

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENT ON BEHALF OF STUDENT,

v.

TEHACHAPI UNIFIED SCHOOL
DISTRICT,

OAH Case No. 2015040167

TEHACHAPI UNIFIED SCHOOL
DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH Case No. 2015050907

DECISION

Student filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, in OAH Case Number 2015040167, on March 30, 2015, naming the Tehachapi Unified School District (District). District filed a complaint in OAH Case Number 2015050907 on May 22, 2015, naming Parent on Student's behalf. On May 1, 2015, OAH reset the hearing timelines in Student's case to June 1, 2015. OAH granted a continuance in Student's case on June 5, 2015. OAH consolidated the two matters on June 9, 2015.

Administrative Law Judge Adrienne L. Krikorian heard this matter in Tehachapi, California, on June 30, July 1, 2, 7, 8, and 9, 2015, and telephonically in Van Nuys, California on July 10, 2015.

Attorney Andréa Marcus represented Student. Paralegal and educational advocate Vikki Rice assisted Ms. Marcus on the first five hearing days. Mother was present during the first six hearing days, and testified.

Attorney Daren Bogié represented District. District's Director of Special Programs Heather Richter attended the first six hearing days.

At the conclusion of the hearing, OAH granted a continuance for the parties to file written closing arguments and the record remained open until July 27, 2015. The parties timely filed their written closing arguments, the record closed, and the matter was submitted for decision on July 27, 2015.

ISSUES¹

*Student's Issues*²

1. Did District procedurally deny Student a free appropriate public education from August 14, 2013, through March 30, 2015, by failing to timely and appropriately conduct a functional behavioral assessment?

2. Did District substantively deny Student a FAPE from August 14, 2013, until March 30, 2015, by failing to include autism-specific behavior therapies in the classroom; failing to provide a dedicated one-to-one behavioral aide to Student throughout Student's school day; and failing to provide structured teaching methods to meet Student's unique needs?

¹ The ALJ has reorganized and renumbered the issues 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.) Student attempted to raise issues at hearing and in his closing brief that Student did not raise in his complaint, specifically: whether District failed to appropriately implement Student's Seizure Disorder Plan; whether Student's placement in a special day class was the least restrictive environment; and that the Special Circumstance Instructional Assistance assessment was not accurate or valid. A party who requests a due process hearing may not raise issues at the hearing that were not raised in his request, unless the opposing party agrees to the addition. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1465.) Accordingly, this Decision does not address those issues and arguments.

² Student withdrew the following issues alleged in his complaint: all claims relating to District assessments other than the functional behavioral assessments; his claim that District allegedly made a conditional offer of one-to-one aide services at the March 12, 2015 individualized education program team meeting; and that District failed to timely and appropriately conduct a triennial psychoeducational assessment of Student. OAH dismissed Student's claims arising under the American with Disabilities Act (20 U.S.C. § 12101, et seq.) and Section 504 of the Rehabilitation Act of 1973 (20. U.S.C. § 794.).

District's Issue

3. Did District's speech and language assessment, conducted in February and March 2015, comply with the Individuals with Disabilities Education Act, such that Student is not entitled to an independent educational evaluation?

SUMMARY OF DECISION

On Issue One, Student made educational progress in the 2013-2014 school year, and his behavior did not impact his access to his education to such a degree that District should have conducted a functional behavior assessment in that school year. In the 2014-2015 school year, District offered Student two assessment plans for functional behavior assessments within one month after Student returned to school following a medical diagnosis of a seizure disorder that resulted in dramatic changes in his behaviors at school. Mother signed an assessment timeline waiver approximately three weeks after the 60-day assessment timeline lapsed. Student was on a home-hospital placement in November and December 2014, on a part-time schedule when he returned to school in January 2015, and he missed four days of school through February 2015. The evidence established that District's delay in commencing and completing the two appropriately conducted functional behavioral assessments did not result in a significant procedural violation of the IDEA by District.

On Issue Two, during the 2013-2014 school year, Student made meaningful progress and met some of his goals and objectives in a special day kindergarten classroom staffed by a credentialed special education teacher and several adult paraprofessionals. Classroom staff successfully managed and redirected Student's behavior in most instances. Student offered no evidence that District denied him a FAPE by failing to provide a dedicated one-to-one behavior aide throughout the school day, autism-specific behavior techniques, or specific teaching strategies. In the 2014-2015 school year, Student's dramatic change in medical history resulted in District initiating multiple assessments to determine his new needs and the necessary related supports. The IEP team had not completed its determination of what was appropriate for Student before Mother removed him from school in March 2015. However, from late September 2014 and until Mother withdrew him from school in March 2015, District assigned a trained paraprofessional to support Student throughout the school day whenever Student was at school. Student did not offer any credible evidence that District staff failed to use appropriate teaching methods or that "autism-specific behavior therapies" were necessary to address Student's needs, which had changed since his May 2014 IEP, known to the District at the time.

On Issue Three, District failed to demonstrate that its February and March 2015 speech and language assessment was appropriate because the assessor did not administer any standardized assessments in the area of pragmatics even though the assessor noted deficiencies in pragmatic language in her report, and other District staff observed deficits in pragmatics during their February 2015 assessments. Therefore, the speech and language assessment did not fully assess Student in all areas of suspected disability.

On Student's issues, Student is entitled to no relief. On District's issue, the assessment was not appropriate and Student is entitled to an independent educational evaluation in speech and language at public expense based upon Parent's May 14, 2015 request.

FACTUAL FINDINGS

Jurisdiction

1. At the time of hearing, Student was a seven-year old boy who resided with Parents in the District and was eligible pursuant to his May 2012 individualized education program for special education under the categories of autistic-like behavior and, secondarily, speech and language impairment. From and after September 2014 Student's physician diagnosed him with a seizure disorder. Student required a trained person to administer Diastat, a seizure medication, in connection with specific instances of seizures.

Educational History

2. Student attended Southern Kern County Unified School District (Kern County) during the 2012-2013 school year. Kern County developed an IEP on May 21, 2012, and a Behavior Intervention Plan, which Student's Kern County IEP team reviewed and updated on May 14, 2013.

3. Student enrolled in District's Cummings Valley Elementary School on August 14, 2013. Prior to enrollment, Mother sent an email to District requesting that District permit privately funded aides to be in the classroom to support Student. District held an IEP team meeting on September 12, 2013. The team incorporated some of the terms from the Kern County May 14, 2013 IEP. The September 12, 2013 IEP did not include a behavior intervention plan, but included speech, social emotional, and academic goals. District did not offer a dedicated one-to-one behavior aide. Although Director of Special Programs Kathleen Siciliani did not receive Mother's email request, the IEP team agreed to allow Student's private aides in the class. Mother consented to the IEP.

2013-14 SCHOOL YEAR: KINDERGARTEN

4. Student was in Richard Stanley's kindergarten mild/moderate classroom in the 2013-2014 school year. Mr. Stanley was a credentialed special education teacher. He completed training qualifying him to teach students with mild, moderate, and severe disabilities. He also completed courses that addressed methodologies to help students with behavior issues, including behavior intervention. His work experience included approximately six months as a paraprofessional. His duties as full-time teacher at Cummings Valley Elementary included becoming familiar with students' IEP's, developing daily curriculum and weekly plans for students, working directly with the students, and ensuring that the classroom paraprofessionals implemented the curriculum in small group sessions.

5. Mr. Stanley began developing curriculum for the classroom, including for Student, immediately after District assigned him to Student's classroom as a temporary substitute teacher. He transitioned from substitute teacher status at the beginning of the school year to full-time status in or about October 2013.

6. Mr. Stanley worked directly with Student on his IEP goals and objectives, and daily lessons, including reviewing the daily calendar, teaching him numbers, shapes, simple math, and alphabet. Students generally performed at three levels of academic ability in Mr. Stanley's class. Student performed at the high end of the middle group of students. Student exhibited no behaviors that caused Mr. Stanley concern, or that Mr. Stanley was not able to control. Mr. Stanley successfully redirected Student when he occasionally refused to do classwork. Mr. Stanley did not observe Student engage in any aggressive or other behaviors that were harmful to Student, other students, or adults in the classroom. Student did not exhibit any violent outbursts during the school year. Student would frequently get upset when given instructions, refuse to do classwork, or crawl under tables for extended periods to avoid work, but would come out after being encouraged to do so. His general behavior gradually improved toward the end of the school year; he was more attentive, cooperated, and he did not crawl under the table as frequently. Mr. Stanley did not think Student required more supports in the classroom than what District provided. If he had believed that Student needed more behavior support, he would have called an IEP team meeting to discuss behavior issues. Mr. Stanley periodically entered progress notes regarding Student's goals and objectives in Student's online cumulative records.

7. District paraprofessionals Cynthia Isbell and Melinda Anspach were assigned to Mr. Stanley's kindergarten classroom during the 2013-2014 school year. Both paraprofessionals had more than 10 years of experience and were trained and experienced in the application of Applied Behavior Analysis.³ Both worked with Student in the classroom in group sessions. They were aware Student had private aides that came into the classroom to observe Student; neither saw Student work directly on classwork with his private aides. Ms. Isbell and Ms. Anspach observed Student engage in behaviors such as elopement out of the classroom, avoidance of work, and defiance to adult instruction. They agreed the classroom paraprofessionals successfully redirected Student on most occasions, including by using reinforcements for positive behavior.

