

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

TEHACHAPI UNIFIED SCHOOL DISTRICT.

OAH Case No. 2016110657

DECISION

Parents on behalf of Student filed a due process hearing request with the Office of Administrative Hearings on November 14, 2016, naming Tehachapi Unified School District. On January 6, 2017, OAH granted Student's request to continue this matter.

Administrative Law Judge Kara Hatfield heard this matter in Bakersfield, California,<sup>1</sup> on February 14, 15, and 16, 2017.

Andréa Marcus and Kelly Kaeser, Attorneys at Law, represented Student. Mother attended the hearing only on February 14, 2017.<sup>2</sup> Student did not attend the hearing.

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<sup>1</sup> On January 6, 2017, OAH granted Student's motion to change the hearing location from Tehachapi, California to Bakersfield, California based on Student's attorney's representation that Bakersfield was a location reasonably convenient to the parents.

<sup>2</sup> When neither parent appeared for the second day of hearing, Student's attorney explained they would not be coming because they had no car and the bus was too difficult to take all the way from Tehachapi.

Darren Bogié and Stephanie Virrey Gutchner, Attorneys at Law, represented District. Regina King, District's Chief Administrator of Instructional Services, attended the hearing on February 14 and 15, 2017. Dennis Ferrell, District's Director of Programs, attended the hearing on February 15 and 16, 2017.

At the request of the parties, OAH continued the matter for written closing arguments. The record closed on March 13, 2017, upon receipt of closing briefs from the parties.

### ISSUES<sup>3</sup>

Did District deny Student a free appropriate public education by:

1. Failing to offer Student a full-time one-to-one applied behavior analysis-trained aide with two hours per week of supervision by a Board Certified Behavior Analyst
  - a. in the January 19, 2016 individualized education program; and
  - b. in the March 4, 2016 IEP; and
2. Failing to file for a due process hearing with OAH to seek a determination that the January 19, 2016 IEP offered Student a FAPE and to authorize District to implement the January 19, 2016 IEP without parental consent?

### SUMMARY OF DECISION

Student prevailed in a prior OAH case and as a remedy the decision granted specific services while a functional behavior assessment was conducted. Student contends District denied him a FAPE by failing to write those OAH-ordered services into

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<sup>3</sup> 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.)

an IEP District held for the purpose of implementing the ordered services, and by failing to file for a due process hearing after Parents refused to sign that IEP. Student also contends District denied him a FAPE by failing to offer him the same services OAH had ordered after the functional behavior assessment was completed.

District contends Student received the services OAH ordered and District was not required to list them in an IEP or to seek OAH approval of an IEP that Parents refused to sign, which had been held solely to develop an interim behavior intervention plan as ordered by OAH. District also contends the IEP held after the functional behavior assessment did not state Student would continue to have aide support, but he in fact did. District argues the March 2016 IEP was continued for further exploration by District of the availability of Board Certified Behavior Analyst services and that District is not liable for any failure to offer services in the document prepared at the incomplete IEP team meeting. District also argues Student failed to prove he required supervision by a Board Certified Behavior Analyst to receive a FAPE and District therefore did not deny Student a FAPE.

This Decision finds that although the January IEP did not expressly state Student would receive the one-to-one behavior aide and supervision services OAH ordered, Student in fact received those services. This Decision also finds that District was not required to file for due process to obtain OAH authorization to implement services OAH had previously ordered, regardless of Parents' lack of consent to the IEP document. This decision further finds that although the March IEP did not expressly state Student would receive a one-to-one applied behavior analysis-trained aide, Student in fact continued to receive that service from March 2016 through the 2016 extended school year. Further, although the March IEP did not offer Student two hours per week of supervision from a Board Certified Behavior Analyst, Student failed to prove he required that service to receive a FAPE.

## FACTUAL FINDINGS

### BACKGROUND

1. Student was nine years old at the time of the hearing and resided with Parents within District's boundaries during the applicable time frame. Student was eligible for special education under the eligibility category of autism and a secondary eligibility category of other health impairment due to Attention Deficit Hyperactivity Disorder.

2. Based on dissatisfaction with District's offer of special education and related services when Student moved to District from another state in early 2014, Student filed a request for due process hearing in OAH Case Number 2015050839. After a five day due process hearing, OAH issued a final Decision in that case on December 22, 2015.<sup>4</sup> The facts and issues of the current case arise out of Student's disagreement with District's conduct in reaction to the orders of the December 22, 2015 Decision. Some of the factual findings and legal conclusions from the December 22, 2015 Decision are relevant to the issues in the current case and are summarized here.

