BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2019080045

PARENT ON BEHALF OF STUDENT,

v.

OAKLAND UNIFIED SCHOOL DISTRICT.

DECISION

JANUARY 10, 2020

On July 31, 2019, the Office of Administrative Hearings, called OAH, received a due process hearing request from Student, naming Oakland Unified School District as respondent. Administrative Law Judge Charles Marson heard this matter in Oakland, California, on November 12, 13, 14 and 15, 2019.

Christian M. Knox and Lindsay A. Whyte, attorneys at law, represented Student. Parents attended all hearing days on Student's behalf, and were assisted by Spanish language interpreters.

David Mishook, attorney at law, represented Oakland and was assisted by Elizabeth Schwartz. Oakland's Coordinator of Elementary Networks Cary Kaufman, Deputy General Counsel Andrea Epps, Coordinator for High Schools Neku Pogue, and Executive Director of Special Education Neena Bhatha attended successive hearing days on respondent's behalf.

At the parties' request the matter was continued to December 9, 2019 for written closing briefs. The record was closed, and the matter was submitted on December 9, 2019.

ISSUES

1. Did Oakland deny Student a free appropriate public education during the 2017-2018 school year by:
    a. failing to offer measurable goals in all areas of need: specifically, in the areas of reading decoding, phonological processing, reading fluency, executive functioning, attention and social-emotional functioning;
    b. failing to offer an adequate structured literacy program;
    d. denying Mother meaningful participation in the individualized education program process at the December 14, 2017 IEP team meeting by failing to provide adequate Spanish translation, and failing to provide adequate data in progress reports on Student's 2017 goals;
    e. failing to make a clear written offer; and
    f. failing to provide adequate specialized academic instruction?

2. Did Oakland deny Student a free appropriate public education during the 2018-2019 school year by:
    a. failing to offer measurable goals in all areas of need; specifically, in the areas of reading decoding, auditory processing, phonological processing, reading fluency, written expression, executive functioning and social-emotional functioning;
    b. failing to offer an adequate structured literacy program;
    e. failing to make a clear written offer;
    f. failing to provide adequate specialized academic instruction; and
    i. failing to adequately maintain his student records?
3. Did Oakland deny Student a free appropriate public education during the 2019-2020 school year, through the filing of the complaint, by:
    a. failing to offer measurable goals in all areas of need; specifically, in the areas of reading decoding, auditory processing, phonological processing, reading fluency, written expression, executive functioning and social-emotional functioning;
    b. failing to offer an adequate structured literacy program; and
    d. failing to provide adequate specialized academic instruction?

Before and at hearing, Student withdrew issues 1 .c, 1.g, 1.h, 2.c, 2.d, 2.g, 2.h, 3.c, 3.g, and 4 as set forth in the Order Following Prehearing Conference dated November 5, 2019. The original alphabetic lettering of sub-issues in that Order is retained here for clarity. Since Student withdrew all issues pertaining to the extended school year, references in the issues to the extended school years have been removed.

JURISDICTION

This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations. (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 Individuals with Disabilities Education Act, referred to as the IDEA, are to ensure:

- all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living, and
- the rights of children with disabilities and their parents are protected.

(20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

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, assessment, or educational placement of the child, or the provision of a free appropriate public education, known as a FAPE, to the child. (20 U.S.C. § 1415(b)(6) and (f); 34 C.F.R. § 300.511 (2006); 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, and has the burden of proof by a preponderance of the evidence. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 56-58, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see also 20 U.S.C. §1415(i)(2)(C)(iii).) Accordingly, Student had the burden of proof in this matter. The factual statements below constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

Student was 13 years old and in eighth grade at the time of hearing. He resided within Oakland's geographic boundaries at all relevant times. He was eligible for special education under the primary category of other health impairment because of attention deficit hyperactivity disorder, called ADHD, and under the secondary category of specific learning disability. Student is bilingual in Spanish and English.