³ Ms. Anspach received Applied Behavior Analysis training in 2006 from the District, including learning how to observe behavior and apply techniques to change behavior by encouraging positive behaviors, discourage negative behaviors, and intervening before behavior escalates. She also received training in the application of Applied Behavior Analysis and data keeping from a non-public agency, Multilevel Applications and Positive Support Services (MAPS). In her opinion, Applied Behavior Analysis training did not teach her anything different from the techniques she used prior to the training.

8. Ms. Isbell had worked with children with varying disabilities, including autism, since 1983. She does not have a teaching credential. Ms. Isbell never saw Student's IEP and District did not assign her to work directly with Student. In her opinion Student had difficulty completing his work by himself, when he was frustrated and during transitions, although his behavior was not "bad." As the school year progressed, District's classroom paraprofessionals increased the use of reinforcements with Student. Although in Ms. Isbell's opinion Student's behaviors, including frustration, defiance and aggressiveness, escalated at the end of the year, she was not qualified to give an opinion as to whether those behaviors impacted Student's access to his education or his ability to make progress. Mr. Stanley's testimony was more credible because he was more familiar with Student's IEP goals; he worked with him on those goals; he saw him make progress despite his behaviors; and he entered periodic progress reports into Student's records based upon his work with Student.

9. On May 12, 2014, District held an annual review IEP team meeting. Mr. Stanley attended the meeting along with Mother and other required District staff. The IEP team reviewed Student's progress toward his goals and objectives. He made academic progress in Mr. Stanley's class, notwithstanding Student's classroom behavior. Student met his three social/emotional goals in communication, compliance, and verbally expressing anger and frustration. His behaviors were less extreme at the end of the year: he listened and cooperated more frequently; his interruptions were less frequent; he followed directions more frequently; he occasionally needed redirection; and he no longer crawled under a table for extended periods of time. He responded to attempts to redirect him. He met his goals in academic/reading and academic/math, and his communication goal. He could identify upper and lower case letters with 60 percent accuracy four out of five times; and he named and recognized whole numbers with 75 percent accuracy, exceeding his goal of 60 percent.

10. The IEP team acknowledged that Student continued to require redirection and support in connection with his behavior in the class and on the playground. The IEP team developed new goals and objectives in writing, reading, and math. The IEP team did not feel that Student required a behavior goal or behavior intervention plan but developed accommodations that included verbal encouragement, on-task reminders, warning Student of transitions and environmental changes, directions given in a variety of ways, and increased verbal response time. District offered continued placement in a first grade special day class. The IEP notes reflect different levels in the number of minutes of proposed services and supports from the page of the IEP that specifically described District's offer of FAPE. The IEP provided for instruction in a special day class, mainstreaming with general education peers during recess 20 minutes daily for socialization; 30 minutes daily in a general education class for the remainder of kindergarten for curricular integration and 40 minutes a day in first grade; and 40 minutes a week of speech and language. Parents consented and agreed to implement the May 12, 2014 IEP in its entirety.

11. Easter Seals gave Parents three written reports relating to the private Applied Behavior Analysis aide home support the entity provided for Student during the 2013-2014 school year. Mother received and reviewed the three reports. The Easter Seals aides provided applied behavioral analysis therapy to Student at home. Student's non-compliant

behaviors at home improved by the end of the 2013-2014 school year and Easter Seals recommended reducing the number of hours of home therapy. Student offered no credible evidence that Easter Seals provided direct one-to-one assistance to Student at school, or when or for what period of time its aides visited Mr. Stanley's kindergarten classroom.

12. Student made academic progress during the 2013-2014 school year without the assistance of a full-time dedicated one-to-one behavior aide. The supports and services District staff provided Student in Mr. Stanley's classroom effectively redirected his behaviors to the extent that his behaviors did not substantially interfere with his access to his education or his ability to make progress at school.

2014-2015 SCHOOL YEAR: FIRST GRADE

13. Student began the 2014-2015 school year on August 13, 2014, in Nancy Piercy's first grade special education class. District did not assign Student a dedicated paraprofessional at the beginning of the school year, and the privately funded aides had stopped attending the classroom.

14. Student experienced a grand mal epileptic seizure outside of school on or about August 24, 2014. He was hospitalized for three days and began illness absence from school on August 25, 2014. On September 8, 2014, in preparation for Student's return to school, District held a review IEP team meeting to discuss Mother's concerns about Student's medical needs. Mother reported that Student appeared to be regressing academically, which she acknowledged might be associated with his seizures. Student exhibited increased non-compliance with directions. The IEP team discussed Student's medical needs, including the administration of Diastat by a trained adult. The team reviewed a doctor's note that recommended that, because of his potential for seizures, Student should have a one-to-one aide to supervise him when going to the restroom or on the playground. District concluded that it could meet Student's medical needs with coverage from existing District staff who volunteered for the required Diastat training. The IEP team created a Seizure Action Plan for Student, pursuant to directives from Student's doctor, and added a behavior goal.

15. Student returned to school on September 22, 2014. In addition to the school principal, school nurse, bus driver, and school health aides, at least two to three staff in Student's classroom received training in the protocols for recognition, observation, and tracking of seizures, and the administration of Diastat.

16. District assigned Ms. Anspach to Student as his medical paraprofessional until October, 2014. She carried the Diastat backpack. After his return to school following the August 24, 2015 seizure, Student's behavior became increasingly aggressive, including hitting, kicking, screaming, and attacking other children and adult staff in the classroom. He resumed elopement behavior. He had a "far-away look" in his eyes, which Ms. Anspach

reported to Ms. Piercy. Ms. Anspach received instructions from Ms. Piercy as to the curriculum for Student and she worked with him in small groups. Student missed school numerous times due to illness and behaviors.

17. District paraprofessional Holly Reddig was a certified emergency medical technician; received a certificate in Crisis Prevention in April 2015; and had taken courses in cardiopulmonary resuscitation and child development. She received training in the application of Applied Behavior Analysis and data keeping from MAPS from November 2013 through approximately February 2014. She completed training in Diastat administration.

18. District assigned Ms. Reddig full-time to Student as his paraprofessional in October 2014. She was familiar with Student because, in 2013-2014, she was a substitute paraprofessional for another student in Mr. Stanley's class and had seen him during that time. In Ms. Piercy's class, Ms. Reddig sat with Student at his desk, or, when he needed breaks, she accompanied him outside, which was his preferred behavior. Student spent approximately 70 percent of the school day on breaks outside of the classroom and avoided spending time on classroom work. Student was not receptive to Ms. Piercy and avoided her when she attempted to instruct him. Ms. Reddig worked with Student on science projects, which he enjoyed. She was familiar with Student's behavior goal from the September 2014 IEP and his medical condition. She recorded daily data on Student's behaviors in notebooks specific to Student and maintained in the classroom. Ms. Reddig met with the school psychologist, other paraprofessionals, and the school principal to collaborate on strategies and techniques to address Student's behaviors. Ms. Reddig was Student's dedicated paraprofessional at school until he went on medical leave in late October 2014.⁴

19. On October 17, 2014, District held a review IEP team meeting to discuss Student's increased seizures at school, his increasingly physically aggressive behavior, his continued elopement, and his behaviors at school in general. Mother actively participated in the meeting. She informed the IEP team that Student's increasingly aggressive behaviors followed his diagnosis of a seizure disorder, and were not behaviors carried over from the

⁴ On one occasion in early October 2014, another child accessed the backpack with Student's medication, leaving only one of two syringes of Diastat for Student. Student suffered no physical harm from the incident. Although Mother did not know how the incident actually happened, she understood that the backpack had one remaining syringe of Diastat immediately after the incident. Student was taken to the school office where another parent observed him without an adult staff member nearby. That parent has a child in Student's class. That parent has filed a complaint on the child's behalf against District, which is pending before OAH. This Decision does not identify the parent's name to protect the child's privacy. The ALJ considered the parent's hearing testimony in this matter, but gave it minimal weight based on lack of relevance to the issues, and on the parent's admission that she was dissatisfied in general with the services District provided to children with special needs, causing her to appear significantly biased against District.

2013-2014 school year. Her primary concern was Student's medical needs. Student's avoidance and elopement behaviors escalated when adults exerted authority. The IEP team discussed certain strategies and reinforcements that worked for Student's behaviors related to avoidance of adult authority. The IEP team discussed Student's Seizure Action Plan and acknowledged that the presence of an adult with "eyes on" Student, particularly during recess, was a necessary part of the Plan. The IEP team discussed additional classroom supports, including access to a one-to-one aide to assist Student with academics and his behaviors.

20. District offered to assess Student to determine whether he needed Special Circumstance Instructional Assistance, referred to by the parties as a SCIA aide. Kern County's SELPA uses SCIA instead of the commonly referred to "one-to-one" aide. The IEP team determines the child's needs based on the SCIA assessment. District assigns the SCIA aide to the Student's classroom, and the child's IEP determines the aide's scope of responsibilities to the child. If a student requires intensive or exclusive one-to-one aide support, the IEP team will include that directive in the IEP. Mother signed an assessment plan for a SCIA assessment on October 17, 2014.