3. Student began attending Cummings Valley Elementary School in mid-February 2014. Due to Student's behavioral challenges, on April 7, 2014, with parental consent, District assigned Student a one-to-one behavior aide for the rest of the 2013-2014 school year and the 2014 extended school year. In the August 15, 2014 IEP, to which Mother consented, Student was assigned a one-to-one behavior aide. Student's classroom had 11 students, one special education teacher, and three aides. Student's one-to-one aide, Sara Brus, was a fourth aide. Ms. Brus was trained in applied behavior analysis and discrete trial training.

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<sup>4</sup> OAH served the Decision on the parties on December 23, 2015.

4. Overall, Student had poor attendance. From mid-February 2014 through April 30, 2014, Student had many unexcused absences. Parents did not send Student to school after April 30, 2014. From the date he started school until the end of the 2013-2014 school year on June 4, 2014, Student attended only 37 of 70 school days. Student did attend extended school year 2014.

5. Student had unexcused absences the first three days of the 2014-2015 school year. From August 18 to November 15, 2014, Student was absent six days. Student did not attend school after December 2, 2014. Parents requested that Student participate in independent study, allegedly due to changes in medical treatments and medications; Mother later admitted that the request for independent study was not related to medication problems. Parents scheduled to return Student to school after the winter break, but they did not return him to school for the remainder of the 2014-2015 school year. For the entire school year of 180 days, Student attended somewhere between 64 and 88 days, and the vast majority of his absences were unexcused.

6. The December 22, 2015 Decision concluded that District denied Student a FAPE by failing to conduct an assessment of Student's behavior after late October 2014 and by failing to offer appropriate behavior services in the November 6, 2014 IEP. However, the impact of District's FAPE denial was reduced by Parents' decision not to send Student to school after December 2, 2014, despite having been mailed a written assessment plan for a functional behavior assessment on January 20, 2015. The impact of District's FAPE denial was also reduced by Parents' refusal to attend an IEP team meeting to review the results of a special circumstances instructional aide assessment; Parents' conduct prevented District from adopting interim and permanent behavior plans and goals.

7. As a remedy for District denying Student a FAPE for a period calculated to be only 34 school days, OAH ordered District to provide Student 34 hours of individual

instruction as compensatory education for the time Parents reasonably did not send Student to school due to safety concerns.

8. With a view to safely returning Student to school after over a year-long absence, OAH ordered District to hold an IEP team meeting within 10 days of the December 22, 2015 Decision “to adopt an interim behavior plan.” OAH ordered District to begin to conduct the functional behavior assessment (to which Parents had ultimately consented) within 21 days of the date Student returned to school, and to hold an IEP team meeting within 45 days after the behavior assessment started. OAH also ordered District to “provide Student with a one-to-one [applied behavior analysis]-trained aide with supervision by a Board Certified Behavior Analyst for two hours per week, until the IEP team convenes an IEP team meeting to review the functional behavior assessment and determines Student’s behavioral needs.”

#### STUDENT’S RETURN TO SCHOOL AND THE JANUARY 19, 2016 IEP

9. Student returned to Cummings Valley Elementary on January 5, 2016.<sup>5</sup>

10. The same one-to-one aide District had assigned to Student when he attended school during fall 2014, Ms. Brus, was again assigned as Student’s one-to-one aide in January 2016. Student was placed in the kindergarten through fifth grade classroom for students with autism, with teacher Joleen Larsen.<sup>6</sup> Ms. Larsen’s class

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<sup>5</sup> Although the parties jointly stipulated that Student attended school from January 15, 2016, through June 3, 2016, with only two absences, evidence indicated that Student returned to school on January 5, 2016.

<sup>6</sup> Ms. Larsen had a bachelor’s degree in psychology and a master’s degree in special education, mild/moderate and severe. She had a preliminary credential in special education.

composition changed over time, at times having four students with four adults – Ms. Larsen, Ms. Brus, and two additional aides – , five students with four adults, and eight students with three or four adults. When Student began in Ms. Larsen’s class in January 2016, it was common for him to swipe things off her desk, spit, kick, bite, and hit with an open or closed hand.

11. An IEP team meeting was held on January 19, 2016. The IEP team developed interim behavior intervention plans to address three behaviors that impeded the learning of Student or others, based on the last known information about Student: 1) banging objects together and knocking items off shelves, referred to by Student as “crashing”; 2) aggression, defined as kicking, hitting with an open or closed hand, and biting; and 3) eloping, defined as leaving the classroom or school boundaries without permission. Parents participated and significantly contributed to the development of the interim behavior plans.