ISSUES 1.A, 2.A, AND 3.A: DID OAKLAND DENY STUDENT A FREE APPROPRIATE PUBLIC EDUCATION DURING THE 2017-2018, 2018-2019 AND 2019-2020 SCHOOL YEARS BY FAILING TO OFFER MEASURABLE GOALS IN ALL AREAS OF NEED: SPECIFICALLY, IN THE AREAS OF READING DECODING, AUDITORY PROCESSING, PHONOLOGICAL PROCESSING, READING FLUENCY, WRITTEN EXPRESSION, EXECUTIVE FUNCTIONING, ATTENTION AND SOCIAL-EMOTIONAL FUNCTIONING?

Student contends that each of his individualized education programs, known as IEP's, in the school years at issue should have contained additional annual goals. He argues that additional goals were required for him to receive a FAPE.

Oakland argues that Student's claim for the first part of sixth grade is barred by the statute of limitations. Oakland also contends that the goals in all of Student's IEP's were adequate to provide a FAPE, as evidenced by his success in accessing the curriculum.

A FAPE means special education and related services that are available to an eligible child who meets state educational standards at no charge to the parent or guardian. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17 (2006).) Parents and school personnel

develop an IEP for an eligible student based upon state law and the IDEA. (20 U.S.C. §§ 1401(14), 1414(d)(1); 34 C.F.R. §§ 300.17, 300.34, 300.39 (2006); Ed. Code, §§ 56031, 56032, 56341, 56345, subd. (a) and 56363, subd. (a); 34 C.F.R. §§ 300.320, 300.321 (2007.)

In general, a child eligible for special education must be provided access to specialized instruction and related services which are individually designed to provide educational benefit through an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. (*Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176, 201-204, 206-207 [102 S.Ct. 3034; 73 L.Ed.2d 690]; *Endrew F. v. Douglas County Sch. Dist. RE-1* (2017) 580 U.S. ____ [137 S.Ct. 988, 1000; 197 L.Ed.2d 335].)

Whether an IEP offers a student a FAPE is assessed in light of information available at the time the IEP was developed, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) An IEP "is a snapshot, not a retrospective"; it must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid*. (quoting *Fuhrmann v. East Hanover Bd. of Educ*. (3rd Cir. 1993) 993 F.2d 1031, 1036 (Mansmann, C.J., concurring)); see also *L.J. v. Pittsburg Unified Sch. Dist*. (9th Cir. 2017) 850 F.3d 996, 1004 ("the 'snapshot' rule . . . instructs the court to judge the appropriateness of the determination on the basis of the information reasonably available to the parties at the time of the IEP meeting."); *JG v. Douglas County Sch. Dist.* (9th Cir. 2008) 552 F.3d 786, 801.)

An annual IEP must contain a statement of measurable annual goals designed to: (1) meet the individual's needs that result from the individual's disability to enable the pupil to be involved in and make progress in the general curriculum; and (2) meet each

of the pupil's other educational needs that result from the individual's disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); Ed. Code, § 56345, subd. (a)(2).) Annual goals are statements that describe what a child with a disability can reasonably be expected to accomplish within a 12-month period in the child's special education program. (*Letter to Butler*, 213 IDELR 118 (OSERS 1988); Notice of Interpretation, Appendix A to 34 C.F.R., part 300, Question 4 (1999 regulations).)

A procedural error does not automatically require a finding that a FAPE was denied. A procedural violation results in a denial of a FAPE only if the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see Ed. Code, § 56505, subd. (f)(2); *W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

GOALS FOR READING DECODING, PHONOLOGICAL PROCESSING, AND READING FLUENCY

SIXTH GRADE, 2017-2018 SCHOOL YEAR

The only evidence that Student needed additional reading goals in the sixth grade was the opinion of licensed educational psychologist Natasha Limones, Ph.D. Dr. Limones has a school psychologist's credential and a doctorate degree from the University of California at Berkeley. She worked for three school districts as a school psychologist and had a private practice at the time of the hearing. In both roles, she conducted many assessments. She also has substantial experience in teaching and has published many peer-reviewed articles. She is bilingual in English and Spanish.

After examining all of Student's school records in the exhibit books produced by the parties for the hearing, Dr. Limones concluded that his IEP's had been inadequate throughout the school years at issue because they did not contain more specific goals on reading elements, such as spelling, decoding, phonological processing and reading fluency. She testified that Student needed those additional goals because, without them, his progress in those elements of reading could not be measured.

SIXTH GRADE GOALS

At the beginning of the sixth grade in fall 2017, Student's program was governed by a triennial IEP written and approved by Parents on February 1, 2017. That IEP gave Student goals in reading comprehension, spelling and writing. At hearing, Dr. Limones opined that these goals were insufficient, and that Student should have had additional goals in the areas of decoding, phonological processing and reading fluency.

California has a two-year statute of limitations for the filing of IDEA claims. (Ed. Code, § 56505, subd. (l).) The two-year period begins to run when a parent knew or should have known of the facts giving rise to the claimed violation. (*Ibid.*) Parents know what an IEP contains when it is offered to them. Here, Student's request for due process hearing was filed on July 31, 2019, making claims arising before July 31, 2017 time-barred. However, Student contends that because the February 2017 IEP goals were in operation from July 31, 2017 until the end of January 2018, during the two-year statutory period, that IEP can be challenged here. Oakland disagrees.

Several authorities support Oakland's position. A student cannot challenge the contents or design of an IEP written before the two-year statute of limitations period, even though that IEP remained in effect during the two-year period that is within the

statute of limitations. (*K.P. v. Salinas Union High Sch. Dist*. (N.D.Cal., April 8, 2016, No. 5:08-CV-03076-HRL) 2016 WL 1394377 [nonpub. opn.], pp. 10-11; see also *D.K. v. Abington Sch. Dist.* (3d Cir. 2012) 696 F.3d 233, 248; *P.P. v. West Chester Area Sch. Dist*. (E.D.Pa. 2008) 557 F.Supp.2d 648, 661-662.) In comments to the 2006 IDEA federal regulations, the United States Department of Education advised that there is no continuing violation claim under the IDEA. (U.S. Dept. of Education, Off. of Special Education and Rehabilitation Services, final Regs., Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, Analysis of Comments and Changes, comments. to 34 C.F.R. § 300.324(d), 71 Fed.Reg. 46540, 46697 (Aug. 14, 2006). Previous OAH decisions have followed that principle. (See, e.g., *Student v. Long Beach Unified Sch. Dist.* (OAH, Sept. 27, 2019, No. 2018081089), pp. 34-35; *Student v. Springs Charter Schools, et al.* (OAH, Jan. 14, 2019, No. 2018031003), p. 47; *Student v. Torrance Unified Sch. Dist.* (OAH, May 9, 2017, No. 2016120826), p. 45.)

Student relies on a single authority in support of his position: *O'Toole v. Olathe District Schools Unified Sch. Dist. No. 233* (10th Cir. 1998) 144 F.3d 692. That decision is inapplicable because it included general language that an IEP is both a writing and a course of implementation, but it did not involve the statute of limitations. Instead, it addressed the snapshot rule and the rule that a school district cannot ignore the fact that an IEP is not working. (*Id.* at p. 702.)

Here, Parents were aware of the contents of the February 1, 2017 when it was offered, but waited more than two years to challenge the goals offered in that IEP. According to the weight of authority, Student's challenge to the February 2017 IEP goals is therefore barred by the statute of limitations.

Since this conclusion rests on a body of law not fully developed, it should be noted that, if it were not time-barred, Student's claim regarding the absence of goals in the first semester of the sixth grade would still not prevail. Student's claim that his operative IEP during the first semester of the sixth grade failed to contain necessary annual goals in the areas of reading decoding, phonological processing, reading fluency, executive functioning, attention and social-emotional functioning would fail because it was based entirely on the opinions of Dr. Limones. Those opinions were unpersuasive for the same reasons as set forth later in connection with goals in Student's seventh and eighth grade years.

SEVENTH AND EIGHTH GRADE GOALS

Student's goals in his February 2017 IEP were changed in his new annual IEP on January 30, 2018. