may not have been effective strategies, the evidence presented did not support that those two strategies arose to the level of an invasion of Student's dignity or privacy. While District's behavior intervention strategies were ineffective, District employed the behavior intervention strategies in the February 27, 2014 behavior intervention plan and considered Student's physical freedom and social interaction. There was no evidence, besides Mother's opinion that District should have employed different and more effective strategies, to support a finding that District's administration of those strategies amounted to disrespecting Student's dignity and personal privacy.

15. Student did not meet his burden of demonstrating that District administered behavior interventions in a manner that disrespected Student's human dignity and personal privacy. However, Student met his burden of demonstrating that District did not provide an appropriate behavior intervention plan for approximately four weeks in the 2014-2015 school year in the general education, transition kindergarten class, during the period that he was attending school, and shall be

awarded a remedy as set forth in the remedy section below.

ISSUES 1(C): DISTRICT'S DUTY TO TIMELY FILE FOR DUE PROCESS

16. Student contends that District violated its duty to timely file for due process after Mother failed to consent to the placement and services offered at the August 29, 2014 IEP team meeting. District contends that it did not make any FAPE offer at the August 29, 2014 IEP team meeting, but opened a discussion on various ways to handle Student's maladaptive behaviors.

17. If the local educational agency determines that the proposed special education program component to which the parent does not consent is necessary to provide a FAPE to the child, a due process hearing shall be initiated. (Ed. Code, § 56346, subd. (f); *I.R. v. Los Angeles Unified School District* (9th Cir. 2015) 805 F.3d 1164.)

18. District called an IEP team meeting on August 29, 2014, to discuss ways of handling Student's escalating maladaptive behaviors and concluded that additional data was required to develop effective strategies for revising the February 27, 2014 behavior intervention plan. Because conflicting placement information appeared on one page of the August 29, 2014 IEP document, Student contended that District made a new placement offer with which Mother disagreed, thereby triggering District's duty to file for due process. Student's contention on this issue is less persuasive because the totality of the evidence supported that District did not make a FAPE offer at the August 29, 2014 IEP team meeting. Student remained in general education. The only evidence supporting the change of placement was a reference to "18 percent" next to the words general education. The rest of the document showed that placement remained the same as the May 5, 2014 IEP indicating that the special day class ended on June 24, 2014, at the end of the previous 2014-2015 school year; and that while a change of placement from general education to a special day class was discussed, the IEP team meeting did not conclude and was continued for further discussion so that District could collect more

data about Student's maladaptive behaviors. There was no persuasive evidence that District determined that changing Student's placement was FAPE, or was even offered. District did not make a new FAPE offer, and did not make any changes to the placement and/or any services in Student's May 5, 2014 operative IEP. Student stopped attending school before District was able to take further behavioral data in the classroom environment to make a FAPE offer. District was not required to file for due process after each IEP team meeting where Mother did not agree with all items discussed when the facts did not support that District had made any FAPE offer.

19. Student did not meet his burden of demonstrating that District failed to offer a FAPE by not initiating a due process filing within a reasonable time after the August 29, 2014 IEP team meeting.

REMEDIES

1. Student prevailed as to Issue 1(a). District prevailed as to Issues 1(b) and (c). As a remedy, Student requests a non-public agency, one-to-one full time behavioral aide trained in Applied Behavior Analysis and supervised by a Board Certified Behavior Analyst. Student also requests that District fund parent and teacher trainings in Applied Behavior Analysis by a non-public agency. Student further requests that District provide him substitute teachers and aides who would be capable of implementing Student's behavior intervention plan. Student further requests compensatory educational services for the instructional time loss Student suffered, including for the period he was not in school. District contends no remedies are appropriate because Student did not meet his burden of persuasion on any issue.

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* (D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be fact-specific and be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place."(*Ibid.*)

3. Student prevailed as to Issue 1(a) because District's inappropriate February 27, 2014 behavior intervention plan denied Student a FAPE for approximately four weeks, from August 13, 2014 to September 10, 2014. Although Student did not exhibit maladaptive behaviors during academic times in 2016, he still engaged in maladaptive behaviors during transitions and when substitute staff supported Student. As a remedy, District shall provide a total of 12 hours of services by a Board Certified Behavior Analyst from Autism Partnership or, at District's discretion, another non-public agency with which District contracts. Six of the 12 hours shall be training, to be completed no later than 10 school days after the start of the 2016-2017 school year: (a) of all District teachers, aides and substitutes working with Student to consistently administer Student's operative IEP, and all supports and accommodations; and (b) of District staff to take Student's behavioral data for 30 school days. The data will document Student's maladaptive behaviors, if any, during the entire school day, including lunch, recess, bus transportation, transition times and all other non-instructional times during the school day, so the IEP team will be prepared with the necessary and current information to develop effective behavior intervention strategies. District will also provide four hours for a Board Certified Behavior Analyst to analyze the behavioral data collected and, up to two hours, for the Board Certified Behavior Analyst to attend Student's IEP team

meeting to discuss the data and, together with the IEP team, determine whether Student requires a behavior intervention plan, and/or behavior intervention strategies.

ORDER

1. District shall provide a total of 12 hours of services from a Board Certified Behavior Analyst from Autism Partnership, or District may select another non-public agency with which District contracts: (a) to complete a total of six hours of training, no later than 10 school days after the start of the 2016-2017 school year, (i) of all District teachers, aides and substitutes working with Student to consistently administer Student's operative IEP, and all supports and accommodations; (ii) of District staff to take Student's behavioral data for 30 school days; (b) to provide a total of four hours for a Board Certified Behavior Analyst to analyze the behavioral data taken and recommend to the IEP team whether Student requires a behavior intervention plan and/or develop effective behavior intervention strategies; and (c) to provide a total of two hours for the Board Certified Behavior Analyst to attend Student's IEP team meeting.

2. The 12 hours, or any unused portion thereof, set forth in the preceding paragraph shall not expire as long as Student attends school within District's boundaries. However, if the 12 hours, or any unused portion thereof, remains unused because Student's unexcused absences render it impossible for District to execute funding of the (a), (b), and/or (c) tasks set forth in the preceding paragraph, then any unused hours will expire by the end of the 2016-2017 school year.

3. All other requests for relief are denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Student was the prevailing party as to Issue 1(a), and District was the

prevailing party as to Issues 1(b) and (c).

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: July 18, 2016

/s/

SABRINA KONG

Administrative Law Judge

Office of Administrative Hearings