12. The January 19, 2016 IEP document did not state that District would provide Student with a one-to-one aide trained in applied behavior analysis, and did not state that a Board Certified Behavior Analyst would provide behavior supervision for two hours per week. The notes of the IEP team meeting also did not state that these services would be provided. Parents did not consent to the January 19, 2015 IEP, and attached to the IEP a page of reasons. Parents wanted the IEP to state that, as ordered in the December 22, 2015 Decision, Student would have 34 hours of individualized instruction (the compensatory education Student was awarded) and a one-to-one applied behavior analysis-trained aide with supervision by a Board Certified Behavior Analyst for two hours per week. Parents also wanted the interim behavior plans to specify that monitoring and measuring would be done by the one-to-one aide with Board Certified Behavior Analyst supervision.

## FUNCTIONAL BEHAVIOR ASSESSMENT AND THE MARCH 4, 2016 IEP

13. School psychologist Dawn Roach<sup>7</sup> conducted a functional behavior assessment between January 14 and February 20, 2016. District contracted with Autism Partnership, Inc. and its director Dr. Sanford Slater to assist Ms. Roach with the assessment. Dr. Slater was a Board Certified Behavior Analyst.<sup>8</sup> Dr. Slater supervised Ms. Roach as part of her practical hours training toward becoming a Board Certified Behavior Analyst herself. Ms. Roach produced a written report dated February 24, 2016. Based on data she, Ms. Larsen, and Ms. Brus collected, Ms. Roach concluded that a behavior intervention plan was needed to address Student's aggression, which consisted of hitting, kicking, and biting. She concluded that a behavior intervention plan was not required for elopement or for "crashing"; however, she did recommend that Student have behavior goals to address aggression and crashing. Ms. Roach also identified two additional behaviors that she believed should be addressed through "proactive programming": wandering, defined as leaving the designated or assigned work or activity area; and swiping/property destruction, defined as swiping objects off tables and desks and damaging property by kicking objects, crumpling paper, throwing objects, marking on objects not intended to be written on, and tearing or breaking items.

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<sup>7</sup> Ms. Roach had a bachelor's degree in psychology and a master of science in school psychology. She had completed her course work for a Board Certified Behavior Analyst certification and was working towards her supervised hours. She had not taken the Board Certified Behavior Analyst exam. She worked for District as a school psychologist since 2010.

<sup>8</sup> Witnesses credited him with being a "BCBA-D," a Board Certified Behavior Analyst – Doctoral.



14. District scheduled an IEP team meeting for February 25, 2016, to review the functional behavior analysis. At Parents' request, District moved the meeting to March 4, 2016.<sup>9</sup>

15. From the time Student returned to school until the March 4, 2016 IEP team meeting, Ms. Brus was Student's aide. At hearing, her service was described in different terms, including a special circumstances instructional assistant, direct access aide, one-to-one aide, and classroom aide. Regardless of labels, the evidence established that Ms. Brus was with Student almost at all times, even during recess and lunch. She did not enter the restroom with Student. She took breaks, and during that time another aide remained with Student.

16. From the time Student returned to school until the March 4, 2016 IEP team meeting, Dr. Slater provided approximately two hours per week of supervision of Student's behavioral program. He came from Orange County roughly twice a month, sometimes more often, and provided services at multiple campuses in District. Across the campuses, he provided support in classrooms, helped with classroom management, and assisted with students who needed some extra support in the form of overseeing implementation of specific behavior plans. Dr. Slater specifically provided oversight of Student's program and worked with school psychologist Ms. Roach, classroom teacher Ms. Larsen, and the paraprofessionals in Student's classroom. Dr. Slater consulted with the classroom staff on the best approaches to take with Student. He came to Ms. Larsen's classroom about every other week, and he emailed or text messaged Ms.

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<sup>9</sup> Although the IEP document prepared at the March 4, 2016 meeting bore the date February 25, 2016, there was no dispute that the IEP was actually developed on March 4, 2016, and will be referred to in this Decision as the March 4, 2016 IEP.

Larsen in between to see how things were going. Dr. Slater and Ms. Larsen communicated about Student almost on a weekly basis.

17. At the March 4, 2016 IEP team meeting, Ms. Larsen reported Student had made progress with his maladaptive behaviors since starting school in January, engaged in them much less frequently, and was able to be redirected more quickly. But as of March 4, 2016, he still spit, bit, kicked, hit, screamed, lay down on the floor, and swiped all items off Ms. Larsen's desk. Mother's testimony reflected her belief that by the March 4, 2016 IEP team meeting, Student's behaviors had lessened, and she attributed the improvement to the increased behavior support he received since starting school.

18. During the IEP team meeting, Ms. Roach presented her functional behavior assessment and her proposed behavior intervention plan for aggression and swiping/property destruction, and the proposed behavior goals. Parents and their attorneys participated in discussion of the behavior plan and the proposed goals, and there was agreement about them.

19. As established by a written transcript of an audio recording of the March 4, 2016 IEP team meeting, Student's attorneys inquired about whether District would continue to provide Student a one-to-one aide. Ms. Roach stated that in developing the behavior plan, she assumed Student would continue to have aide service from Ms. Brus. Student's attorney threatened to file a request for due process hearing if District did not offer Student a one-to-one aide. District clarified with Student's attorneys that they were requesting a one-to-one aide who would work only with Student and who had training in applied behavior analysis. Student's attorneys confirmed that was what they wanted Student to receive. District personnel talked among themselves off the recording, and then District's Director of Programs, Mr. Ferrell, stated to the full IEP team, "And the district will honor that." However, District's offer to provide a one-to-one aide was not specified in the written IEP document.

20. Student's attorneys then requested that District offer supervision of the aide by a Board Certified Behavior Analyst for two hours per week. Student's attorney again threatened that if District did not offer that, Student would "go to hearing." Mr. Ferrell explained that District had contracted with Autism Partnership, Inc. for two hours per week of supervision of Student's interim behavior program because of the December 22, 2015 Decision. However, District did not know if Dr. Slater was available to continue supervising Student's behavior program. District needed to continue the IEP team meeting to explore what Board Certified Behavior Analysts were available before District could make an offer regarding supervision of Student's behavior program.

21. Student's attorneys pressed further and wanted to know if supervision was going to be offered or not. Mr. Ferrell stated "there should be BCBA oversight," and reiterated that District needed to explore the availability of a Board Certified Behavior Analyst. The IEP team, including Student's attorneys and District personnel, agreed that Board Certified Behavior Analyst supervision would continue as it had been under the December 22, 2015 Decision until District was able to confirm the availability of Board Certified Behavior Analyst supervision for Student's new behavior program. Cummings Valley Elementary principal Traci Minjares took the notes of the IEP team meeting and documented the discussion about what would happen while District explored the availability of a Board Certified Behavior Analyst as, "The team agreed that the BCBA oversight continue." The IEP team meeting ended.

22. During the March 4, 2016 IEP team meeting, Ms. Roach did not state any opinion she had regarding the necessity of aide supervision by a Board Certified Behavior Analyst. She also did not testify regarding this at the hearing.

23. Joanna Hammer,<sup>10</sup> the school psychologist assigned to Cummings Valley Elementary, attended and participated in the March 4, 2016 IEP team meeting. She also did not state during the IEP team meeting any opinion about whether Board Certified Behavior Analyst supervision was necessary for Student to receive a FAPE. However, at the hearing, Ms. Hammer testified that she believed Student did not require supervision by a Board Certified Behavior Analyst. She opined that type of supervision was only necessary when a behavior plan was so complex that it could not be carried out in a typical mild/moderate classroom, such as when a student had extreme sensory needs or there were extreme environmental circumstances that required extra insight. Ms. Hammer believed that school psychologists were capable of supervising the implementation of a behavior intervention plan. Ms. Hammer did not believe the behavior plan developed at the March 4, 2016 IEP team meeting was at the level of complexity that would require supervision from a Board Certified Behavior Analyst, because Student's behaviors were neither as complex nor as frequent as would necessitate supervision by anyone other than a school psychologist. Her testimony was credible and not contradicted by any other witness.

24. During the March 4, 2016 IEP team meeting, Mr. Ferrell did not state any opinion about the necessity of aide supervision by a Board Certified Behavior Analyst for Student to receive a FAPE. At the hearing, Mr. Ferrell testified that District thought the functional behavior assessment and the behavior intervention plan developed at the March 4, 2016 IEP team meeting, along with the structure of the classroom, including

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<sup>10</sup> Ms. Hammer had a bachelor's degree in psychology and a master's in education with an emphasis in school psychology. She held a pupil personnel services credential. She worked as a behavior therapist before becoming a school psychologist approximately five years before the hearing.

the teacher and aide support, were sufficient to meet Student's needs. District proposed to continue the IEP team meeting to allow District to explore the availability of supervision from a Board Certified Behavior Analyst and to eventually offer Board Certified Behavior Analyst supervision only to placate Parents and Student's attorneys, not because District believed Student required the service.

