

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

TEHACHAPI UNIFIED SCHOOL
DISTRICT.

OAH Case No. 2015050839

DECISION

Parents on behalf of Student filed a due process hearing request with the Office of Administrative Hearings on May 12, 2015, naming the Tehachapi Unified School District. On June 11, 2015, OAH extended the procedural timelines as Parents did not participate in the mandatory resolution session, and district was granted a continuance on July 28, 2015.

Administrative Law Judge Robert Helfand heard this matter in Tehachapi, California, on October 28 and 29, 2015 and November 3, 4, and 10, 2015.

Andrea Marcus and Kelly Kaeser, Attorneys at Law, represented Student. Student's mother was present throughout the hearing.

Darren J. Bogié, Attorney at Law, represented Tehachapi. Heather Richter, Director of Programs for Tehachapi, was present throughout much of the hearing. Kathleen Siciliani, Program Specialist from Tehachapi, was also present for part of the hearing.

The record closed on December 8, 2015, upon receipt of written closing briefs from the parties.

ISSUES¹

1. Whether Tehachapi denied Student a free appropriate public education from April 7, 2014, through the present, by:
 - (A) Failing to assess Student in all areas of suspected disability, specifically behavior; and,
 - (B) Failing to address Student's need for behavior services?
2. Whether Tehachapi denied Student a FAPE since the April 7, 2014 Individualized Education Program team meeting, by failing to provide prior written notice involving Parents' request for behavior and assistive technology assessments?
3. Whether Tehachapi denied Student a FAPE when it failed to have a general education teacher in attendance at the June 2, 2014, IEP team meeting?

SUMMARY OF DECISION

This Decision finds that (1) Tehachapi denied Student a FAPE at the November 6, 2014 IEP team meeting when it failed to provide Student with appropriate behavior services and to offer a behavioral assessment; (2) Tehachapi did provide Student with a FAPE at all other IEP team meetings, and (3) Tehachapi did not commit procedural violations of the Individuals with Disabilities Education Act relating to prior written notice and failure to have a general education teacher in attendance at the June 2, 2014 IEP team meeting.

FACTUAL FINDINGS

1. Student is an eight-year-old boy who currently resides with his family in Tehachapi. He is currently eligible for special education under the primary eligibility category of autism with a secondary eligibility category of other health impaired due to Attention Deficit and Hyperactivity Disorder.² Student's autism has severely impacted his

¹ The issues have been rephrased and reorganized for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

² Attention Deficit and Hyperactivity Disorder is described in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition as "a persistent pattern of inattention and/or hyperactivity-impulsivity that interferes with development, has symptoms presenting in two or more settings (e.g. at home, school, or work), and negatively impacts directly on social, academic or occupational functioning."

behaviors and speech and language development. In the classroom, Student has had difficulties with attention and elopement.

Jacksonville, Alabama IEP

2. Student, then four years old, was initially assessed for special education in March 27, 2012, while residing within the Jacksonville City Schools District in Alabama. Glenwood, Inc., a private entity, conducted the assessment and recommended that Student be found eligible for special education under the category of autism.³ The assessment noted that Student wandered away and ran off in public occasionally, was aggressive when upset, and destructive with toys. Both parents and Student's teacher reported that Student engaged in severe tantrums, aggression to others, self-injurious behavior (biting himself), destructiveness towards objects, inability to respond to questions, and elopement. The Jacksonville IEP team found Student eligible for special education under the categories of autism, and speech and language impaired. The IEP noted that Student's deficits in his cognitive ability, communication skills, and his behavior "greatly impact his ability to learn in the general education setting."

3. For school year 2013-2014, Student's IEP team convened the annual meeting on August 14, 2013. The IEP placed Student with specially designed instruction in a resource room for small group and individual instruction to address his academic, communication, and behavioral needs. Student was also provided with (1) occupational therapy for one, 30-minute session weekly, and (2) two, 20-minute speech and language therapy sessions per week to improve his basic language skills. The IEP stated that Student did not present with behaviors that impeded his learning or the learning of others. The document also noted that Student had a need for assistive technology devices and services. Because Student was receiving mental health services from the Calhoun/Cleburne County Mental Health Day Treatment Program, Student was to be transported to that program each day at 11:30 a.m. Parents did not consent to the IEP at that time.

4. On October 3, 2013, the Jacksonville IEP team reconvened. The team agreed to continue Student's program without any changes. Parents signed their consent to the IEP at that time.

5. The IEP for school year 2013-2014 stated:

[Student] has an educational diagnosis of Autism. He has been absent frequently this school year. When [Student] is at school, he is eager to learn. He interacts with classmates and tries to help them. He talks to his teachers and responds to questions. It is difficult to understand [Student's] speech at

³ Jacksonville's referral to Glenwood was to determine whether Student met the educational criteria for an autism spectrum disorder. No testing was conducted in other areas, including cognitive ability.

times. His behavior improves when he has been at school on a consistent basis. When he comes to school after being absent, problem behaviors include falling out in (sic) the floor, telling the teacher “no” when requested to do something and refusing to work. His problem behaviors do not require a behavior intervention plan at this time.

6. In January 2014, Student and his family moved to Tehachapi.

February 10, 2014, to April 7, 2014

7. In early February 2014, Parents telephoned Tehachapi notifying them of their intent to enroll Student. Kathleen Siciliani,⁴ then Director of Student Services, spoke to Mother. Ms. Siciliani explained to Parents that Tehachapi would offer Student a placement for 30 days based on his prior IEP. Tehachapi would then conduct an assessment to determine Student’s levels and needs, which would result in an IEP team meeting where a new IEP would be developed.

8. Ms. Siciliani met with Parents on February 10, 2014, to establish a 30-day placement. Based on the Jacksonville IEP, Tehachapi offered Student placement in a kindergarten-first grade special day class at Cummings Valley Elementary School, with speech and language therapy twice per week for 20 minutes per session, and occupational therapy once weekly for 30 minutes. The class implemented behavior management strategies including behavior modification as part of the curriculum. Student’s placement at Cummings Valley was because his home school, Tompkins Elementary, did not have an appropriate special day class. Parents consented to the placement.

9. On February 11, 2014, Tehachapi forwarded to Parents a notice of IEP team meeting for March 3, 2014, at Cummings to conduct a 30-day placement review. On February 20, 2014, Parents returned the form stating that they would attend.

10. On February 21, 2014, Sharon Owen, a Tehachapi school psychologist,⁵ forwarded a Consent for Assessment form to Parents. The form indicated that Tehachapi

⁴ Ms. Siciliani is currently a program specialist with Tehachapi. Ms. Siciliani has a bachelor’s degree in applied arts and sciences, and a master’s degree with an emphasis in special education. She received her teaching credentials in special education and multiple subjects in 1993. She taught special day classes from 1992 to 2006. From 2006 to 2010, Ms. Siciliani was a program specialist with the Kern County Superintendent of Schools. Prior to her current position, she had served as a Vice Principal from 2010 to 2013 and was Director of Student Services from 2013 to 2015 at Tehachapi.

⁵ Ms. Owen has a bachelor’s degree in psychology, and a master’s degree in school psychology. She has been a licensed education psychologist since 1997 and possesses a pupil personnel services credential. She has been a school psychologist since 1990 and has

would assess Student in the areas of academic performance; self-help, social and emotional status including social behavior; motor ability; language and speech; general ability; health development; vision and hearing; occupational therapy which would include sensory processing; and a parent questionnaire.

11. Student entered the special day class taught by Richard Stanley. Mr. Stanley was assisted by three instructional assistants. Student was difficult to control and would roam away from his seat. He would often go outside the classroom. He refused to follow staff's directions to return but would go and lay down in the sand. Student also had problems during schedule transitions. He was able to complete work and responded to praise for completing activities. Student regularly attended school through March 28, 2014. After March 28, 2014, through April 22, 2014, Student was absent six out of 10 school days.

April 7, 2014 IEP Meeting

12. Student's IEP team convened for the 30-day review meeting on April 7, 2014.⁶ Parents attended, accompanied by Timaree Torres, who then worked for Hearts Connection.⁷ The Tehachapi IEP team was comprised of Mr. Stanley; Ms. Owens; a general education teacher; an occupational therapist; two speech and language pathologists; and an administrator. Parents presented their input as to Student's needs and their concerns. Mr. Stanley reviewed Student's levels of functioning. Under present levels of performance, the IEP noted that Student "has trouble staying in his seat" and spent a lot of time outside. When asked to return to the class, Student would run to the playground, lie in the sand and pretend to be asleep. The IEP team noted that Student's behavior impeded his learning and that of others. Because of safety concerns with Student eloping, the IEP team agreed to assign Student for the remainder of the school year a one-to-one aide, a special day class paraprofessional trained in positive behavior management strategies. The IEP offered to maintain Student's 30-day placement with the addition of aide services. Parents consented.

13. Additionally, Parents also signed the February 21, 2014 Consent for Assessment. At the time the Consent for Assessment was drafted and later signed, Student did not have severe behaviors that necessitated a behavioral assessment nor had Parents requested such an assessment. Ms. Torres had a practice that she would assist her clients to

been with Tehachapi since 1999. During the 2002-2003 school year, Ms. Owen served as the interim director for special education services at Tehachapi. Ms. Owen estimates that she has conducted over 2,500 assessments.

⁶ The 30-day IEP team meeting was originally scheduled for March 3, 2014. Parents requested that the meeting be rescheduled. Student's father signed a timeline waiver at the April 7, 2014 meeting.

⁷ Hearts Connection is an organization which provides support to parents of special needs children. Ms. Torres was then a family resource specialist, in charge of the Tehachapi office. Presently, Ms. Torres does similar work with an agency she owns.

prepare a written statement to be attached to the IEP expressing parents' objections to an IEP and requests made by them. Parents did not submit such a statement following the April 7, 2014 IEP team meeting.

April 22, 2014 Incident and April 30, 2014 IEP Meeting

14. Prior to April 22, 2014, Parents were contacted on two occasions by telephone to pick Student up early from school because of behavior problems.

APRIL 22, 2014 INCIDENT

15. On April 22, 2014, the first day back from Spring Break, Student ran out of the classroom as the class was preparing to go to the buses at the end of the day. Student ran away from his aide to the large playground, crossed in front of a tractor lawn mower, then ran to the lower playground, refused to comply with his teacher's directions, and then rolled around in wood chips. After Mr. Stanley unsuccessfully tried to talk Student onto his bus by offering him crackers and to play with an electronic device, the teacher and an aide picked Student up. Student let his body go limp while being carried to his bus. When he arrived home, Parents observed that Student's shirt was dirty and he had scrapes on his arms. The Behavior Emergency Report stated that there would be an IEP meeting within two days to determine the need for a functional behavioral assessment and/or if an interim behavior plan was needed.

APRIL 30, 2014 IEP MEETING

16. On April 30, 2014, an IEP meeting was convened to discuss concerns arising out of the April 22, 2014 incident. Mother attended with Ms. Torres. Tehachapi attendees included Ms. Owen and Michelle Cortichiato, the school psychologist at Cummings Valley. Mother voiced her concern about the class door not being locked, and that Student's class teacher and aides were not trained in Applied Behavior Analysis methods.⁸ Ms. Siciliani explained that the classroom was required to remain unlocked due to fire safety rules. As to the training of classroom staff, Ms. Siciliani stated that they were trained in positive interventions and behavior management. She also said that the staff utilized ABA/behavior modification strategies as part of the curriculum. The IEP team discussed Parents' request for a functional behavior assessment. The IEP document indicated that Ms. Siciliani stated that Tehachapi should "start with the least restrictive approach before moving to an FBA [functional behavior assessment]." There was also discussion regarding the lack of time to conduct a behavior assessment since the school year ended on June 4, 2014. Ms. Siciliani also stated that a functional behavior assessment was not needed as Student's behaviors did not constitute a danger to himself or others. Ms. Siciliani and Tehachapi IEP team members agreed that behavior management strategies should be attempted to determine if Student

⁸ ABA is a behavior modification methodology that focuses on the observable relationship of behavior to the environment, including antecedents and consequences.

would respond. If he did not respond positively, then a functional behavior assessment would be called for. Mother opined that Student needed a more restrictive classroom due to his behaviors. She suggested that Student's elopement outside might be due to his need for a sensory break and/or ADHD medication issues. The team discussed Mother's suggestion and Tehachapi pointed out that the academic level in Student's current class was at his level while a more restrictive class would be far below his academic level. Tracy Doue, the Tehachapi occupational therapist for Student, reported that Student could work for five to 15 minutes at most before requiring a break. The team discussed behavior supports including conducting a Special Circumstances Instructional Aide (SCIA) assessment or a functional behavior assessment.⁹ The IEP team agreed to continue Student's aide pending the completion of the SCIA assessment.

17. Ms. Owen did not believe that a functional behavior assessment was needed since Student's April 22, 2014 elopement was the first incident serious enough to warrant an IEP team meeting. Student had been attending Tehachapi schools for only 35 days, and staff had not tried various intervention strategies to see if they would be effective.¹⁰ A functional behavior assessment and the creation of a behavior intervention plan are normally done after various interventions are used which prove not to be effective. The exception to that is where the behaviors endanger the child or others, which was not the case here. Also, Student was able to be redirected by permitting him to use an electronic device (such as a cell phone) as a reward.

18. The Tehachapi IEP team recommended that a SCIA assessment be conducted to determine goals and strategies to be used by Student's aide relating to his behavioral problems. Because such an assessment would take 60 days and the school year would end in the first week of June, the IEP team decided that the SCIA assessment would be conducted at the beginning of the 2014-2015 school year. Mother voiced concerns about Student's safety at school. Mother shared her belief that Student did better with a timed schedule, so he was aware of break times. The team agreed for the Cummings Valley school psychologist, Michelle Cortichiato, to plan behavior supports to be implemented for the remainder of the school year which included: a timed schedule, use of a picture schedule, visual supports, and setting up a reward system. Ms. Siciliani noted that Student had made a "huge transition" from Alabama and moving to a new school in a new state, could cause behavior issues.

⁹ Functional behavior assessments are used to identify controlling variables for maladaptive behaviors as the basis for intervention designed to decrease the occurrence of those behaviors. A SCIA assessment is not as extensive an evaluation as the functional behavior assessment. It is a rubric to determine if a child's behaviors require the direct assistance of a dedicated one-to-one aide. The SCIA assessment also contains goals and strategies for the SCIA to utilize.

¹⁰ Student had missed a total of 12 days up to April 30, 2015.

Mother inquired about putting Student on home hospital. Ms. Siciliani reviewed the process, which included a Doctor's recommendation for it to be considered.¹¹

19. Parents did not consent to the IEP and submitted an addendum to the IEP document after the meeting. Parents agreed to the aide, the speech and occupational services, and to the academic goals. They felt that Student was not receiving adequate sensory breaks. They also requested that a behavior plan be set. Tehachapi did not respond.

May 1, 2014 to End of School Year

20. Parents removed Student from school following the April 30, 2014 IEP team meeting. From May 1, 2014, through the end of the 2013-2014 school year on June 4, 2014, Student had 21 unexcused absences. Since arriving at Tehachapi to the end of the 2013-2014 school year, Student was in attendance a total of 37 days out of 70 days.

TEHACHAPI'S INITIAL ASSESSMENT

21. The Tehachapi assessment team was comprised of Ms. Owen; Diane Cole, the speech and language pathologist assigned to Cummings Valley; Ms. Doue, occupational therapist; and Mr. Stanley. To accommodate Parents who did not have transportation available, the assessment occurred on May 16, 2014, and May 30, 2014, at Tompkins, which was in walking distance of Student's home. All three assessors noted that Student was extremely distracted as he could only attend to a task between three and five minutes. He required constant prompting and praise, plus frequent breaks. Because of this extreme distractibility, the three assessors believed that Student's scores underestimated his abilities. Because Student was not attending school, the assessors were unable to conduct observations of Student in the school environment. Further, Ms. Doue was unable to conduct her assessment since an occupational therapy assessment is based on classroom performance.

22. Mr. Stanley administered three standardized tests to determine Student's levels in early reading skills, mathematical skills, and his writing abilities. Student scored below average in early writing ability. In early reading skills and mathematics, Student was poor. Ms. Cole administered three standardized tests, which indicated that Student was below average in expressive language and receptive language. In an informal language sample, Ms. Cole noted that Student was able to initiate conversation, make requests and ask and answer questions; but his use of pronouns, contractions, adjectives, adverbs, and prepositions was

¹¹ On May 8, 2014, Parents submitted to Tehachapi an application for Home/Hospital Instruction. Parents stated that Student "is very stressed at school, it has become an (sic) safety issue due to teacher's unable (sic) to supervise [Student] properly." In support of the application, Student submitted a form by Barbara Apicella, a family nurse practitioner, which cited that the family "has concerns about their child's safety." Tehachapi rejected the application since there was no medical reason cited in support of the application.

limited. Ms. Coles concluded that Student continued to be eligible for speech and language services.