21. On October 29, 2014, District held a manifestation determination meeting following Student's suspension for an incident in which he was violent and aggressive to a teacher and other students. Student did not engage in similar behaviors at school before his first seizure. The IEP team determined that Student's behaviors were a manifestation of a suspected disability but not necessarily the disability of autism. It discussed strategies and accommodations, including reinforcements, to address Student's behaviors. The manifestation team agreed to advance Student's triennial multi-disciplinary assessments and hold an IEP team meeting upon the completion of assessments to determine what changes were necessary based on his recent medical diagnosis and new behaviors. Mother signed a comprehensive assessment plan that included two functional behavior assessments to evaluate targeted behaviors in aggression and elopement, a speech and language assessment, and assessments of academic performance, social/emotional, and motor ability.⁵

22. Student was absent from school from October 23 through November 11, 2015, including two unexcused absences and seven illness days. Mother applied for home hospital placement, supported by a doctor's note, on November 4, 2015. On December 8, 2014, District issued an Administrative Amendment to Student's IEP changing his placement to home hospital, and designating the assignment of a teacher for one hour of daily academic instruction. Mother signed the amendment on the same date. Student was on home hospital placement from November 13, 2014, through December 19, 2014. District did not change Student's IEP services in the amended IEP, which continued to include specialized academic

⁵ Mother also consented to an educationally related mental health evaluation. The parties offered no evidence as to the outcome of that evaluation.

instruction 180 minutes daily by a District teacher, and 40 minutes a week of speech and language therapy.⁶ He remained out of school until January 6, 2015. District did not complete any assessments of Student while he was on home hospital instruction.

23. Student returned to school on a modified schedule in January 2015. An adult paraprofessional supported him and made notes in the classroom notebooks regarding his behaviors. District suspended Student for behavior on January 23, 2015. School psychologist Dawn Roach asked Mother to sign a waiver of assessment timelines, explaining that, because Student was absent during the required assessment period, District could not timely complete the assessments. She also informed Mother that District staff wanted to give Student time to readjust to the school environment and to see how Student did after his medication was adjusted to determine if he still needed all of the behavior related assessments. Mother signed the waiver on January 26, 2015.⁷

24. Brian Burrows was Student's assigned paraprofessional beginning in February 2015; his role was to stay close to Student as a medical aide for Student. His assignment lasted approximately one month. Student's behaviors, which Mr. Burrows considered severe, worsened from the first day Mr. Burrows worked with him. He engaged in loud outbursts, temper tantrums, anger, hitting, and elopement. Student eloped from class almost every day, to the point where Mr. Burrows observed that Ms. Piercy was unable to instruct Student consistently. Student was absent from school on February 4, 19, and 26, 2015, because of illness,

25. From the time Student returned to school in September 2014 until early March 2015, District assigned a dedicated trained paraprofessional to provide medical and behavior support to Student throughout the school day, whenever Student was at the elementary school. The paraprofessionals kept detailed handwritten notes of Student's academic activities and behaviors in notebooks kept in the classroom; assisted Student with his academics; provided behavior support; and were qualified to recognize seizures and administer Diastat if necessary. They collaborated with the teacher, and occasionally with the school psychologist and Ms. Siciliani.

⁶ Neither party offered any credible evidence as to what, if any, specific instruction and support services District provided to Student while he was on home hospital placement; what his behaviors were during home hospital instruction; whether his behaviors interfered with any home hospital instruction or support services, if provided; or any other details about the home hospital placement.

⁷ Mother testified at hearing that she would not have signed the assessment timeline waiver if she had seen, or been told about, the content of personal notebooks maintained by classroom aides, which she first saw at hearing. However, Mother conceded the notebooks reported that District staff informed Father of some of the reported incidents and behaviors, establishing that at least one parent knew about Student's reported behaviors.

2014-2015 ASSESSMENTS

26. Ms. Roach completed the SCIA assessment on February 13, 2015. She held a master's degree in school psychology, was a licensed educational psychologist, and worked as a school psychologist since 2011. She has trained, and trains others, in the area of behavior analysis and positive intervention support. She received training in Applied Behavior Analysis. As part of her job duties as a school psychologist, she has administered psychoeducational assessments, collected data, reported evaluation results, written reports, consulted with school staff, and participated in multidisciplinary teams. She was qualified to administer the SCIA assessment of Student.

27. The SCIA assessment included a detailed review of Student's familial, medical, and educational background and history; teacher and parent interviews; and multiple observations. In particular, Ms. Roach noted that Student had difficulties in the area of social pragmatics. He struggled with socialization and participating in group activities. He required an adult to facilitate social interaction with peers and remain in close physical proximity. Primary play involved restricted, repetitive, and stereotypical behavior patterns without direct and specialized interventions from a trained adult. Changes in routine were so disruptive even with interventions that Student was not benefitting from his IEP.

28. Based upon the results of the SCIA assessment, Ms. Roach recommended that District continue the health alert plan and assign a SCIA aide to Student throughout the school day. The role of the SCIA aide included maintenance and administration of Diastat; remaining in close proximity to Student to recognize and treat oncoming seizures; assisting with behavior through redirection; and specified procedures for handling non-compliance and keeping Student in line of sight for his and his peers' safety.

29. Ms. Roach conducted the two functional behavioral assessments in February and March 2015. She was qualified to administer the assessments. Ms. Roach did not administer any standardized tests in connection with the functional behavior assessments, which relied largely on observations and related collection of data and the analysis of that data. The purpose of the functional behavioral assessments was to observe Student's reactions and behavior in the school environment, both in the classroom and during recess and lunch, to determine what situations triggered Student's behaviors and what behaviors were consequential. Data collection relating to behaviors was important because it identified what reinforced Student's behavior and whether strategies applied by District staff were effective. Conducting Ms. Roach's observations for either of her functional behavioral assessments of Student in the home environment while he was on home-hospital instruction would not have produced sufficient valid results applicable to designing a valid plan for the school setting. If Ms. Roach had observed Student in the home setting, she might have been able to develop some strategies to assist him in transitioning back to school in addition to getting data from the home hospital teacher. However, home observations would have only provided limited information about Student's behaviors applicable to an educational environment at school.

30. In her February 6, 2015 report relating to Student's aggressive behaviors, Ms. Roach noted Student had no behavior goals as of his October 24, 2014 IEP and did not have a behavior intervention plan. She observed Student in the school setting at least eight times and collected data as part of her assessment; she conducted teacher and parent interviews; and she evaluated antecedents and consequences of Student's behaviors. With respect to the targeted behavior of aggression, Ms. Roach recommended three behavior goals in target behavior, desired replacement behavior, and functional equivalent replacement behavior including self-regulation, if applicable.

31. In her March 6, 2015 report relating to Student's elopement, Ms. Roach summarized Student's history; his lack of behavior goals and lack of a behavior intervention plan; described the targeted behavior as "leaving the designated work area" during seatwork or table work in small groups; and reported in detail her five classroom observations and related data collection. Ms. Roach did not receive information from Mother that Student received private service applied behavioral analysis therapy at home. The information would have been useful to Ms. Roach to determine what strategies worked for Student at home. She also did not interview Mr. Stanley about Student's behaviors in kindergarten because he no longer worked for District. Student spent an average of 111 minutes away from the designated work area during her observations. Ms. Roach recommended that the IEP team develop a behavior intervention plan to address specified behavior goals addressing targeted behavior, desired replacement behavior, and functional equivalent replacement behavior, if applicable. Her practice was to go into the classroom to teach the teachers and classroom paraprofessionals implementation or recommended techniques.

32. Ms. Owen conducted a psychoeducational assessment, which she documented in a report dated March 6, 2015. She held a master's degree in school psychology and was a licensed educational and school psychologist. She worked as a school psychologist for 16 years, had training and experience in developing behavior support plans, in positive behavior intervention support, Applied Behavior Analysis, and in administering assessments, including the Autism Diagnostic Observation Schedule, Second Edition. She had extensive experience working with children with a diagnosis of autism, although she was not an expert in the administration of Applied Behavior Analysis strategies and techniques. In addition to an extensive records review, Student observations and Parent and teacher interviews, Ms. Owen conducted a variety of standardized psychological assessment tools, including observations, standardized tests, and clinical interviews. She did not interview Mr. Stanley. Student was non-compliant on two occasions during her assessments.

33. In Ms. Owen's opinion, based partly upon his aggressive behaviors prior to the diagnosis of a seizure disorder, and later bizarre behaviors and obsession on violent and negative thinking including death and dying⁸, Student met the criteria for eligibility of

⁸ In response to Ms. Owen's testimony regarding Student's fixation with death and dying, Mother explained at hearing that, in February 2015, Student's family experienced the death of a close family member, and shortly thereafter Student began demonstrating negative speech about death and dying after Mother informed him of the death.

emotional disturbance. She based her opinion on findings that Student was social, exhibited social reciprocity, shared enjoyment, and used visually directed referencing; looked for responses from others; was animated while having a conversation; asked questions; spontaneously used descriptive body and facial gestures; had good eye contact and was affectionate. He was able to read the nonverbal behavior of others and to understand what another person might be thinking. In her opinion, these characteristics are not typical of a child with autism.⁹ Her report recommended a variety of strategies to respond to Student's verbal or physical aggression.

34. Lindy Cyr conducted a speech and language assessment in late February and early March 2015, which she documented in an undated report. Ms. Cyr held a master's degree in speech language pathology and worked as a credentialed speech and language pathologist since 2008. She has conducted approximately 250 speech and language assessments and worked with approximately 50 students with autism during her career. She worked with Student when he was in preschool, beginning from 2009 in the Southern Kern County School District, and continued to serve him when he enrolled at Cummings Valley Elementary School. Ms. Cyr was qualified to conduct the speech and language assessment for Student.

35. The purpose of the educationally related speech and language assessment was to determine how Student functioned in the school setting, including in the classroom and in quiet settings where he received speech and language services. Conducting the assessment in the home environment while Student was on home hospital instruction was not appropriate. The setting, distractions, and potential of parental prompting were likely to produce results that would not be valid in the school setting. The results from a school-based assessment would better inform Ms. Cyr on what Student's needs at school were and how to serve them.

36. Ms. Cyr's assessment included Parent and teacher interviews, behavioral observations, oral mechanism evaluation, administration of the Goldman Fristoe Test of Articulation 2nd Edition, the Preschool Language Scale 5th edition, informal speech samples, and informal language samples. She also considered "existing evaluation data," assessments, and observations by "related service providers." She followed instructions from the test publishers, Student cooperated during testing, and she received valid results. During her testing and observations, she observed that Student had no difficulty hearing her instructions. However, on the Goldman Fristoe because of Student's non-compliance, she did not administer "sounds and words" subtests, which, in her opinion, were not required for valid results. On the Preschool Language Scale, Ms. Cyr looked at Student's receptive and auditory skills, beginning the testing after determining Student's baseline, in accordance with

⁹ Although Ms. Roach and Ms. Owen reported conflicting findings that raised questions as to Student's eligibility criteria, eligibility was not at issue in this case and this Decision does not make any determination of eligibility.

the test publisher's directions. Ms. Cyr transcribed 50 of Student's verbal responses to her questions on the language samples, but did not include her questions on the transcription. Her assessment report listed 10 of those responses. Student's intelligibility was 70 percent based on 7 of 10 utterances. Student's behavior was appropriate during the testing. The testing results reflected his true abilities. Student's receptive and auditory skills were borderline average. His total language score was below average.

37. Student's pragmatic deficits included poor use of social constructs and proxemics. His conversation during play lacked basic organization and vocabulary selection and decreased sentence length and complexity. Ms. Cyr did not ask Mother whether she observed pragmatic deficits in Student, including problems with skills such as turn taking, speaking over peers, and using physical acts instead of language. However, Ms. Cyr participated in the administration of the Autism Diagnostic Observation Schedule administered by Ms. Owen. During that test, Student complied with directives, he was capable of redirection, and, in Ms. Cyr's opinion, he presented with a wide variety of appropriate pragmatic behaviors. She did not administer any standardized test instruments during her speech and language assessment to determine Student's level of functioning in pragmatics.

38. Student qualified for speech and language services because he demonstrated severe impairment in articulation and phonological ability, he was below average in overall language skills and demonstrated multiple errors in semantics, morphology and syntax. Ms. Cyr recommended a number of activities and games designed to enhance Student's speech and language skills.¹⁰

39. Karen Schnee was a licensed speech pathologist with a master's degree in special education, and multiple credentials and certificates in special education and educational therapy. She had administered approximately 200 speech and language assessments as part of her private practice. In preparation for her testimony, Ms. Schnee reviewed only the written report from Ms. Cyr's speech and language assessment. She did not review any attachments to the report, protocols, speech samples, other data from the testing instruments, or any other records relating to Student. She did not meet or assess Student. Her opinions were limited to what she read in Ms. Cyr's report.

40. Ms. Schnee's relevant criticisms of Ms. Cyr's report were limited to the lack of testing in the area of pragmatics. She explained social pragmatics looks at a student's language abilities in several areas. These areas include the ability to: interpret and react to someone else's perspective; maintain topic; engage with another individual even if the topic

¹⁰ On May 14, 2015, Parents requested an independent educational evaluation of Student in speech and language, disagreeing with District's March 12, 2015 assessment report.

is not a preferred topic; engage in reciprocal dialogue; read body gestures and non-verbal facial communications; using words to get a desired response; initiate communication and make basic needs known. In Ms. Schnee's opinion, one age-appropriate standardized language assessment and one language sample of 50 utterances were not enough to assess whether Student had deficits in social pragmatics. Ms. Cyr formally tested Student only in a limited setting, with no dynamic testing or observations in the classroom or on the playground. Pragmatic social behavior requires participation by another person. In the case of Ms. Cyr's language samples, she only reported 10 of the samples in her report, but did not include her questions. The utterances alone do not provide sufficient information to determine pragmatic skills.

41. Student's self-talk that centered on death and dying could indicate a social pragmatic issue. Student indicated difficulty in understanding false belief, which might suggest that Student had difficulties with sarcasm, and interpreting statements literally rather than based on the intent of the other participant. Ms. Cyr noted that Student had weaknesses in pragmatic, but she did not otherwise address pragmatics, leaving unanswered questions as to whether Student had pragmatic deficits.

42. Ms. Schnee was also critical of the Preschool Language Scale 5th Edition used by Ms. Cyr, which is a survey of semantics, morphology, and syntax, rather than an evaluation; it lacks any pragmatic evaluation tools. The test was of questionable validity because Student had almost normed out of the age limits for the test. Ms. Schnee did not offer any recommendations for services and supports for Student, stating that she would need to do more testing in the area of pragmatics.

MARCH 12, 2015 IEP

43. District held an IEP team meeting to discuss all of the assessment reports on March 12, 2015. The IEP team discussed Student's present levels of performance, and the findings of the various assessors. The IEP team did not agree on Student's eligibility or placement. They did not determine whether Applied Behavior Analysis intervention would work for Student, particularly given his aggressive behavior toward other children. District members of the team felt Student's eligibility might be emotional disturbance rather than autistic-like characteristics. Parent wanted to explore further whether autism-specific supports would be helpful for Student.

44. District's elementary schools provide placement options of general education classes with resource support, mild/moderate and moderate/severe classrooms to children with special needs. In cases where a child's needs do not fit within those options, District relies on the SELPA to provide additional options on the continuum of placement options. District recommended that Parents listen to a presentation of the various programs, services and supports offered by the SELPA for children with autistic-like characteristics and mental health needs. Mother was concerned that a long commute to Bakersfield to access SELPA

programs might not be appropriate for Student given his medical needs and behavior. The IEP team, including Mother, agreed that it would postpone the triennial review IEP for four to six weeks, in part because District proposed bringing SELPA representatives to the next meeting to explain SELPA programs and answer Parents' questions.

45. District proposed to implement, on a temporary basis, recommendations from the functional behavioral assessments in a clinical-like setting, with accommodations, for four to six weeks. The program included: a separate classroom without other students, to ensure Student's and other children's safety; a dedicated teacher who would deliver 190 minutes daily of specialized academic instruction; Ms. Reddig as his dedicated aide; and intensive supervision and support from Ms. Roach for large parts of the school day. Ms. Roach intended to implement a variety of strategies based upon her assessments to determine which strategies worked with Student in order to develop a suitable behavioral intervention plan for Student. District also offered 140 minutes monthly of direct speech services, and 20 minutes monthly of speech and language consult. Mother agreed to implement District's recommended program on a temporary basis up to six weeks and reconvene the IEP team meeting.

46. Student had unexcused absences from March 11 through March 17, 2015. He attended three days of the separate class setting in March 2015. His behavior for those three days was aggressive, and included hitting and kicking. Ms. Roach provided Ms. Reddig with strategies and techniques to work with Student. Ms. Reddig recorded Student's behaviors, including antecedents and consequences. On the third day, he stabbed the teacher with a pencil during a visit by Ms. Siciliani and the school superintendent. District suspended Student from school on March 23 and 24, 2015, and Mother did not allow him to return before the end of the school year because she did not trust District staff, and was concerned for Student's safety

TESTIMONY OF JEFFREY HAYDEN, PHD RE: ABA THERAPY

47. Jeffrey Hayden, Ph.D., testified for Student on the topic of Applied Behavioral Analysis in the context of behavior intervention. Dr. Hayden was a doctoral board certified behavior analyst. He held a Ph.D. in education with an emphasis on special education, disability and risk. Dr. Hayden was involved in working with children with special needs, including autism, in the private sector since 1989. He had reviewed more than 100 IEPs but never worked in a public school setting. At the time of hearing, he was the principal of Hayden Consulting Services, Inc., which provides behavior support services to regional centers, insurance companies, and private clients.

48. District retained Dr. Hayden in 2015 to conduct an independent educational evaluation of Student in the area of functional behavior analysis at District's expense. At the time of hearing, Dr. Hayden provided a draft report that was incomplete and did not include any recommendations. His observations of Student consisted of two three-hour observations

in the home environment while Student had the assistance of a private Applied Behavior Analysis therapist. He needed to conduct additional observations of Student in the school environment before completing his evaluation and report. He based his opinions at hearing primarily on his review of Student's records and home observations. He did not know what behavior support Student received, if any, in kindergarten.¹¹

49. Dr. Hayden observed that Student whined when attention was not on him, and used the behavior as an avoidance technique. Student interrupted conversations, engaged in violent behaviors including striking and spitting at family members, verbal outbursts, and throwing a game from the table to the floor. In Dr. Hayden's opinion, Applied Behavioral Analysis can address behaviors regardless of a child's medical diagnosis. Intervention for behaviors associated with seizures would depend on what the resulting behaviors were. For example, if a child is aggressive immediately following a seizure, one could use certain Applied Behavior Analysis technics to control the behavior. Similarly, if precursors to a seizure are predictable, one could use Applied Behavior Analysis technics to address those precursors. Children with emotional disturbance can benefit from the techniques and principles of Applied Behavioral Analysis. The term "emotional disturbance" is not a diagnostic label but describes instead behaviorally challenged children. The technics are targeted to the principles of antecedents, behavior, and consequences of behavior, which can be applicable to anyone demonstrating behaviors, even without a diagnosis of autism. Behaviors are fluid and can change depending on the antecedents triggering those behaviors.

50. Based upon his records review, Dr. Hayden was critical of District's handling of Student's behaviors during the 2014-2015 school year, up to March 30, 2015. He based his criticism on the fact that the behaviors described during that time still existed during his observations. Although he saw evidence of non-preferred behaviors, during hearing he was not specific as to when those behaviors occurred, and he did not clearly associate or distinguish behaviors within a particular school year or related to Student's change in medical diagnosis in the 2014-2015 school year. Dr. Hayden felt a behavior intervention plan would have been beneficial to Student. Dr. Hayden was critical of the form used by Student's prior school district for his behavior support plan, inferring that District's reliance on any part of that plan when Student enrolled in District was inappropriate.

¹¹ Dr. Hayden's draft report carried no weight as to credibility based on *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149. The draft report was prepared after the March 12, 2015 IEP team meeting, it was not complete, the IEP team had not yet seen or considered a final report, and Dr. Hayden testified that he needed to conduct additional observations of Student, including in the school setting, before making any recommendations. His opinions however, to the extent they related his observations after March 30, 2015, to his understanding of Student's behaviors before March 30, 2015, based on his records review, were entitled to some weight.

51. In his opinion, providing Applied Behavior Analysis intervention to Student during the 2013-2014 and 2014-2015 school years would have made a difference in Student's behaviors because Applied Behavior Analysis is extremely effective when administered as prescribed and would have positively affected Student's behaviors. However, Dr. Hayden did not recall what behaviors Student presented during kindergarten, although he recalled that Student did not exhibit assaults and suspensions when Student had an aide working with him. He also did not comment on whether any private Applied Behavior Analysis services provided to Student during the 2013-2014 school year had any impact on his behaviors. In Dr. Hayden's opinion, Student could have benefitted from Applied Behavior Analysis therapy at school, although he did not provide any specific technics for Student.

52. Dr. Hayden admitted that any recommendations he made were tentative, because an environmental assessment was part of a functional behavior assessment and he had not yet examined the ecology of Student's placement at school as it related to Student's behaviors. His admission weakened the impact of his opinions. Dr. Hayden was not retained to provide specific strategies or develop a behavior support plan. However, any aide assigned to Student would require training on strategies specified in a behavior intervention plan informed by the functions of those behaviors.

LEGAL CONCLUSIONS

Introduction: Legal Framework under the IDEA¹²

1. This hearing was held under the IDEA, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006) et seq.; Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for 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; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective,

¹² Unless otherwise indicated, this Decision incorporates by reference the legal citations in the introduction into the analysis of each issue decided below.

and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are also called designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, § 56032.)

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. 950, 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); 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).) 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. 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].) Student is the petitioning party on issues one and two and has the burden of proof on those issues; District is the petitioning party on issue three and has the burden of proof on that issue.

Issue 1: Failure to Timely and Appropriately Assess Functional Behavior

5. Student contends District failed to timely and appropriately conduct a behavioral assessment of Student from the time he enrolled in District in August 2013. District contends it timely and appropriately assessed Student. Student did not meet his burden of persuasion.

6. When a student transfers from one school district to another within an academic year, the new district must provide a placement and services that are comparable to those offered in the last agreed upon IEP in the prior district for a period not to exceed 30 days before either adopting the old IEP or proposing a new one. (20 U.S.C. § 1414(d)(2)(C)(i)(1); Ed. Code, § 56325, subd. (a)(1).) The IDEA and state law do not expressly provide that students who transfer school districts between academic years are entitled to a comparable placement. (See *Ibid.*)

7. At the beginning of each school year, each local educational agency must have an IEP in effect for each child with a disability within its jurisdiction. (34 C.F.R. § 300.323(a) (2006) ; Ed. Code, § 56344(c).) When developing an IEP, the IEP team must consider the child's strengths, the parent's concerns, the results of recent assessments, and the academic, developmental and functional needs of the child. (Ed. Code, § 56341.1, subd. (a).)

8. To determine the contents of an IEP, a District must assess a student eligible for special education under the IDEA in all areas related to his or her suspected disability. No single procedure may be used as the sole criterion for determining whether the student has a disability or whether the student's educational program is appropriate. (20 U.S.C. § 1414 (a)(2), (3); Ed. Code § 56320, subds. (c), (e), (f).)

9. For purposes of evaluating a child for special education eligibility, the district must ensure that "the child is assessed in all areas of suspected disability." (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) A school district must conduct assessments in a way that: 1) uses a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent; 2) does not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability; and 3) uses technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. The assessments used must be: 1) selected and administered so as not to be discriminatory on a racial or cultural basis; 2) provided in a language and form most likely to yield accurate information on what the child knows and can

do academically, developmentally, and functionally; 3) used for purposes for which the assessments are valid and reliable; 4) administered by trained and knowledgeable personnel; and 5) administered in accordance with any instructions provided by the producer of such assessments. (20 U.S.C. § 1414(b) & (c)(5); Ed. Code, §§ 56320, subds. (a) & (b), 56381, subd. (h).)

10. Individuals who are both “knowledgeable of the student’s disability” and “competent to perform the assessment, as determined by the school district, county office, or special education local plan area” must conduct assessments of students’ suspected disabilities. (Ed. Code §§ 56320, subd. (g); 56322; see 20 U.S.C. § 1414(b)(3)(B)(ii).) The determination of what tests are required is made based on information known at the time. (See *Vasherresse v. Laguna Salada Union School Dist.* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment adequate despite not including speech/language testing where concern prompting assessment was deficit in reading skills].)

11. The IDEA provides for a school district to conduct periodic reevaluations to be not more frequently than once a year unless the parents and district agree otherwise, but at least once every three years unless the parent and district agree that a reevaluation is not necessary. (20 U.S.C. § 1414(a)(2)(B); Ed. Code, § 56381, subd. (a)(2).) A reassessment may also be performed if warranted by the child’s educational or related services needs. (20 U.S.C. § 1414(a)(2)(A)(i); Ed. Code, § 56381, subd. (a)(1).)

12. A school district must hold an IEP team meeting to develop an IEP as a result of an assessment of a pupil within a total time not to exceed 60 days, not counting days between the pupil’s regular school sessions, terms, or days of school vacation in excess of five school days, from the date of receipt of the parent’s written consent for assessment, unless the parent agrees, in writing, to an extension. (Ed. Code § 56344.)

13. In matters alleging a procedural violation, a due process hearing officer may find that a child did not receive a FAPE only if the procedural violation did any of the following: impeded the right of the child to a FAPE; significantly impeded the opportunity of the parents to participate in the decision-making process regarding the provision of a free appropriate public education to the child of the parents; or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E); Ed. Code, § 56505, subd. (f); see also, *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1483-1484.) The hearing officer “shall not base a decision solely on non-substantive procedural errors, unless the hearing officer finds that the non-substantive procedural errors resulted in the loss of an educational opportunity to the pupil or interfered with the opportunity of the parent or guardian to participate in the formulation process of the individualized education program.” (Ed. Code, § 56505, subd. (j).) While a student is entitled to both the procedural and substantive protections of the IDEA, not every procedural violation is sufficient to support a finding that a student was denied a FAPE. Mere technical violations will not render an IEP invalid. (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 892.)

2013-2014 SCHOOL YEAR

14. Student offered no evidence proving District failed to appropriately consider the information it received, including prior assessment reports and a behavior support plan, from Kern County when it developed Student's initial IEP in September 2013, or that Student had behaviors when he enrolled that should have prompted District to immediately consider assessing Student's behavior. Without such evidence, Student did not demonstrate that District should have assessed Student when he first came to District in August 2013.

15. For the remainder of the 2013-2014 school year, the evidence established that Mr. Stanley, Ms. Cyr, and the classroom paraprofessionals were successful in redirecting Student when he engaged in elopement or avoidance behaviors. He did not behave in a way that suggested he needed a behavior assessment to develop additional interventions so he could meaningfully access his education. Dr. Hayden offered no opinion as to whether District should have assessed Student in functional behavior during the 2013-2014 school year because he could not recall what Student's behaviors were in kindergarten. Although Student inferred at hearing that his behavioral success at school was the result of Easter Seals aides work with him, nobody with first-hand knowledge credibly testified that the Easter Seals aides worked directly with Student on a one-to-one basis in the classroom, or what impact their work had on Student's classroom behavior, if any. The evidence established that Student made some educational progress in kindergarten by meeting his goals and objectives in the areas of social/emotional and academics, and that Student's behaviors in kindergarten did not impede his access to his education.

16. District did not procedurally violate the IDEA in the 2013-2014 school year by failing to conduct a functional behavioral assessment of Student.

2014-2015 SCHOOL YEAR

17. For the 2014-2015 school year, Student failed to prove District denied him a FAPE by failing to timely and appropriately assess Student in the area of functional behavior.

TIMELINESS OF FUNCTIONAL BEHAVIORAL ASSESSMENTS

18. Mother consented to the functional behavioral assessments within two months after Student's first seizure in late August 2015, and one month after his return to school. Ms. Roach completed the assessments before the March 12, 2015 IEP team meeting. The evidence did not support Student's argument that District inexplicably delayed the two functional behavioral assessments. Under the unique circumstances here, District did not cause an unreasonable delay in conducting the functional behavioral assessments and the start of the assessments in early February did not result in a significant procedural error.

19. Within two weeks after the start of the school year, Student developed a seizure disorder. He was out of school until on or about September 22, 2014. His behavior changed dramatically after his first seizure. When Student returned to school, he engaged in multiple instances of uncontrollable and violent behavior that prompted District to hold at least two IEP team meetings within the next month, including a manifestation determination meeting. At the October 29, 2014 manifestation determination meeting, District offered, and Mother consented to, two functional behavioral assessments to address Student's elopement and aggression.

20. Before District could start those assessments, Parents took Student out of school and placed him on home hospital instruction, while his physician monitored and adjusted his medication. Between November 2014 and January 9, 2015, Student was not available in the school setting for assessments, and District could not fully assess Student in the area of functional behavior for the school environment while he was on home hospital instruction.

21. In response to Mother's application, District created an administrative amendment to Student's May 2014 IEP that included home hospital as a temporary placement on the continuum of options available to Student. Neither party offered any credible or conclusive evidence as to what academic instruction or support services District provided to Student during home hospital; what Student's behaviors were during academic instruction at home; whether those behaviors interfered with his access to instruction during home hospital; or what Student's behaviors were generally like as his physician adjusted his medication. Student also did not raise the issue of, or present evidence to support, whether District should have provided behavior support services during his home hospital placement, which would have required District to conduct a functional behavioral assessment in the home hospital environment. In the absence of any supporting evidence, Student did not establish that District should have conducted a functional behavioral assessment applicable to the home hospital placement.

22. The evidence established, however, that even if District had initiated the assessments to which Mother agreed in October 2014, the purpose of a functional behavioral assessment is to determine what behavioral support a child needs in the learning environment. Limited observations in the home would not have provided sufficient valid results to assist Student's IEP team in determining an appropriate educational program for him at school, particularly in the area of behavior management and intervention. Ms. Roach and Dr. Hayden credibly testified that they needed to conduct observations in the school setting before either professional could make credible recommendations regarding Student's behavioral needs and proposed strategies for intervention at school.

23. In justifying the delay in starting the functional behavioral assessments, Ms. Roach, Ms. Siciliani, and Ms. Owen all credibly testified that they felt Student needed time to transition back to school after a two-month absence while his physician adjusted his medication. Mother agreed. Ms. Roach opined, and Student argued, that assessing Student at home might have given District information that could help transition Student back to

school after home hospital. However, Student did not raise the issue of whether District should have provided a transition plan for Student's return after home hospital, which may have justified the need for a behavior assessment during home hospital, and therefore this Decision does not decide that issue.

24. Although Mother contended at hearing that she would not have signed the timeline waiver on January 9, 2015, if she had known the details of Student's behaviors recorded in the aides' notebooks at that time, she gave her testimony in hindsight, after she saw the paraprofessionals' personal notes for the first time during the hearing. Her testimony did not refute Ms. Siciliani's, Ms. Roach's and Ms. Owen's credible testimony regarding the reasons why they wanted to start the assessments in early February. It also did not refute the fact that Student was on a part-time schedule in 2015, and he was absent several days after he returned to school, reducing his availability for assessments.

25. District's delay in commencing the functional behavioral assessments and, for that matter, all of Student's assessments until February 2015 was reasonable under the totality of circumstances. The delays did not constitute a significant procedural error resulting in a denial of FAPE to Student in the 2014-2015 school year.

APPROPRIATENESS OF FUNCTIONAL BEHAVIORAL ASSESSMENTS

26. Student failed to prove Ms. Roach's functional behavioral assessments were not appropriate. In particular, Student's expert, Dr. Hayden, did not criticize how Ms. Roach conducted the assessments, or her findings.

27. Ms. Roach was qualified to administer the two functional behavioral assessments. The assessments used a variety of assessment tools and strategies appropriate for the assessments she conducted. The assessments gathered relevant functional, developmental, and academic information, including information provided by the parent, history and records review, and observations of Student. The assessments did not use any single measure or assessment as the sole criterion for determining whether Student was a student with a disability. The assessments used technically sound instruments in the form of Ms. Roach's personal observations of Student, and input from Student's Mother and teacher that assessed the relative contribution of behavioral factors, in addition to physical or developmental factors. Ms. Roach collected the data and analyzed it in her written reports, which she presented to the IEP team.

28. Student offered no evidence that the assessments were: administered so as be discriminatory on a racial or cultural basis; not provided in a language and form most likely to yield accurate information on Student's functional behavior in the academic setting; not used for purposes for which the assessments were valid and reliable; or not administered in accordance with any instructions provided by the producer of such assessments. Therefore, in the absence of evidence to the contrary, the assessments were appropriate as to those required elements.

29. Ms. Roach included recommended strategies for Student in her written report, and she expanded on those at the March 12, 2015 IEP team meeting by recommending a temporary restrictive placement for Student, with intense one-to-one support, where she could implement and modify strategies to create an appropriate behavior intervention plan for Student.

30. In summary, District did not deny Student a FAPE by failing to timely and appropriately assess Student in the area of functional behavior.

Issue 2: Failure to Offer Appropriate Related Services or Teaching Methods

31. Student contends that, from the time he enrolled at District's Cummings Valley Elementary School in August 2013, District denied him a FAPE by failing to offer and or provide: "autism-specific behavior therapies" in the classroom; a dedicated one-to-one behavioral aide exclusive to Student; and structured teaching methods to meet Student's unique needs. Student asserts that, because his primary eligibility was autistic-like characteristics throughout the relevant period, District failed to address Student's needs as a child with autism. Student also asserts that Student's IEPs during the relevant time periods did not appropriately address Student's behaviors and therefore "impeded his learning." Finally, Student argued in his closing brief that Student not only made no progress, he regressed behaviorally and academically.

32. Legal conclusions 7 and 13 are incorporated by reference.

33. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (See *Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314. For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer of educational services and/or placement must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. (*Ibid.*)

34. A properly crafted IEP addresses a student's individual needs regardless of his eligibility category. (See *Fort Osage R-1 School Dist. v. Sims* (8th Cir. 2011) 641 F.3d 996, 1004 [category "substantively immaterial"]; *Hailey M. v. Matayoshi* (D. Hawaii, Sept. 7, 2011, No. 10-00733) 2011 WL 3957206, p. 3). "The very purpose of categorizing disabled students is to try to meet their educational needs; it is not an end to itself." (*Pohorecki v. Anthony Wayne Local School Dist.* (N.D. Ohio 2009) 637 F.Supp.2d 547, 557.)

35. Several federal courts have disagreed with the argument that intensive Applied Behavioral Analysis is generally the best or the only way to educate an autistic student, and that a school district that does not provide Applied Behavioral Analysis has denied the student a FAPE. The Ninth Circuit has twice rejected the argument. (*Joshua A. v. Rocklin Unified School Dist.* (9th Cir. 2009) 319 Fed.Appx. 692 (unpublished), affirming *Joshua A.*

v. Rocklin Unified School Dist. 2008 WL 906243; *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149-1150; see also, *Deal v. Hamilton County Dept. of Education* (6th Cir. 2008) 258 Fed.Appx. 863, 865 (unpublished); *Gill v. Columbia 93 School Dist.* (8th Cir. 2000) 217 F.3d 1027, 1036-1038; *Burilovich v. Bd. of Education* (6th Cir. 2000) 208 F.3d 26560, 571-572; *Dong v. Bd. of Education* (6th Cir. 1999) 197 F.3d 793, 802-804; *J.P. v. West Clark Community School* (S.D.Ind. 2002) 230 F.Supp.2d 910, 938-939.) The Office of Special Education Programs recently noted that Applied Behavioral Analysis is “only one methodology to address the needs of children with autism spectrum disorder.” (*Dear Colleague Letter* (OSEP, July 6, 2015) 11 LRP 33911 (School districts should ensure that decisions are made “based on the unique needs of each individual child.”)).

36. The Ninth Circuit Court of Appeals has endorsed the “snapshot” rule, explaining that the actions of the district cannot “be judged exclusively in hindsight” but instead, “an IEP must take into account what was, and what was not, objectively reasonable . . . at the time the IEP was drafted.” (*Adams v. Oregon, supra*, 195 F.3d at p. 1149-1150.) “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).