#### REMAINDER OF THE 2015-2016 SCHOOL YEAR AND 2016 EXTENDED SCHOOL YEAR

25. After the March 4, 2016 IEP team meeting was continued, Mr. Ferrell made some efforts to locate a Board Certified Behavior Analyst within 50 miles. But District did not report any information to Parents or to Student's attorneys. District did not reconvene the IEP team meeting during the rest of the 2015-2016 school year or the 2016 extended school year. District did not explain why it never reconvened the IEP team meeting.

26. Student attended school consistently until the end of the regular school year on June 3, 2016. Ms. Brus continued to be his one-to-one aide. Over the spring semester, Student's behaviors improved and reduced to a level his teacher Ms. Larsen described as "manageable." Student adjusted to the class, the way it was run, to his teacher, to his aide, and to the other aides in the classroom. As Student's behaviors decreased, Ms. Brus decreased her proximity to Student and allowed him to attempt tasks on his own, and then moved closer if he required redirection or other support. Later in the semester, Ms. Larsen had different aides rotate through the workstations in the classroom during the small group instruction parts of the day, and work with Student as his one-to-one aide. Student's behaviors spiked with each aide switch, but within a week Student became comfortable working with each aide. He reduced his dependence on any one particular person for answers and became able to generalize responding to one-to-one adult support.

27. No evidence at hearing established the frequency or type of involvement of Dr. Slater in supervising Student's behavior program between March 4 and June 3, 2016. District's written closing argument specifically concedes that from March to June 2016, "Student's aide was no longer supervised by a BCBA for two hours per week."

28. Student attended the 2016 extended school year from June 14 to July 3, 2016, without any absences.

#### 2016-2017 SCHOOL YEAR

27. The 2016-2017 school year started on August 17, 2016. Student did not attend school through September 8, 2016. Parents requested an IEP team meeting, and District convened an IEP team meeting on September 2, 2016. The notes of the IEP reflect that the meeting was called at Parents' request and that the IEP team also wanted to look at Student's current goals and "move towards finalizing an IEP." The meeting ended when Mother said she felt uncomfortable at the meeting and left. The September 2, 2016 IEP is not in issue in this case. Parents and District agreed that Student attended school from September 9 through October 14, 2016, and did not attend school from October 15, 2016 through the dates of the hearing.

28. The only evidence Student produced at hearing regarding Student's need for supervision by a Board Certified Behavior Analyst at the time of the March 4, 2016 IEP team meeting was Mother's opinion that a Board Certified Behavior Analyst was required because District had "an intern on the job with no supervision." Mother was not a behavior or education specialist. Student failed to submit an assessment or expert testimony that supported his claim that he required supervision by a Board Certified Behavior Analyst to receive a FAPE. Student attempts to justify his lack of competent evidence regarding what a Board Certified Behavior Analyst does with respect to supervising an aide or behavior program and why Student required that to receive a FAPE as of March 4, 2016, by arguing it was undisputed that the one-to-one aide

Student required needed to be supervised by a Board Certified Behavior Analyst; Student relies on Mr. Ferrell's comment during the March 4, 2016 IEP team meeting that "there should be BCBA oversight." Mr. Ferrell's comment did not establish what services Student needed, but only reflected District's capitulation to Student's attorney's demand. Overall, Mother's testimony was unsupported and less persuasive than the testimony of Mr. Ferrell and Ms. Hammer, who credibly reported that Student did not require supervision by a Board Certified Behavior Analyst to receive a FAPE.

29. Finally, Student failed to provide evidence regarding the type, amount, duration, and need for any requested compensatory education.

## LEGAL CONCLUSIONS

### INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA<sup>11</sup>

1. This hearing was held under the Individuals with Disabilities Education Act, 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) et seq.<sup>12</sup>; 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 FAPE 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).)

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<sup>11</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

<sup>12</sup> All references to the Code of Federal Regulations are to the 2006 version.

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, which 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); Ed. Code, §§ 56032.)

3. In *Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] ("*Rowley*"), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative



changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 951, fn. 10.) The Supreme Court’s recent decision in *Endrew F. v. Douglas County Sch. Dist. RE-1* (2017) 580 U.S. \_\_\_\_ [\_\_ S.Ct. \_\_\_, \_\_ L.Ed.2d \_\_ (2017 WL 1066260) (*Endrew F.*)] reaffirmed that to meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances; any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal.

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6), (f); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) In this matter, Student, as the complaining party, bears the burden of proof.