23. Ms. Owen conducted the psychological portion of the assessment. She assessed Student in the areas of cognitive ability, perceptual/motor, adaptive, and social/emotional. Ms. Owen administered the fluid reasoning and nonverbal index composites of the Wechsler Preschool and Primary Scale of Intelligence-IV. Student was in the borderline region at the fourth percentile in fluid reasoning, which is a measure of fluid and inductive reasoning. The nonverbal index offers an estimate of the overall ability for children with severe language delays or those diagnosed with an autism spectrum disorder. Student scored in the second percentile or extremely low. In visual-motor integration, Ms. Owens administered the Beery-Buktenica Developmental Test of Visual-Motor Integration-Sixth Edition. Student had a standard score of 95, which was in the average range and the 37th percentile average. For adaptive skills, Ms. Owen administered the Vineland Adaptive Behavior Scales-II Student, which is a questionnaire filled out by Mother. Student was in the moderately low range in the communication and daily living skills domains. In the socialization domain, Student was in the adequate range.

24. In social/emotional, Mother completed a Developmental History Questionnaire and Parents completed the Social Responsiveness Scale-Second Edition, a 65-item questionnaire of symptoms associated with autism. In the Developmental History, Student was reported to be loving, played with other children, had difficulty in communicating due to his language and articulation problems, and was responsible for cleaning his room. Parents only reported concerns were tantrums when Student faced unexpected changes, and keeping Student on task to complete academic assignments. On the Social Responsiveness Scale, Student was in the normal range in social motivation. However, he was in the moderate range (deficiencies in reciprocal social behavior that were clinically significant to lead to substantial interference with everyday social interactions) in the areas of social awareness, social communication, and interaction. Finally, he was in the severe range (deficiencies which were clinically significant and lead to substantial interference with everyday social interactions) in the areas of social cognition and restrictive interests and repetitive behaviors.

25. Ms. Owen recommended that Student's primary eligibility for special education be autism. She recommended the continuation of SCIA services and the use of reinforcers (i.e., warning before transition, sensory breaks, computer access) to be used to keep Student interested and various strategies which may be used (i.e., using a preferred activity to re-charge Student when he is overwhelmed, and positive reinforcement).

JUNE 2, 2014 IEP

26. On June 2, 2014, Student's IEP team reconvened. In attendance were Mother, Ms. Owen, Ms. Cortichato, Ms. Cole, Ms. Doue, Ms. Siciliani, and another administrator. Parental rights were reviewed with Mother. Mother waived the attendance of the general education teacher in writing. Ms. Owen and Ms. Cole reviewed their assessments.

Ms. Owen recommended that Student continue to be eligible for special education under the primary category of autism and under other health impaired as a secondary category based on Student's ADHD, which the team adopted. The team then discussed the unsigned IEP. Mother voiced her concerns that Student did not have a behavior plan. Ms. Cortichiato discussed the visual/behavior supports for Student in the classroom. Tehachapi indicated that they may have representatives from Kern County Superintendent of Schools office to observe and assess Student to see if one of their programs may be more appropriate to meet Student's needs. They stated that a Kern class in Mojave may be appropriate for Student.

27. Tehachapi offered Student extended school year class, which would include behavioral strategies such as a first/then chart, stop/go chart, social stories for school routines, a stop sign on the door with a note to stay in the classroom, an incentive chart for rewards for following directions, picture schedule, and choice boards. New goals, including goals for eloping and classroom transitions, were discussed and approved. The elopement goal was for Student to remain in the classroom in four of five opportunities for three to four periods as measured by teacher data. As to transitions, the goal called for Student to respond to a timer within five seconds to end a classroom activity with fewer than three prompts for four out of five trials as measured by teacher data. The IEP proposed placing Student in a special day class, with speech and language therapy for 140 minutes per month, occupational therapy for 30 minutes per week, and speech and language consult for 20 minutes per month. In an addendum, Mother agreed to the aide, the speech and language and occupational therapy services, academic goals, and to the extended school year class. Mother disagreed with Kern being involved.¹² Mother requested that the IEP team reconvene prior to the beginning of the 2014-2015 school year.

2014 Extended School Year

28. Student was placed in the special day class taught by Troy Hedberg for extended school year 2014. Mr. Hedberg holds teaching credentials for physical education and learning handicap. He has been a teacher for 25 years and has worked with Tehachapi since 2001. He has taught special education classes, resource classes, and physical education classes. Dawn Roach, a school psychologist with Tehachapi, was assigned to develop behavior strategies and monitor Student during the summer program. Ms. Roach has a bachelor's degree in psychology and received a master's degree in school psychology in 2011. She began her employment as a school psychologist with Tehachapi in August 2011. She is in the process of becoming a Board Certified Behavior Analyst having completed all her course work. The class was comprised of students from kindergarten through fourth grade. The class day was from 8:30 a.m. to 12:30 p.m. with three 10-15 minute periods set aside for the class to work on writing, reading and math.

¹² Mother also objected to the Least Restrictive Environment portion of the IEP that mistakenly stated that Student's behavior did not impede his learning or that of others.

29. On June 17, 2014, the first day of the summer program, Ms. Roach conferred with Parents to find out Student's preferences and to discuss the behavior support program. Ms. Roach attended every day the first week and then two to three days each week after. She instituted the following behavior strategies: (1) a visual schedule with Student putting on icons for activities; (2) reinforcers, such as edibles and stickers; (3) verbal praise to reward Student for following directions; (4) visuals, such as a stop sign with a note to Student, on the classroom door to make Student think about what he was doing before eloping; (5) daily home reports using a smiley face; (6) a lollipop for each day when Student had good conduct, and (7) using social stories to reinforce expected behavior. Student was granted five minutes of free time when he completed assigned tasks.

30. Student required frequent redirection and sometimes two verbal prompts to complete tasks. He worked one-on-one with his aide during instructional time in writing and reading. He worked on his social skills and demonstrated progress. Mr. Hedberg did not recall Student eloping. Mr. Hedberg noted that Student could stay on task for five to seven minutes before being distracted. He stated that based on his observations, he did not see a need for a behavioral assessment.

August 15, 2014 IEP Meeting

31. The 2014-2015 school year commenced on August 13, 2014.¹³ Student was assigned to the special day class taught by Nancy Piercy, who was assisted by three aides. The class contained about 11 students. On August 15, 2014, the IEP team reconvened at Mother's request to prepare for the new school year. Mother attended with Ms. Torres. Tehachapi attendees were Ms. Piercy, Ms. Roach, Ms. Cortichiato, and a general education teacher. Mother reported that Student had made progress as he knew his alphabet, numbers, colors and shapes, although he might require reminders. The team agreed that the strategies used during the summer program were successful. The team discussed strategies and implementation. Ms. Piercy stated that she had a highly structured class, which included reviewing the schedule each morning and frequent breaks and activities to allow the children movement. Ms. Roach reported she had trained Student's aide on the behavior techniques used during the summer. Ms. Piercy agreed to use reinforcement and reward for the entire class to remain in their seats whenever she observed Student leaving his seat. Ms. Piercy agreed to daily communication notes to Mother to review how Student did. She would continue the summer strategy of including a dum-dum sucker whenever Student did not elope during the day. Mother consented for Tehachapi to conduct a SCIA and occupational therapy assessments. Mother stated that all her questions and concerns were answered. The IEP offered full-time placement in a special day class with speech and language and occupational therapy services continued from the preceding IEP. Mother consented to the IEP.

¹³ Student had unexcused absences for the first three days of the school year.

Student's Behavioral Issues from August to December 2014

32. Sara Brus was assigned as Student's aide. Ms. Brus had previously worked as a behavior aide in the Chico and Butte County school districts and with the Valley Achievement Center. She was trained in ABA and discrete trial training.¹⁴ From August 18, 2015 through November 15, 2014, Student was only absent on six days. Ms. Brus was the fourth aide present in the classroom. When Student would start to exhibit behaviors, she would take him to a room to de-escalate and let him roll balls, which had a calming effect on him. Student reacted well to positive reinforcements. Student was easily re-directed until the end of October. At the end of October, Student's behavior worsened in that he stopped following directions, became aggressive towards his aide, and refused to engage in activities.

33. On November 4, 2014, Student had trouble at school by going in a supply closet and pushing over a projector, attempting to bite and hit his aide, and scratching his teacher's arm. He was sent home. An IEP meeting was scheduled to discuss Student's behavior.

34. On November 6, 2014, Student's IEP team reconvened to discuss a possible change in placement. Attendees included Ms. Brus and Mrs. Mackie, a special education teacher from Tompkins. Ms. Piercy reported that Student was meeting his academic goals, but he presented with eloping, noncompliant behaviors, destructive behaviors, and hitting and spitting on staff and peers. Ms. Piercy reported that Student was regressing and could only complete three to four worksheets per day. It was noted that most behaviors occurred when he returned from recess. The SCIA assessment had been started but not completed as Ms. Cortichiato had left the employment of Tehachapi. Ms. Roach then completed the assessment. Ms. Piercy agreed to switch snack time to follow recess in lieu of before. Ms. Brus would develop a visual schedule to help with transitions and continue to use timers to assist in transitions. Mrs. Mackie opined that she did not feel Student could progress in her class.

35. On November 18, 2014, Student ran from the school cafeteria through the outside doors to the parking lot area. To prevent him from reaching the parking lot or street, Ms. Brus held Student's hands for 40 minutes until he finally calmed down. Parents were notified of the incident.

36. On December 1, 2014, Student became upset when he missed recess. He begun to strike, kick, spit, and bite Ms. Brus. Once he started to calm down, he returned to his seat; but he then turned and hit his aide very hard in the head.

37. On December 2, 2014, Student became upset while reading and began to tear the classroom apart. Classroom staff placed him in a conference room to calm him. He went

¹⁴ Discrete trial training is a strategy derived from ABA. It is a method of teaching a skill by breaking it down into several steps instead of teaching the skill at one time.

into a meltdown and attempted to throw chairs, clipboards, and a paper shredder. He threw a tape dispenser, which struck Ms. Brus in the back of her head. Student's parents took him home following the incident.

38. Student did not attend school following December 2, 2014. On December 18, 2014, an administrative amendment to the IEP was prepared and consented to by Father. The amendment indicated that Parents chose to place Student on independent study "due to changes in [Student's] medical treatment and resulting difficulty with medication regulating behavior." Student was scheduled to return to school on January 5, 2015, which was the end of Winter Break. Mother admitted that the request for independent study was not related to medication problems.

39. Prior to the Winter Break, Tehachapi spoke to Parents about conducting a functional behavior analysis. Parents told Tehachapi staff that they were "confused" and did not know what they wanted to do. Ms. Roach suggested that they forward questions and concerns which Tehachapi would address. Parents did not respond. On January 6, 2015, Ms. Siciliani spoke to Father by telephone about Student's attendance and to schedule an IEP team meeting. On January 20, 2015, Ms. Roach forwarded a letter to Parents recounting the discussions. The letter contained a Consent for Assessment form for Tehachapi to conduct a functional behavior assessment. On January 29, 2015, Ms. Siciliani forwarded a letter to Parents expressing concern that Student had not been attending school and requesting Parents' consent to the functional behavior assessment. Ms. Siciliani suggested dates for the IEP team meeting in early February. Parents requested that the IEP team meeting be held on February 24, 2015.

SCIA Assessment

40. The SCIA assessment was started by the Cummins Valley school psychologist, Ms. Cortichiato in October 2014 and completed by Ms. Roach. Student was referred for the assessment because of concerns regarding behavior (aggressive and assaultive behavior, non-compliance, over-active behavior, elopement and class disruption), instruction (a need of constant verbal prompts), inclusion (Student required direct instruction and supervision for safety), and pragmatics (to mediate social conflict and help with transitions). The assessment comprised of a records review, interviews with Parents and teacher, and observations. Student was observed on three occasions, October 3, November 2, and November 12, 2014.¹⁵ A written report was prepared on January 13, 2015.

41. Ms. Piercy reported that Student had a short attention span and difficulty focusing. He constantly left his seat and engaged in avoidance behaviors. He refused to follow classroom and playground rules including refusal to re-enter class after recess. He refused to eat lunch and then complained of being hungry. He engaged in throwing objects

¹⁵ Ms. Cortichiato conducted the October 3, 2014 observation. Ms. Roach conducted the other two observations.

including chairs; tearing up the classroom and office; and hitting, kicking, biting and spitting on staff and peers.

42. The SCIA rubric was comprised of health/personal care, behavior, inclusion/mainstreaming, and social pragmatics. Student demonstrated a serious level of behavior incidents with defiance and physical aggression requiring adult monitoring and intervention to prevent escalation. Student required individual instruction in any setting. He required strategies such as ABA, structured teaching and discrete trial training. He also required significant accommodation and modification due to his low cognitive abilities and skills. As for inclusion/mainstreaming, Student required one-to-one staff in close proximity for direct instruction, safety, or behavioral monitoring. In social pragmatics, Student required direct, extensive intervention strategies to initiate or participate in social interactions. Fifty percent of transitions and changes in routine were so disruptive, even with specialized interventions, that Student was not benefiting.

43. Ms. Roach concluded that Student required a SCIA due to his history of elopement and aggression through the entirety of the day. There was no estimate as to how long the SCIA would be required. The SCIA's duty would be to keep data, prompt, redirect, implement reinforcement procedures, and keep Student within sight. Ms. Roach recommended changing Student's goals to (1) Student remaining within two feet of an activity in four out of five opportunities for five consecutive days as measured by staff, (2) Student to follow staff directives within 30 seconds of a verbal prompt paired with a visual prompt without protest four out of five requests for five consecutive trials days, (3) reduce aggressive behaviors to zero occurrences throughout the school day, and (4) Student to request for or engage in selected coping strategies for at least one minute when aversive or non-preferred events are presented in four out of five opportunities for five consecutive days.

February 24, 2015 IEP

44. The IEP team reconvened to review the SCIA assessment, getting consent to conduct a functional behavior assessment, and to discuss parental concerns. Father did not agree with the June 2, 2014 IEP. He believed that the summer program went well but Student's problems surfaced starting a month into the new school year. Father felt Student's problems were environmental and based on his attention difficulties. Ms. Roach reviewed her SCIA assessment and her proposed new goals. She also recommended that the IEP team review Student's goals after the functional behavior assessment was completed. Mother suggested that staff be more "hands-on" in dealing with Student's behaviors. Ms. Siciliani explained that Tehachapi procedures only permit restraint being utilized when there was imminent danger of the child hurting himself or others. Parents consented to the functional behavior assessment, the proposed SCIA goals, and placement.

45. Parents never gave notice to Tehachapi that Student would not return to class. Tehachapi never completed the functional behavior assessment because Student never attended school for the remainder of the 2014-2015 school year except for one day. For the

entire school year of 180 days, Student attended only 64 days.¹⁶ Student failed to attend school after the December 2, 2014 incident except for a single day, when he was observed by a psychologist retained by Parents.

Dr. Gilbertson's Psycho-Educational Evaluation

46. Parents retained David Gilbertson, Ph.D. to perform an independent psycho-educational evaluation of Student. Dr. Gilbertson authored a report dated April 27, 2015.¹⁷ He received a bachelor's degree in psychology, a master's degree in clinical child psychology, and a Ph.D. in educational psychology. He is a licensed educational psychologist, and licensed marriage and family therapist in California and Hawaii. He also holds California credentials for school psychologist/pupil personnel services and administrative services. He served as a school psychologist, special education administrator and as a director of a special education local planning area for approximately 25 years. He has not worked in an educational setting since 2010. He has and continues to maintain a private practice in the areas of educational psychology, and marriage and family counseling in both California and Hawaii.

47. Dr. Gilbertson conducted his evaluation between March 9 and 12, 2015, almost one year after Tehachapi's assessment. The evaluation comprised five standardized tests, four surveys given to Parents, and observations at home and school. Student was administered the standardized tests in his home with Father present. Dr. Gilbertson noted that Student "moved independently and comfortably" at his home. Student exhibited an attention span of approximately four to five minutes. Student demonstrated perseverating behaviors during the testing, and he had difficulty returning to tasks. During the testing itself, Student required close adult supervision and redirection to permit him to focus on the tasks. Dr. Gilbertson granted Student numerous breaks, which included permitting Student to take a brief walk outside, playing with a favorite toy, or other preferred activity. Father, whom Mother described as the family disciplinarian, assisted in setting specific time-limits to breaks and offering verbal encouragement to Student during testing. This is in comparison to Tehachapi's assessment, which took place in an unfamiliar environment at Tompkins, with Mother present but not assisting the examiners. This may have led to varying results compared to the earlier assessment. Like Ms. Owen, Dr. Gilbertson felt that the results he obtained might, in general, be lower than Student's true levels due to his distractibility.

TEST RESULTS

¹⁶ Of Student's 92 absences, 24 were characterized as "excused." Student was absent 12 days in December, which were listed as excused. Parents had applied for independent study in December because of medication problems. As stated above, Mother admitted that there were no such concerns at the time. Thus, it is apparent that the unexcused absences would be about 76 days.

¹⁷ Dr. Gilbertson did not release the written report until October 27, 2015.

48. To gauge Student's cognitive abilities, Dr. Gilbertson administered a single measure, the Test of Non-Verbal Intelligence-Fourth Edition because of Student's language problems. Student scored in the "average" range as compared to the Tehachapi results, which scored Student in the "extremely low" range on the Non-Verbal Index and "borderline" on the Fluid Reasoning Index. In academic achievement, Student scored "below average" on the Wechsler Individual Achievement Test-Third Edition in basic reading and written expression, and he scored "low" in oral language, total reading, mathematics, math fluency, and total achievement. On the test of Visual Motor Integration, Student scored "low average" as compared to Student's scoring "average" in the administration by Ms. Owen. Student received a score of "significantly delayed" on the Test of Auditory Processing Skills-Third Edition.

49. To assess in the areas of social-emotional and behavior, Dr. Gilbertson administered surveys to Parents. Parents scored Student "very elevated" on the Behavior Rating Inventory of Functioning which "demonstrated that Student's executive functioning had a detrimental effect on [Student's] learning and must be considered in his daily instructional program and strategies." Student's score on the Connors Behavioral Rating Scale-Third Edition demonstrated "very significant behavior problems." He scored in the clinical range on the social competence scale of the Achenbach Child Behavior Rating Scale. Student exhibited problem behaviors in thought problems, attention, rule-breaking behavior, and aggressive behavior. He also scored in the clinical range for attention deficit/hyperactivity, oppositional defiant behavior, and conduct problems. Dr. Gilbertson administered the Childhood Autism Rating Scale-Second Edition-High Functioning Version and the Childhood Autism Rating Scale-Second Edition-Standard Version. Student demonstrated mild to moderate symptoms of Autism Spectrum Disorder and was in the average range for a child with high functioning autism.

DR. GILBERT'S OBSERVATIONS AT SCHOOL

50. On March 2, 2015, Father forwarded an email to Ms. Siciliani and requested permission to permit "his Doctor to observe Student in class and on the playground" because of Student's behavior and medication changes.¹⁸ Permission was granted for an observation on March 9, 2015. Dr. Gilbertson was accompanied by Ms. Roach.

51. Dr. Gilbertson noted that the class comprised 12 students with diverse needs. He found the classroom a "typical" special day class with students being noisy and noncompliant. Dr. Gilbertson categorized the class as not using language-based instruction. He observed Student on the playground engaging in parallel play with a basketball and hula-hoop. He did not see any children interacting with Student. During snack time, Student sat with the teacher and four peers engaging in high fives. After snack time, Student returned to

¹⁸ Medication changes were given as the reason for Student not attending school although Mother admitted that was not true. Dr. Gilbertson never treated Student.

the classroom and was directed to look at his visual schedule. He then engaged in a paper/pencil activity. During story time, Student joined the class on the carpet and was able to pay attention for about five minutes. He then played with his tongue and his nose. After 15 minutes, he laid on his back and sought to interact with his aide. Later he attempted to rise, but he was successfully redirected. After story time, he participated in a spelling lesson although it appeared he was not paying attention. The group proceeded to the library. Student did not comply and quietly walked around with an aide following him. He would look at books for two minutes, return to the group and then leave again. At one point, he was redirected to the group, and stretched out and laid on his side. The class then went to the computer room. Student sat at a computer and began to do an activity. He became upset because he wanted to do another activity, watching police car crashes. After unsuccessfully searching for police car videos, he became upset and asked the teacher for help. When the teacher refused to help, Student became more upset. Dr. Gilbertson reported that the teacher stated that Student had a “really bad temper” and needed to be sent home. Mother then came and picked Student up. Dr. Gilbertson testified that Student needed redirection approximately every 30 seconds.

52. Ms. Roach disputed the accuracy of Dr. Gilbertson’s observations. Ms. Roach noted that Dr. Gilbertson did not take any notes during the entire observation time, which Ms. Roach did. She also stated that he was wrong that the class was not using language-based instruction. Ms. Roach indicated that Dr. Gilbertson failed to mention in his report that prior to recess, lunch and library the children were prompted to do what was expected from them. She also disagreed with Dr. Gilbertson categorizing Student’s playground play as parallel as she observed Student engaging with peers. Dr. Gilbertson omitted that Student was pre-prompted while transitioning to the classroom from the playground. Ms. Roach also had no recall of the teacher stating that Student needed to be sent home and that he has a very bad temper. Ms. Owens opined that Dr. Gilbertson’s use of the Test of Non-Verbal Intelligence-Fourth Edition, as the only measure of Student’s cognitive level was not consistent with the best practices of the Board of Behavioral Scientists.

DR. GILBERTSON’S FINDINGS AND RECOMMENDATIONS

53. Dr. Gilbertson diagnosed Student pursuant to the Diagnostic Statistical Manual as having Autism Spectrum Disorder, without intellectual impairment, with language impairment, requiring very substantial support and Attention-Deficit/Hyperactivity Disorder, Combined Type, plus educational and social problems. He recommended that the IEP team find Student eligible for special education under autism and other health impaired. He recommended that Student be placed in a regular education classroom with one-to-one support, structured opportunities for social interactions, behavior support, and participation in extracurricular activities and events. The aide should be ABA-trained and supervised by a Board Certified Behavior Analyst and would also provide after school ABA services. Additionally, Dr. Gilbertson recommended that Student be further assessed in the areas of assistive technology, augmentative communication, and music therapy. Dr. Gilbertson offered no authority to support his recommendations that Student should be assessed in

assistive technology and music therapy, other than that the services might benefit Student's education program.

54. Dr. Gilbertson also opined that Student's behavior "clearly presented safety issues in the school setting," based on his frequent elopement and other behaviors, which required a functional behavior assessment and behavior intervention plan. As to the elopement goal, Dr. Gilbertson opined that without a functional behavior assessment or comprehensive positive behavior plan in place, Tehachapi "would explicitly have no appropriate plan in place." He also criticized the goal, which proposed to reduce the number of daily elopements and not eliminate it, as posing "significant and substantial risk of physical injury to [Student]."

55. In addition to her criticism of the results of the school observation, Ms. Roach opined that Dr. Gilbertson's recommendation for placement was not appropriate. Student's behaviors and his academic levels were not suitable for general education. Additionally, a general education class was not compatible with an aide using ABA and/or Discrete Trial Training strategies to the extent required by Student. The result would be Student being isolated from his peers socially. She also opined that the Test of Auditory Processing score should be considered with extreme caution as Dr. Gilbertson failed to administer an optional portion designed to be given to children with attentional difficulties. The screening test was designed to determine if the Test of Auditory Processing would yield accurate results for children with attention problems.

56. At hearing, Dr. Gilbertson elaborated on matters not contained in his report. Dr. Gilbertson opined that Tehachapi had sufficient information when Student started at Cummings Valley as to the necessity to develop an interim behavior plan and conduct a functional behavior assessment. Dr. Gilbertson cited Student's elopement history, aggressive behavior towards others, severe temper tantrums multiple times throughout the day, and his display of intent to harm himself when upset. Other factors which should have led Tehachapi to conduct a behavior assessment included Student's need for frequent redirection, failure to follow directions, and his need for individual and small group instruction. Although the Jacksonville IEP stated that Student did not require a behavior intervention plan at that time, Dr. Gilbertson opined that the factors clearly indicated the need. Although he testified that a functional behavior assessment relating to school behaviors could be conducted when a child was not attending school, Dr. Gilbertson later conceded that home and school are different environments so that a child needs to be in school for a functional behavior assessment to be conducted.

57. Ms. Owen stated that a functional behavior assessment and the development of a behavior intervention plan were usually conducted after school staff had unsuccessfully attempted to implement behavior intervention strategies. An interim behavior intervention plan could be developed and implemented prior to the functional behavior assessment in cases where the student was a danger to himself or others. Ms. Roach noted that a functional behavior assessment evaluates the environment and the behaviors in that environment which require redirection. It requires that the student be in the structured environment and routine

at least two weeks or more prior to the evaluation. Ms. Owen and Ms. Roach agree that the functional behavior assessments can only be done in the environment, at school, where the targeted behaviors occur.

58. Although Dr. Gilbertson's credentials are impressive, the ALJ granted little weight to his testimony. The quality of the school observation was questionable due to Student not being in school for three months and the failure of Dr. Gilbertson to take notes.¹⁹ Student's results on the cognitive testing varied greatly from the results obtained on prior assessments. This could be due to Student being tested at his home, where Dr. Gilbertson noted he was comfortable, and the presence of Father, who assisted in prompting Student. Dr. Gilbertson's recommendation for a general education placement was based, or partly based, on Student scoring in the average range. Dr. Gilbertson's recommendation that Student should be placed in a general education class were inconsistent with his findings that Student had significant delays in academic functioning, his undisputed need for individual and small group instruction, his poor communication skills, his constant need for redirection, poor executive functioning skills, and his severe behavior problems.

LEGAL CONCLUSIONS

*Introduction: Legal Framework under the IDEA*²⁰

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300.1 (2006)²¹ 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 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.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability.

¹⁹ Dr. Gilbertson testified as a rebuttal witness and Student's counsel failed to inquire as to this issue.

²⁰ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

²¹ All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

(20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) “Related services” are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a))

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 (*Mercer Island*) [In enacting the IDEA, 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).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) In this matter, Student had the burden of proof on all issues.

5. An IEP is evaluated in light of information available to the IEP team at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (*Adams*).) “An IEP is a snapshot, not a retrospective.” (*Id.* at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Ed.*, *supra*, 993 F.2d 1031, 1041.) The IEP must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*) Additionally, to determine whether a school district offered a student a FAPE, the focus must be on the adequacy of the district’s proposed program. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) (*Gregory K.*) If the school district’s

program was designed to address the student's unique educational needs, was reasonably calculated to provide the student with some educational benefit, and comported with the student's IEP, then the school district provided a FAPE, even if the student's parents preferred another program.

Procedural Violations

6. There are two parts to the legal analysis of a school district's compliance with the IDEA. First, there is the determination whether a district has complied with the procedures set forth in the IDEA. (*Rowley, supra*, 458 U.S. at pp. 206-207.) Second, there is the decision whether the IEP developed through those procedures was designed to meet the child's unique needs, and was reasonably calculated to enable the child to receive educational benefit. (*Ibid.*). A procedural violation constitutes a denial of FAPE only if it impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the child, or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E); Ed. Code, § 56505, subds. (f) and (j); see also, *W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992), 960 F.2d 1479, 1483-1484 (*Target Range*); *Rowley, supra*, 458 U.S. at p. 200.)

Appropriate Behavior Services

7. Student contends that Tehachapi failed to conduct a behavior assessment, develop a behavior plan, and provide appropriate behavior services to meet Student's behavior needs at the IEP meetings on April 4, 2014, April 30, 2014, August 15, 2014, June 2, 2014, and November 6, 2014. Student also contends that none of the IEP's offered "a systematic behavior approach with which to address Student's behavioral needs."

8. Tehachapi contends that Parents did not request a behavior assessment at the April 7, June 2, and August 15, 2015 IEP team meetings. As to the April 30, 2014 IEP team meeting, Tehachapi contends that there was not enough time to complete a behavior or SCIA assessment as there was about one month left of the school year. Further, Student was still transitioning, and the April 22, 2014 incident was the first serious behavior incident. Tehachapi avers that it was prevented from conducting a functional behavior assessment as Parents did not consent to the assessment until February 24, 2015 and Parents withheld Student from attending school after December 2, 2014.

9. At all relevant times, California law has recognized behavioral supports such as a functional behavioral assessment and behavior support plans, but it had not prescribed the content of a behavior support plan, or defined a functional behavior assessment. However, until July 1, 2014, the California Code of Regulations specifically defined the content and application of additional, specific behavioral supports, known as a functional analysis assessment and a behavioral intervention plan. This case therefore straddles two versions of California law regarding behavior interventions. Student's IEP's of April 7, 2014, April 30, 2014, and June 2, 2014, were subject to the prior law, as contained in the

California Code of Regulations. As of July 1, 2014, an amended version of the California Code of Regulations became effective. The amended version repealed the behavior intervention provisions of the prior version of the regulation. (*See*, Stats. 2013, ch. 48.) Therefore, all of Student's IEP's created subsequent to July 1, 2014, were not subject to the regulations regarding the application, form, and content of a functional analysis assessment and a behavioral intervention plan.

10. Prior to July 1, 2014, California law defined a behavior intervention plan as "the systematic implementation of procedures that resulted in lasting positive changes in the individual's behavior." (Cal. Code Regs, tit. 5, § 3001(d), repealed effective July 1, 2014.) It included the design, evaluation, implementation, and modification of the student's individual or group instruction or environment, including behavioral instruction, to produce significant improvement in the student's behavior through skill acquisition and the reduction of problematic behavior. (*Ibid.*)

11. When behaviors rose to the level of "serious behavior problems," California law prior to July 1, 2014, imposed formal requirements for addressing them, even when they had not resulted in formal discipline. "Serious behavior problems" meant behaviors which were self-injurious, assaultive, or caused serious property damage and other severe behavior problems that were pervasive and maladaptive for which instructional/ behavioral approaches specified in the student's IEP were found to be ineffective. (Cal. Code Regs., tit. 5, § 3001, subd. (a),(b), repealed effective July 1, 2014.)

12. Prior to July 1, 2014, if the IEP team found that such "serious behavior problems" existed, a functional analysis assessment should be performed. (Cal. Code Regs., tit. 5, § 3052, subd. (b), repealed as of July 1, 2014.) The regulations specified who could conduct such an assessment, how such an assessment was to be performed, and the contents of the assessment report. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(1), (b)(2), repealed as of July 1, 2014.) Upon completion of the functional analysis assessment, an IEP team meeting was to be held to review the results and to develop the behavioral intervention plan, if necessary. (Cal. Code Regs., tit. 5, § 3052, subd. (c).) The behavioral intervention plan was only necessary if the student exhibited a serious behavior problem that significantly interfered with the implementation of the goals and objectives of the student's IEP. (Cal. Code Regs., tit. 5, § 3001, subd. (f); Cal.Code Regs., tit. 5, § 3052, subd. (a)(3), repealed as of July 1, 2014.)

FAILURE TO ASSESS FOR BEHAVIOR

13. Parents did not request a behavior assessment at the April 7, 2014 IEP meeting. Although the IEP noted that Student was "hard to control," had problems with transitions, and would run to the sand box when directed to enter class form outside, Student had not exhibited severe behavior problems. Also, he was placed in a strange environment due to his move from Alabama, and the Jacksonville IEP noted that Student's behavior improved with consistent attendance.

14. The April 22, 2014 incident occurred after Student's attendance became sporadic (he missed one-third of the 10 school days between March 28 and April 22, 2014 (which included spring break). An IEP meeting was held due to the incident. The IEP team denied Mother's request for a behavior assessment or behavior plan as less restrictive approaches were required to be used. At that time, Student was in the process of being assessed by Ms. Owen. This initial assessment had been delayed because of Student's sporadic attendance and the failure of Parents to give consent timely. After April 22, 2014, Student did not attend school for the remainder of the school year, which effected Tehachapi's assessment. Ms. Owen completed the assessment on May 16, 2014, because Student was permitted by Parents to be tested at Tompkins. Student's absences resulted in Ms. Owen not being able to conduct classroom and playground observations that assist in determining Student's behavioral problems and the necessity of a separate behavioral evaluation. Student's absences also prevented Ms. Doue from completing the occupational therapy assessment. The occupational therapy assessment directly related to behavior since Mother opined that Student's behaviors, including leaving his seat and elopement, were directly related to sensory processing issues. Since Student's assessment had not been completed because of Parents' failure to timely consent, Student's absences after March 28, 2014, which prevented a complete psycho-educational assessment, and insufficient time to complete a functional behavior assessment, Tehachapi's failure to conduct a behavior assessment was impeded by Parents.

15. Mother did not request a behavior assessment at the June 2, 2014 IEP team meeting. The IEP team discussed the Tehachapi suggested behavior intervention strategies to be used during the extended school year program (i.e., stop sign on door, top/go chart, social stories, incentive charts, and rewards for following directions). These suggestions were essentially an interim behavior intervention plan. The IEP team, including Mother, adopted the strategies which were successfully implemented during the extended school year.

16. Mother consented to the August 15, 2014 IEP, which continued the behavior strategies, including the elopement reward system, utilized during the summer program. For the first two months of the new school year, Student had no behavior problems. Mother did not make a demand for a behavior assessment. Because Student did not exhibit behaviors which interfered with his learning, there was no need to conduct a functional behavior analysis.

17. In late October, Student's behavior markedly escalated and the strategies in use were no longer effective. Student stopped following directions, became aggressive towards his aide, and refused to engage in activities. On November 4, 2014, Student went into a supply closet and pushed over a projector and physically assaulted his aide. This resulted in an IEP meeting on November 6, 2014, to consider a change of placement due to the escalation of Student's behavior. Ms. Piercy reported that Student was progressing on his academic goals, but Student presented with noncompliant behaviors, elopement, causing property damage, and being assaultive towards peers and staff. A discussion ensued as whether Student should be placed in a lower level special day class at Tompkins. This demonstrated the seriousness of Student's deteriorating behaviors, and its adverse effect on

his learning and that of the others in the class. Here, Student's behaviors clearly presented safety concerns because (1) his consistent elopement, (2) refusal to comply with directions, and (3) his behaviors had escalated to where he was causing property damage and attacking and hurting staff and peers. Also in the past, Student had reportedly had less behavior problems when he had consistent attendance in Alabama. Here, Student's attendance was consistent to begin the 2014-2015 school year, and he had been part of the environment for more than a sufficient time to have transitioned to the class. Student's behavior was serious and Tehachapi had an obligation to timely and appropriately conduct a behavior assessment and develop a behavior plan. (See, Education Code section 56520, subdivision (b).)

18. The failure of Tehachapi to conduct a timely behavior assessment is a procedural violation which resulted in Student being deprived of a free appropriate public education. Here, Student was deprived of educational benefits as his out of control behavior directly prevented him from learning. Student engaged in further serious and dangerous incidents on November 18, 2014, elopement to the parking lot and toward the street; December 1, 2014, physical assaulting and injuring his aide; and December 2, 2014, causing property damage and assaulting and injuring his aide. It also impeded his parents from significantly participating in the IEP decision-making process by depriving them of essential information required to develop appropriate behavior supports, goals and services.

19. After January 19, 2015, Tehachapi approached Parents about conducting a functional behavior analysis in December 2014. Parents failed to communicate with Tehachapi in December and withheld consent for the behavior assessment until February 24, 2015. Tehachapi rightfully claims it has been unable to do a functional behavior assessment because of Parent's decision to not have Student attend school.

Appropriateness of Behavior Intervention Services in the IEP

20. Student contends that Tehachapi has failed to provide appropriate behavior services since April 7, 2014. Student has failed to meet his burden of demonstrating that Tehachapi has denied Student a FAPE by failing to provide Student with appropriate behavioral services in the IEP's of April 7, 2014; April 30, 2014; June 2, 2014; August 15, 2014, and February 24, 2015. However, Student has met his burden of demonstrating that Tehachapi denied him a FAPE in the November 6, 2014 IEP by failing to provide Student with appropriate behavior services as of that date.

APRIL 7, 2014 IEP

21. Student's special day class implemented positive behavior management strategies in its curriculum. As stated above, Student had not exhibited severe behavior problems up to the April 22, 2014 incident. Although Student did require constant redirection and was difficult to control, as of the April 7, 2014 IEP team meeting, it was appropriate for Tehachapi to adopt Student's Jacksonville IEP which stated that Student's behaviors improved with consistent attendance and that he did not require a behavior intervention plan. Additionally, Student was in the midst of moving to a new state and

attending a new school. Because of Student's eloping behavior, Tehachapi added the services of a special day class paraprofessional. Tehachapi's response to Student's behaviors was appropriate based on the information it had at the time. (*Adams, supra*, 195 F.3d at 1149.)

APRIL 30, 2014 IEP

22. Parents prevented Tehachapi from conducting its initial assessment by their failure to timely consent to the assessment, which included a psycho-educational and occupational therapy evaluations, including individual functioning skills, adaptive and social behavior, and Student's sensory issues affecting Student's behaviors. Mother opined that Student's elopement might be a result of his need for a sensory break. Tehachapi also noted that the incident occurred after Student's attendance became sporadic and he had only been in school a total of 35 days. Based on the information available to the IEP team at the April 30, 2014 IEP meeting, including the Jacksonville IEP, and Tehachapi's waiting for the completion of the assessment, the IEP team's decision to continue aide support utilizing various behavior management strategies was appropriate. It should be noted that Parents' refusal to permit Student to return to school through the end of the school year precluded Tehachapi from completing the occupational therapy assessment and for the school psychologist to adequately evaluate Student's behaviors. Tehachapi's response to Parents' request was appropriate based on the information possessed by it at the time. (*Adams, supra*, 195 F.3d at 1149.)

JUNE 2, 2014 AND AUGUST 15, 2014 IEP'S

23. At the June 2, 2014 IEP meeting, Tehachapi proposed implementing behavioral strategies at the extended school year class supervised by Ms. Roach. The IEP team opted to continue the strategies from the extended school year at the August 15, 2014 IEP meeting. These strategies were the equivalent of a behavior plan. Student reacted positively to these strategies and showed improved behavior. From the start of the new school year on August 13 through the end of October 2014, Student's behavior was able to be managed using the implemented behavior strategies. Ms. Brus easily re-directed Student and de-escalated his behaviors by using such strategies. The IEP team's decision at the August 15, 2014 IEP meeting to continue utilizing Ms. Roach's behavior strategies was appropriate as the behavior strategies being implemented were succeeding.

NOVEMBER 6, 2014 IEP

24. At the end of October 2014, Student's behavior became severe as he stopped following directions, became aggressive towards his aide and peers (including hitting and spitting), and refused to participate in activities. The change in Student's behavior was serious enough to warrant an IEP meeting on November 6, 2014, to discuss changing Student's placement to a more restrictive special day class. Thus, Tehachapi possessed sufficient information to know that Student required additional behavioral services to regulate his behavior, and he had a need for a functional behavior assessment. Ms. Owen

testified that Tehachapi could adopt an interim behavior plan pending the completion of a full functional behavior analysis when a student's behavior appeared to amount to a danger to himself and others. Here, the evidence demonstrated that Student's behaviors were placing him and others in danger as he became more aggressive and more non-compliant. Although Tehachapi's SCIA assessment was not completed timely, two school observations had been completed prior to the November 6, 2014 IEP meeting. Tehachapi could have utilized the information from the two observations, coupled with input from Ms. Brus and Ms. Piercy, to construct an interim behavior plan. Since Tehachapi had sufficient information to realize that Student's behavior was severe enough to require behavioral intervention and a functional behavior assessment, the failure to do so resulted in Student being deprived of education benefit as his behavior impeded him and others to learn. Student's behaviors continued to worsen resulting in the November 18, 2014, December 1, 2014, and December 2, 2014 incidents. If Tehachapi had adopted an interim behavior plan to target Student's escalated behaviors, the three incidents may have had strategies in place to de-escalate Student's behaviors.

FEBRUARY 24, 2015 IEP TO PRESENT

25. In December 2014, Tehachapi sought Parents' consent to conduct a functional behavior assessment as Parents' earlier requested. Parents did not respond to Tehachapi's offer. On January 6, 20, and 29, 2015, Tehachapi again sought Parents' consent for the functional behavior assessment. Parents finally consented to the assessment request at the February 24, 2015 IEP team meeting. Additionally, Parents refusal to send Student to school after December 2, 2014, prevented the completion of a functional behavior assessment as such an assessment must be conducted in the environment where the behaviors occur. Thus, Tehachapi was prevented by Parents from obtaining information necessary to create a behavior intervention plan. Because Parents prevented Tehachapi from obtaining sufficient information to establish a behavior intervention plan and behavior goals, Tehachapi did not deny Student a FAPE at the February 24, 2015 IEP team meeting and thereafter.

Prior Written Notice

26. The IDEA contains a procedural notice provision that requires an educational agency to provide "prior written notice" whenever the agency proposes or refuses to initiate or change "the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education." (20 U.S.C. §1415(b)(3); see also 34 C.F.R. § 300.503(a); Ed. Code, § 56500.4, subd. (a).) An appropriate prior written notice must contain (1) a description of the action proposed or refused by the agency, (2) an explanation for the action, and (3) a description of the assessment procedure or report which is the basis of the action. (34 C.F.R. § 300.503(a); Ed. Code, § 56500.4, subd. (b).) An IEP document can serve as prior written notice as long as the IEP contains the required content. (71 Fed.Reg. 46691 (Aug. 14, 2006).) The procedures relating to prior written notice "are designed to ensure that the parents of a child with a disability are both notified of decisions affecting their child and given an opportunity to object to these decisions." (*C.H. v. Cape Henlopen School Dist.* (3rd Cir. 2010) 606 F.3d 59, 70.) Student contends that Tehachapi

failed to give Parents prior written notice of Parents' request for behavior and assistive technology assessments.

APRIL 7, 2014 IEP

27. Student contends that Tehachapi failed to give a prior written notice of its decision to deny Parents' request for it to conduct an assistive technology assessment. Student offered no evidence that Parents ever requested that Tehachapi conduct an assistive technology assessment. Parents did review services Student received from the Alabama district at the April 7, 2014 IEP meeting. Although the Alabama IEP did indicate that Student needed assistive technology devices and/or services, no such services were listed in the IEP. The 30-day placement did not include assistive technology nor did the Consent for Assessment form indicate such an assessment. Parents had a practice to attach to the IEP documents written statements stating their differences with the IEP team. At none of the IEP meetings did Parents ever submit a written statement that they requested an assistive technology assessment.

28. Student offered no evidence that Parents requested a behavior assessment at the April 7, 2014 IEP. Although there was a discussion regarding Student's behavior-trouble staying in his seat and spending time outside-Parents did not request a behavior assessment. As stated above, a school district is obligated to issue to Parents a prior written notice before the proposal to change a student's educational program or refuse to adopt a request by parents. Here, Tehachapi did not refuse a request for services, placement, or assessment because Parents never made any requests. Therefore, Tehachapi was not under an obligation to send a prior written notice to Parents.

JUNE 2, 2014 AND AUGUST 15, 2014 IEP'S

29. As to the June 2, 2014, and August 15, 2014 IEP's, Student offered no evidence that Parents requested a behavior assessment. Parents prepared a written addendum to the June 2, 2014 IEP, which failed to state any request for any assessment. Parents did not submit a written statement to the August 15, 2014 IEP.

APRIL 30, 2014 IEP

30. The IEP team discussed whether Tehachapi should conduct a behavior assessment or SCIA assessment at the April 30, 2014 IEP. The team discussed reasons for denying Parent's request for a behavior assessment which included that the lack of time to conduct such an assessment as the school year ended shortly, Student was still in transition from his move, and that he had only one serious behavior incident. The IEP document only stated that a behavior assessment was not appropriate at that time as Tehachapi should "start with the least restrictive approach before moving to an FBA." Here, Parents requested a behavior assessment and a discussion followed. A school district need not issue a formal prior written notice where the same information is contained in an IEP document. The IEP document failed to contain an explanation of the basis for the denial of Parents' request,

specifically that there was a lack of time to complete the assessment. Thus, Tehachapi should have issued a prior written notice outlining the reasons that Parent's request was denied.

31. Since failure to issue a prior written notice is a procedural violation, Student has the burden of proof to establish whether the violation impeded his right to a FAPE, significantly impeded his parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to him, or caused a deprivation of educational benefits. (*Target Range School, supra*, 960 F.2d at pp.1483-1484; *Rowley, supra*, 458 U.S. at p. 200.) As discussed above, Tehachapi did not deny Student a free appropriate public education at the April 30, 2014 IEP meeting. Student failed to meet his burden that Parents' right to meaningful participate in the IEP decision-making process was impeded. The evidence showed that the Tehachapi IEP team members discussed their reasons for the denial of Parents' request which included (a) that there was not sufficient time to conduct a functional behavior analysis as school was scheduled to end on June 4, 2014, (b) Tehachapi should try various behavior strategies first as it was "less restricted," and (c) Student's behaviors did not constitute a danger to him and others. Thus, Parents were aware of Tehachapi's position regarding their request. Tehachapi did not deny Parents meaningful participation in the IEP decision-making process since Parents fully participated in the discussion and Tehachapi IEP team members discussed their reasons for denying Parents' request. Therefore, Tehachapi did not deny Student a free appropriate public education by its failure to issue a prior written notice regarding its decision to not provide Student with a behavior assessment.

Failure to Have a General Education Teacher at June 2, 2014 IEP

32. An IEP team is required to include: one or both of the student's parents or their representative; a regular education teacher if a student is, or may be, participating in regular education; a special education teacher; a representative of the school district who is qualified to provide or supervise specially designed instruction, is knowledgeable about the general education curriculum and is knowledgeable about available resources; a person who can interpret the instructional implications of assessments results; at the discretion of the parties, other individuals; and, when appropriate, the person with exceptional needs. (20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. § 300.321(a); Ed. Code, §§ 56341, subd. (b).) A required team member may be excused from attending an IEP team meeting if the parent agrees in writing that the attendance of the member is not necessary because the member's area of the curriculum is not being modified. (Ed. Code § 56341(g).

33. Mother waived the requirement of the general education teacher at the June 2, 2014 IEP meeting by signing a written waiver. Student did not produce any evidence that Mother's waiver was not valid. Because Mother agreed in writing that a general education teacher did not have to attend the IEP team meeting, Tehachapi was not required to have the teacher present. There was no FAPE violation under these circumstances.

Remedies

34. ALJ's have broad latitude to fashion appropriate equitable remedies for the denial of a FAPE. (*School Comm. of Burlington v. Department of Educ.* (1985) 471 U.S. 359, 370 [105 S.Ct. 1996, 85 L.Ed.2d 385 (*Burlington*)]; *Parents of Student W. v. Puyallup School Dist.*, No. 3 (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*).)

35. Appropriate equitable relief can be awarded in a decision following a due process hearing. (*Burlington, supra*, 471 U.S. at p. 374; *Puyallup, supra*, 31 F.3d at p. 1496.) Here, a preponderance of evidence showed that Tehachapi failed to provide Student with a behavior assessment and appropriate behavior services at the November 6, 2014 IEP. Tehachapi's failure to provide a behavior assessment at the November 6, 2014 IEP was mitigated by its attempts to have Parents consent to a functional behavior analysis in December 2014 and their refusal to have Student attend school so that an assessment can be completed.

36. Student contends that Parents were compelled to keep Student home for school due to their concerns for his safety. As a remedy for any denial of FAPE, Student requested 180 hours of compensatory education consisting of individual instruction, which equates to approximately one hour for each day that Student was absent during the second half of the 2013-2014 school year and the 2014-2015 school year. From the November 6, 2014 IEP through January 19, 2015, when Tehachapi provided Parents with a consent form for a functional behavior assessment, 34 school days elapsed. Parents' withheld Student from school based on their fear that Student's behaviors constituted a safety issue. Their concerns were a result of there being no interim behavior plan in place or a behavioral assessment being conducted to set up a permanent behavior plan. Thus, Student lost the education benefit for those days he was absent and received no educational services. However, any time Student missed school after Tehachapi offered to conduct a behavior assessment was not reasonable. Parents' decision to not have Student attend school following the January 19, 2015 assessment plan was presented, prevented Tehachapi from conducting the assessment and their refusal to attend an IEP team meeting to review the SCIA assessment prevented Tehachapi from adopting an interim and permanent behavior intervention plans and goals. Since Student missed 34 days of school as a direct result of Tehachapi's FAPE violation, Student is entitled to 34 hours of individual instruction as compensatory education for the time Student did not attend school due to parental safety concerns.

ORDER

1. Within 10 school days of its receipt of this Decision, Tehachapi shall hold an IEP meeting to adopt an interim behavior plan.

2. Within 21 days of Student returning to attend school, Tehachapi shall begin to conduct a functional behavior assessment pursuant to the February 24, 2015 Consent for

Assessment. An IEP team meeting shall be held to review the functional behavior assessment within 45 days of the commencement of the functional behavior assessment.

3. For all days that Student attends school, Tehachapi shall continue to provide Student with a one-to-one ABA-trained aide with supervision by a Board Certified Behavior Analyst for two hours per week, until the IEP team convenes an IEP meeting to review the functional behavior assessment and determines Student's behavior needs.

4. Tehachapi shall provide Student with 34 hours of individual instruction as compensatory education by a certified special education teacher or certified non-public school or certified non-public agency after regular school hours. Student will have 12 months from receipt of this Decision to utilize the hours.

PREVAILING PARTY

Pursuant to 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. In accordance with that section the following finding is made: Student prevailed in part on Issue 1 (A) and (B). Tehachapi prevailed in part on Issue 1 (A) and (B), and prevailed fully on issues 2 and 3.

RIGHT TO APPEAL THIS DECISION

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56506, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

DATE: December 22, 2015

/s/

ROBERT HELFAND
Administrative Law Judge
Office of Administrative Hearings