37. A school district has the right to select a program for a special education student, as long as the program is able to meet the student’s needs; the IDEA does not empower parents to make unilateral decisions about programs funded by the public. (See, *N.R. v. San Ramon Valley Unified School Dist.* (N.D. Cal. January 25, 2007, No. C 06-1987 MHP) 2007 WL 216323; *Slama ex rel. Slama v. Indep. School Dist. No. 2580* (D. Minn. 2003) 259 F.Supp.2d 880, 885; *O’Dell v. Special School Dist. of St. Louis* (E.D. Mo. 2007) 503 F.Supp.2d 1206.) Nor must an IEP conform to a parent’s wishes in order to be sufficient or appropriate. (*Shaw v. Dist. of Colombia* (D.D.C. 2002) 238 F.Supp.2d 127, 139 [The IDEA does not provide for an “education . . . designed according to the parents’ desires.”], citing *Rowley, supra*, 458 U.S. at p. 207.)

38. The school district has discretion as to the methodology used to implement an IEP so long as the methodology meets a child’s needs and is reasonably calculated to provide some educational benefit to the child. This also applies to disputes regarding the choice among methodologies for educating children with autism. (See *Rowley, supra*, 458 U.S. at p. 208; *Adams v. State of Oregon, supra*, 195 F.3d at p. 1149; *Pitchford v. Salem-Keizer School Dist.* (D. Or. 2001) 155 F.Supp.2d 1213, 1230-32; *T.B. v. Warwick School Comm.* (1st Cir. 2004) 361 F.3d 80, 84.) Parents, no matter how well motivated, do not have a right to compel a school district to provide a specific program or employ a specific methodology in providing education for a disabled child. (*Rowley, supra*, 458 U.S. 176, 208.) “Beyond the broad questions of a student’s general capabilities and whether an educational plan identifies and addresses his or her basic needs, courts should be loathe to intrude very far into interstitial details or to become embroiled in captious disputes as to the precise efficacy of different instructional programs.” (*Roland M. v. Concord School Comm.* (1st Cir. 1990) 910 F.2d 983, 992 (citing *Rowley*, 458 U.S. at p. 202.)

39. The IDEA requires that qualified personnel provide special education and related services. (20 U.S.C. § 1412(a)(14)(A).) The IDEA defines the term “qualified personnel” as personnel who are appropriately and adequately prepared and trained, and who possess the content knowledge and skills to serve children with disabilities. (*Id.*; 34 C.F.R. § 300.156(a).) Paraprofessionals may assist in the provision of special education and related services if they are “appropriately trained and supervised, in accordance with State law, regulation, or written policy . . .” (20 U.S.C. § 1412(a)(14)(B)(iii).) A paraprofessional means an “educational aide, special education aide, special education assistant, teacher associate, teacher assistant, teacher aide, pupil service aide, library aide, child development aide, child development assistant, and physical education aide.” (Ed. Code, § 44392, subd. (e).)

ANALYSIS – 2013-2014 SCHOOL YEAR

AUTISM-SPECIFIC BEHAVIOR THERAPIES AND DEDICATED ONE-TO-ONE AIDE

40. Student did not require” autism-specific behavior therapies” in the kindergarten classroom, or a dedicated one-to-one behavioral aide throughout the school day, to make meaningful progress or access his education. Student’s school records and testimony from Mr. Stanley, Ms. Isbell, and Ms. Anspach established that Student accessed his education and he received some academic benefit as contemplated by *Rowley*, including meeting some or all of his goals and objectives, without the need for additional behavior aide support.

41. Mr. Stanley, Ms. Anspach, and Ms. Isbell credibly testified that, although Student engaged in elopement and avoidance of disfavored activities, trained classroom staff successfully redirected him without specifically using Applied Behavioral Analysis strategies or a dedicated one-to-one behavior aide assigned exclusively to Student. Classroom staff sufficiently addressed Student’s behavior in kindergarten for him to access his education and make some meaningful academic progress. Student offered no credible evidence to the contrary.

42. Student’s assertion that Student made no academic progress in kindergarten because he had no dedicated one-to-one behavior support incorporating autism-specific behavior therapies was not supported by the evidence. Student argued in his closing brief that Student’s behaviors in kindergarten improved from preschool because he had private aide support in the classroom, inferring that District should have provided that service at public expense. However, no evidence established that the Easter Seals aides actively engaged with Student in the classroom or provided any direct one-to-one behavior support in the classroom that had a positive impact on his behaviors or academic performance. District did not deny Student a FAPE in the 2013-2014 school year by failing to provide a dedicated one-to-one behavior aide or by failing to utilize Applied Behavior Analysis or any other “autism-specific behavior therapies.”

STRUCTURED TEACHING METHODS

43. Mr. Stanley was qualified to, and worked with, Student on academic subjects, and Student advanced academically. Mr. Stanley developed curriculum for the classroom, including Student. Mr. Stanley and the classroom paraprofessionals worked with Student on the curriculum toward his goals. Student made meaningful progress during the school year, including meeting some of his goals. Student offered no credible evidence that persuasively established that Student suffered academic regression or failed to make some meaningful progress because of the teaching methodology used by Mr. Stanley, or that some other teaching methodology was required to meet Student's unique needs.¹³

ANALYSIS: 2014-2015 SCHOOL YEAR

AUTISM-SPECIFIC THERAPIES

44. Student did not demonstrate that District denied him a FAPE by failing to provide "autism-specific behavior therapies in the classroom" particularly after August 25, 2014, when Student experienced a significant change in his medical condition and escalation of his behaviors. Student's eligibility of autistic-like characteristics was not the sole determining factor on what services and supports Student required after August 25, 2014. His needs changed dramatically, and the IEP team was required under the IDEA to consider and support all of his unique needs, regardless of his eligibility category. He was absent a large part of the school year, and no evidence established that he did not make any meaningful progress, either when he was at school or during home hospital, because of anything District failed to do. The evidence also established that the three District paraprofessionals assigned to Student received training in Applied Behavioral Analysis and used those strategies and techniques with Student.

45. Given the change of circumstances, District was required under the IDEA to assess Student to determine his needs. At the October 17, 2014 IEP review meeting, the IEP team agreed to do a SCIA assessment to determine what type of SCIA support Student required. On October 29, 2014, the IEP team agreed that Student needed a full battery of assessments so that his IEP team could reevaluate eligibility, develop the appropriate behavior intervention plan, and provide the appropriate supports to Student given his changing needs. Mother consented to all of the proposed assessments.

¹³ In support of his argument that Student did not make progress during the 2013-2014 school year, Student referred in his closing brief to "Exhibit D 28," which District did not offer into evidence. The ALJ gave little weight to any documents admitted over District's objections or to Student's arguments, unless Student corroborated those documents and arguments by direct evidence. (Cal. Code Regs., tit. 5 § 3082, subd. (b).)

46. After Student returned to school in January 2015, the results of the assessments District conducted in February and March 2015 raised questions as to whether the IEP team should change Student's eligibility from autistic-like characteristics to emotional disturbance. Ms. Roach and Ms. Owen found that Student had needs that may have fit the eligibility categories of either or both autistic-like characteristics and emotional disturbance. Ms. Owen expressed concern at the March 12, 2015 IEP team meeting that Student required additional supports and services more directly addressing needs associated with emotional disturbance, notwithstanding his behaviors associated with autistic like characteristics observed by Ms. Roach. Student offered no credible testimony that confirmed, based upon what information the IEP team had at that time, District should have provided "autism-specific behavior therapies" without also considering the other information the assessments had revealed about Student's behaviors. The fact that, at that time, Student was eligible under the category of autistic-like characteristics was not solely determinative of what his needs were or what specific supports he needed.

47. Although Dr. Hayden and Ms. Roach opined that one could use Applied Behavior Analysis techniques for behaviors associated with both autism and emotional disturbance, neither professional testified that it was the only type of intervention that would work for Student. The evidence established that Ms. Reddig and Ms. Anspach had training in Applied Behavior Analysis and they applied their knowledge when working with Student. Dr. Hayden offered no specific recommendations constituting what Student characterized as "autism-specific behavior therapies" that would have been applicable to Student's aggressive and violent behaviors after his first seizure. Dr. Hayden only speculated Applied Behavioral Analysis technics might work for Student before or after a seizure, basing his opinion on his observations of Student in the home setting and his review of Student's records. His opinions did not carry great weight because he had never observed Student in the school setting, either at school or during home school. He did not define what the term "autism-specific behavior therapies" meant in the context of Student's unique needs known to the IEP team in March 2015. His report was tentative and he did not offer any specific recommendations as to Student. His testimony focused on the research and science of Applied Behavioral Analysis, which he credibly opined therapists could use for all types of behaviors, thus contradicting Student's contention that Student required "autism-specific" behavior therapies.

48. Based upon assessment results, Ms. Roach, who was familiar with Student in the school setting, wanted to work directly with Student in the one-to-one setting proposed by the March 12, 2015 IEP team to develop specific behavior strategies that worked with Student, notwithstanding the need for more clarity of his eligibility. Based upon discussions at the IEP team meeting, District also wanted Parents to hear input from the SELPA on both its autism and emotional disturbance programs to provide further information for the IEP team as to the most appropriate strategies for Student's behaviors. These programs may have included "autism-specific behavior therapies" once the IEP team fully determined Student's

needs. District was required to make those services available at no expense to Student and in a manner that met his unique needs, whether by District's own personnel or through the SELPA, directly or through a non-public agency.

49. Student offered no credible evidence that, based on what the IEP team knew about Student through March 12, 2015, District denied Student a FAPE by failing to offer "autism-specific behavior therapies in the classroom" during the 2014-2015 school year.

DEDICATED ONE-TO-ONE BEHAVIORAL AIDE

50. Student did not prove District denied Student a FAPE by failing to provide a dedicated one-to-one behavior aide. No one on the IEP team disagreed that Student required adult assistance, or that Student needed the adult to be trained and physically close enough to recognize the need for and administer Student's Diastat when appropriate, and to provide behavior intervention when needed. Student's needs were changing during the 2014-2015 school year because of his seizure disorder, and the IEP team was working to determine how District could most effectively address Student's unique needs with all resources available, including SELPA resources. Student offered no evidence that District failed in those responsibilities.

51. The evidence contradicted Student's assertion in his closing brief that Student never received "truly 1:1 aide support other than that provided to him privately in kindergarten." When he returned to school in September 2014, District assigned Ms. Anspach, and later Ms. Reddig and Mr. Burrows, to Student as a one-to-one paraprofessional. Ms. Reddig, Mr. Burrows, and Ms. Anspach had MAPS training in Applied Behavioral Analysis techniques. They all had experience working with children with a variety of behaviors and they had training in Diastat administration. District trained several other staff members in the administration of Diastat, and at least one Diastat-trained adult with a Diastat backpack was within sight or arm's length of Student to support him if he had a seizure.

52. At hearing, the parties attempted to distinguish the semantics between the term "dedicated one-to-one behavior aide" and a classroom paraprofessional whose duties to a particular child were specific to that Student's IEP, defined by District witnesses as a SCIA. The interpretation of the relative meaning of the two terms is not determinative of the issue. The IDEA requires that any adult assigned to serve Student, regardless of title, must have the skills and training to meet his unique needs as determined by his IEP team. Ms. Owen and Ms. Siciliani credibly explained that the IEP team and the IEP dictate the SCIA aide's responsibilities to its assigned student. Student did not demonstrate through credible evidence that, from the time Student returned to school in September 2014 until the March 12, 2015 IEP team meeting, District failed to provide appropriate adult assistance in the classroom tailored to address all of Student's behavior needs known to District, including his unique medical and fluctuating behavior needs.

53. After all assessments were completed, at the March 12, 2015 IEP, District offered Student a temporary placement consisting of a dedicated classroom solely for Student, a dedicated one-to-one teacher, and a full-time trained paraprofessional in Applied Behavior Analysis technics and Diastat administration with significant assistance from Ms. Roach. The IEP team agreed that, based on Student's fluctuating and violent behaviors, it needed additional time to develop an appropriate educational plan for Student, including evaluating the effectiveness of some of the interventions recommended by Ms. Roach and Ms. Owen in the temporary setting; introducing programs available from the SELPA to Parents; and consideration of Student's mental health needs. On the third day of the temporary program, Student engaged in violent behavior against his teacher. Ms. Reddig was his full-time dedicated paraprofessional at the time. Student was suspended, and Mother, who was reasonably concerned about the safety of her child and others, chose to remove Student from school after only three days of that placement.

54. District's inability to finalize an appropriate program for Student after the March 12, 2015 IEP team meeting, including the scope of the SCIA aide's responsibilities to Student, was not unreasonable. District did not have the opportunity to implement the short-term plan to which Mother previously agreed, or to present SELPA programs to Parents in order to complete the IEP process.

55. Student argued in his closing brief that the October 2014 incident where another child accessed the Diastat backpack supports a finding that District failed to provide adequately for Student's safety by assigning a trained dedicated behavior aide to Student. However, Student offered no credible evidence establishing what actually happened or how the incident happened. More important, Mother testified that the incident resulted in no actual harm to Student, and the backpack had one remaining syringe of Diastat immediately after the incident. Therefore, notwithstanding Mother's understandable concern for Student's safety at school, the incident was not probative of whether District failed to provide a dedicated one-to-one behavior aide throughout the school day for the school year until March 30, 2015, to enable Student to access his education. The preponderance of evidence established that District met its obligation to provide to Student, throughout the school day, trained adult assistance with knowledge of and experience with behavior interventions.

STRUCTURED TEACHING METHODS

56. The evidence established that Student's extreme behaviors and multiple absences interfered with Ms. Piercy's ability to teach Student. Student did not offer any credible evidence from a professional or expert in the area of education that the teaching methods Ms. Piercy used with Student when he was in class deprived him of access to his education, or that Student required additional or different teaching methods. Dr. Hayden, who primarily focused his testimony on behavioral technics and the science upon which they were based, was not instructive on this issue because he had no relevant experience as an

educator or in a school setting, and he did not observe Student in the school setting. Student offered no credible evidence that established what “specific structured teaching methods” District provided to Student, why they were not successful, or what District should have provided in their place, if anything, to ensure that Student could access his education after he had his first seizure. Student did not meet his burden. District did not deny Student a FAPE by failing to offer “specific structured teaching methods” during the 2014-2015 school year.

57. In summary, on Issue Two, the totality of the evidence supported a finding that District did not deny Student a FAPE in the 2013-2014 or 2014-2015 school years by failing to provide autism-specific strategies, a dedicated one-to-one behavioral aide, or structured teaching methods.

Issue 3: District’s Speech and Language Assessment

58. District contends that its 2015 speech and language assessment, documented in a report presented to the March 12, 2015 IEP team, was appropriately conducted and therefore Student is not entitled to an independent educational evaluation in speech and language. District did not meet its burden of proof on this issue because one essential component of the assessment was missing.

59. Legal conclusions 7 through 13, and 25 are incorporated by reference.

60. Ms. Cyr assessed Student in speech and language in late February and early March 2015. Ms. Cyr was qualified to administer the assessments. Ms. Cyr used a variety of assessment tools, including parent and teacher interviews, behavioral observations, oral mechanism evaluation, administration of the Goldman Fristoe Test of Articulation 2nd Edition, the Preschool Language Scale 5th edition, informal speech samples and informal language samples. In the absence of any evidence to the contrary, an inference can be made that Ms. Cyr selected assessment instruments that were not discriminatory on a racial or cultural basis, and they were administered in a language and form most likely to yield accurate results. Ms. Cyr used the assessment tools for the purposes that were valid and reliable and in accordance with instructions provided by the producer of the assessments. Ms. Cyr documented her findings and recommendations in a report that she presented to the March 12, 2015 IEP team meeting.

61. Ms. Cyr’s assessment resulted in a finding that Student was eligible for speech and language services due to severe deficiencies in articulation. However, her assessment was not sufficiently comprehensive to assess all of Student’s suspected needs in speech and language. Ms. Cyr’s testing environment was limited to a closed environment in the room where she provided Student with speech services. She did not do any specific testing in the classroom or with Student among other children or adults. Although Ms. Cyr observed Student during administration of the Autism Diagnostic Observation Schedule and concluded that he had pragmatic language skills, her report noted three separate times that Student had possible pragmatic language deficits. She did not test Student in the area of pragmatics.

62. Ms. Schnee credibly opined that the notes in Ms. Cyr's report suggested that Ms. Cyr should have pursued standardized assessments, and she should have tested Student in a variety of environments, in order to more fully explore Student's pragmatic language skills. In her opinion, Ms. Cyr only administered one valid standardized assessment, and reported 10 language samples without adequately explaining the circumstances and context in which My Cyr obtained those samples. Without testing in pragmatics, the overall assessment was incomplete, and failed to consider all possible speech and language deficits.

63. Ms. Roach noted in her February 13, 2015 SCIA assessment report, which was available to, and reportedly considered by, Ms. Cyr during her own assessment, that Student struggled in relationships with peers without adult intervention to facilitate social interaction. Student's primary play was restricted without specialized interventions, and changes in routine were so disruptive even with interventions that Student was not benefitting from his IEP. Her notations emphasized the need for including pragmatic language in the speech and language assessment.

64. Ms. Cyr had enough information and sufficient access to Student before she completed her assessment to assess Student in pragmatic language. District failed to prove that its speech and language assessment was appropriate. The evidence established that, to the extent Ms. Cyr's assessment lacked standardized testing in the area of pragmatic language skills, the speech and language assessment was not sufficiently comprehensive to assess all of Student's suspected needs in the area of speech and language. Student is therefore entitled to an independent educational evaluation in speech and language at public expense pursuant to Parent's May 14, 2015 request.

ORDER

1. In Student's case, all relief requested by Student is denied.
2. In District's case, District's speech and language assessment did not comply with the IDEA. Student is entitled to an independent educational evaluation in speech and language at public expense pursuant to Parent's May 14, 2015 request.

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, District prevailed on Issues One and Two, and Student prevailed on Issue Three.

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: August 20, 2015

/s/
ADRIENNE L. KRIKORIAN
Administrative Law Judge
Office of Administrative Hearings