ISSUE 1(A): FAILING TO OFFER ONE-TO-ONE AIDE WITH TWO HOURS PER WEEK OF SUPERVISION BY A BOARD CERTIFIED BEHAVIOR ANALYST IN THE JANUARY 19, 2016 IEP

5. Student contends District denied him a FAPE by failing to offer him a full-time one-to-one applied behavior analysis-trained aide with two hours per week of supervision by a Board Certified Behavior Analyst in the January 19, 2016 IEP.<sup>13</sup>

6. District argues the January 19, 2016 IEP was held to adopt an interim behavior plan as ordered by the December 22, 2015 Decision; therefore, District was not required to offer of a one-to-one aide who was trained in applied behavior analysis with two hours per week of Board Certified Behavior Analyst supervision. Rather, District provided Student that type of aide and supervision from January 5 through March 4, 2016, because of the December 22, 2015 Decision and until it could complete a functional behavior assessment and consider that assessment during an IEP team meeting, and therefore District did not deny Student a FAPE.

7. If a child's behavior interferes with his learning or the learning of others, the IDEA requires the IEP team, in developing the IEP, to "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).)

8. An administrative hearing decision in favor of a student constitutes a student's stay put placement as Student's last agreed upon educational program.

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<sup>13</sup> In his closing brief, Student raises new procedural claims regarding the January and March 2016 IEPs. Those claims exceed the scope of the issues presented in this case and will not be addressed in this Decision. (See *M.S. by and through Sartin v. Lake Elsinore Unified School Dist.* (9th Cir 2017) \_\_ Fed.Appx. \_\_, 2017 WL 711105; 20 U.S.C. § 1415(f)(3)(B).)

(*Ravenswood City School Dist. v. J.S.* (N.D. Cal. Nov. 18, 2010, No.C 10-03950 SBA.)2010 WL 4807061, \*\*3-4; 34 C.F.R. § 300.518(d).)

9. The December 22, 2015 Decision ordered that if Parents returned Student to school, District was to conduct a functional behavior assessment. To support Student until that assessment was completed and an IEP team met to review Student's behavior needs, District was ordered to develop an interim behavior plan and provide Student a one-to-one aide trained in applied behavior analysis and supervised two hours per week by a Board Certified Behavior Analyst. District convened the IEP team meeting held on January 19, 2016, for the sole purpose of reviewing the stale information District had about Student's behaviors from when he last attended school more than one year before the meeting, new information that District had acquired about Student in the nine school days since he had returned, and to develop an interim behavior plan. As ordered by OAH, upon Student's return on January 5, 2016, District reassigned Ms. Brus, who had training in applied behavior analysis, as Student's one-to-one aide. Ms. Brus was supervised by Dr. Slater, a Board Certified Behavior Analyst.

10. Student's complaint does not take issue with the adequacy of the interim behavior plan but only with the fact that the document prepared at the January 19, 2016 IEP team meeting did not state that District was, as ordered by the December 22, 2015 Decision, providing Student a one-to-one aide trained in applied behavior analysis and supervised two hours per week by a Board Certified Behavior Analyst. Student offers no authority for the proposition that District needed to prepare an IEP document and seek parental consent for the delivery of interim services District had been ordered by OAH to provide.

11. Furthermore, the evidence established that between January 5 and March 4, 2016, Student in fact received the services about which he complains: a one-to-one aide trained in applied behavior analysis and supervised two hours per week by a

Board Certified Behavior Analyst. Student failed to demonstrate that District's failure to specify in an IEP that it was offering or providing interim services it had been ordered by OAH to deliver to Student denied him a FAPE.

**ISSUE 1(B): FAILING TO OFFER ONE-TO-ONE AIDE WITH TWO HOURS PER WEEK OF SUPERVISION BY A BOARD CERTIFIED BEHAVIOR ANALYST IN THE MARCH 4, 2016 IEP**

12. Student contends District denied him a FAPE by failing to offer him a full-time one-to-one applied behavior analysis-trained aide with two hours per week of supervision by a Board Certified Behavior Analyst in the March 4, 2016 IEP.

13. With respect to the one-to-one aide, District argues that it provided Student a one-to-one aide who was trained in applied behavior analysis from March 4, 2016, through the remainder of the 2015-2016 school year, and during the 2016 extended school year and therefore did not deny Student a FAPE on that basis. With respect to the supervision by a Board Certified Behavior Analyst, District asserts that the March 4, 2016 IEP was not completed, was continued with the agreement of Student, and therefore District cannot be liable for any failure to write an offer on that date. District also contends that Student's behavior program developed at the March 4, 2016 IEP did not require supervision by a Board Certified Behavior Analyst for Student to receive a FAPE.

14. In developing an IEP, the IEP team must consider the strengths of the child, the concerns of the parents for enhancing the child's education, the results of the most recent evaluations of the child, and the academic, developmental, and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. § 300.324 (a).) The "educational benefit" to be provided to a child requiring special education is not limited to addressing the child's academic needs, but also social and emotional needs that affect academic progress, school behavior, and socialization. (*County of San Diego v. California*

*Special Educ. Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467.) A child's unique needs are to be broadly construed to include the child's academic, social, health, emotional, communicative, physical and vocational needs. (*Seattle School Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500, citing H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106.)

15. If a child's behavior interferes with her learning or the learning of others, the IDEA requires the IEP team, in developing the IEP, to "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).)

16. An IEP is evaluated based on information available to the IEP team at the time it was developed; it is not judged exclusively in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) "An IEP is a snapshot, not a retrospective." (*Id.* at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*) However, after-acquired information may be used to assess the reasonableness of a school district's determinations. (*E.M. v. Pajaro Valley Unified School Dist.* (9th Cir. 2009) 652 F.3d 999, 1004.)

17. To determine whether a school district substantively offered a student a FAPE, the focus must be on the adequacy of the district's proposed program. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1313-1314.) If the school district's program was designed to address the student's unique educational needs, was reasonably calculated to provide the student with some educational benefit, comported with the student's IEP, and was in the least restrictive environment, then the school district provided a FAPE, even if the student's parents preferred another program, and even if the parents' preferred program would have resulted in greater educational benefit. (*Ibid.*) School districts need to "offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make

progress appropriate in light of his circumstances." (*Andrew F.*, *supra*, 580 U.S. \_\_\_\_ [\_\_\_\_ S.Ct. \_\_\_, \_\_ L.Ed.2d \_\_\_\_ (2017 WL 1066260).)

18. Prior to the March 4, 2016 IEP team meeting, District had not explored the availability of ongoing supervision of the aide by a Board Certified Behavior Analyst. With Student's agreement, District continued the IEP team meeting to obtain additional information regarding that service before making any offer regarding aide supervision by a Board Certified Behavior Analyst. Although in other circumstances District might be correct that it could not be faulted for the absence of an offer of a specific service in an IEP that was not yet complete, here District never reconvened the IEP team meeting. The next IEP team meeting was held six months later, when Parents requested a meeting at the start of the next school year. District cannot be absolved of any failure to offer Student a FAPE through its delay and avoidance as District provided no reason for the delay. The March 4, 2016 IEP will therefore be evaluated as District's offer of an educational program for Student.

19. The March 4, 2016 IEP did not state District offered Student a full-time one-to-one aide who was trained in applied behavior analysis. However, the transcript of the March 4, 2016 IEP team meeting recording established that District offered Student a one-to-one aide who would work only with Student and who had training in applied behavior analysis. Parents and their attorneys participated in the discussion that led to the offer, and they understood the offer. (See *S.H. v. Tustin Unified School Dist.* (9th Cir. 2017) \_\_\_\_ Fed.Appx. \_\_\_, 2017 WL 992521, \*2.)

20. Despite not writing the service of a one-to-one into the March 4, 2016 IEP document, District complied with its verbal offer and continued to have Ms. Brus assigned as Student's full-time one-to-one aide for the remainder of the 2015-2016 school year and the 2016 extended school year. Student did not establish that District did not continue to provide Student Ms. Brus as an aide during the times he attended

school in the 2016-2017 school year, after the IEP team meeting on September 2, 2016. Student did not allege any procedural violations in his complaint, and failed to meet his burden of establishing that District substantively denied him a FAPE in the March 4, 2016 IEP by failing to offer a full-time one-to-one applied behavior analysis-trained aide.

21. District was required to offer the aide service in writing in the March 4, 2016 IEP, listing the projected date for the beginning of services and the anticipated frequency, location, and duration of those services. (20 U.S.C. § 1414(d)(1)(A)(VII); Ed. Code, § 56345, subd. (a)(7).) The requirement of a coherent, formal, written offer creates a clear record that helps eliminate factual disputes about when placements were offered, what placements were offered, and what additional assistance was offered to supplement a placement. It also assists parents in presenting complaints with respect to any matter relating to the educational placement of the child. (*Union School Dist. v. Smith* (1994) 15 F.3d 1519, 1526 (*Union*).)

22. Although District violated *Union*, Student failed to prove that violation impeded Student's right to a FAPE, significantly impeded Parents' opportunity to participate in the decision making process regarding the provision of a FAPE to their child, or caused a deprivation of educational benefits for Student. (20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2); Ed. Code, § 56505, subd. (f)(2); see also, *W.G. v. Board of Trustees of Target Range School Dist.* (9th Cir. 1992) 960 F.2d 1479, 1483-1484.) Parents and their representatives participated in the March 4, 2016 IEP team meeting, heard and understood the offer for the aide service, and District actually provided that service.

23. District did not make an offer of aide supervision by a Board Certified Behavior Analyst in the March 4, 2016 IEP. However, Student provided no competent evidence to support his contention that as of March 4, 2016, such supervision was required. Although Student displayed many and frequent behaviors that disrupted his

learning and the learning of others when he returned to school in January 2016, the data collected during the functional behavior assessment and the testimony of Mother and District personnel established Student's behavior had improved by the time of the March 4, 2016 IEP team meeting. The behavior plan developed at the March 4, 2016 IEP team meeting included proactive and reactive programming strategies to address Student's behaviors of aggression and swiping/property destruction. Behavior goals were developed to address less significant behaviors, such as wandering. District personnel did not believe Student's behaviors were so significant or his behavior plan so complex that supervision by a Board Certified Behavior Analyst was required. Student's one-to-one aide was not supervised by a Board Certified Behavior Analyst after the March 4, 2016 IEP team meeting. Yet Student's behavior continued to improve over the remainder of the 2015-2016 school year and by June, Student was working with multiple aides and generalizing his ability to respond to adult support.

24. District witnesses Mr. Ferrell and Ms. Hammer persuasively testified that Student did not require oversight by a Board Certified Behavior Analyst to receive a FAPE. The March 4, 2016 behavior intervention plan, coupled with the classroom structure, was appropriate to meet Student's educational needs as of March 4, 2016. Student did little to refute that testimony and failed to prove that, at the time of the March 4, 2016 IEP team meeting, it was objectively unreasonable for District not to offer supervision by a Board Certified Behavior Analyst. Student also failed to prove that the lack of supervision by a Board Certified Behavior Analyst over the remainder of the school year and extended school year resulted in regression or other loss of educational benefit.

25. Therefore, Student failed to prove by a preponderance of the evidence that District denied him a FAPE by failing to offer supervision for two hours per week by a Board Certified Behavior Analyst in the March 4, 2016 IEP.



## ISSUE 2: FAILING TO FILE FOR OAH AUTHORIZATION TO IMPLEMENT THE JANUARY 19, 2016 IEP

26. Student contends that under Education Code section 56346, subdivision (f), and the recent decision in *I.R. ex rel. E.N. v. Los Angeles Unified School Dist.* (9th Cir. 2015) 805 F.3d 1164 (*I.R.*), District was required to file with OAH a request for a due process hearing when Parents did not consent to the January 19, 2016 IEP. District argues it was not required to file a request for a due process hearing to seek authorization to implement, as described in *I.R.*, a service District thought was necessary to provide Student a FAPE and to which Parents would not consent; OAH had already authorized and ordered, by the December 22, 2015 Decision, District to implement, on an interim basis while a functional behavior analysis was conducted, a behavior plan and a full-time one-to-one aide trained in applied behavior analysis and supervised by a Board Certified Behavior Analyst.

27. *I.R.* clarified that Education Code section 56346, subdivision (f), requires a school district to “expeditiously” request a due process hearing when a district determines, for a student who is already receiving special education and related services, any portion of an IEP to which a parent does not consent is necessary to provide the student with a FAPE. (805 F.3d at p. 1169.) The Ninth Circuit explained, “If, in the school district’s judgment, the child is not receiving a FAPE, the district must act with reasonable promptness to correct that problem by adjudicating the differences with the parents. The reason for this urgency is that it is the child who suffers in the meantime.” (*Id.* at p. 1170.)

28. In this case, District was not required to seek OAH authorization to implement an interim behavior plan and aide service with supervision OAH itself ordered District to provide Student. It would be a waste of resources to litigate whether

District could, without parental consent, implement services that OAH ordered District to provide after Student prevailed in a prior due process hearing.

29. Student failed to prove District denied Student a FAPE by failing to file for a due process hearing with OAH to seek a determination that the January 19, 2016 IEP offered Student a FAPE and to authorize District to implement the January 19, 2016 IEP without parental consent.

30. Consequently, Student failed to meet his burden of proof on any claim.

## ORDER

All relief sought by Student is denied.

## PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. District prevailed on all issues heard and decided in this case.

## 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: March 28, 2017

/s/

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KARA HATFIELD

Administrative Law Judge

Office of Administrative Hearings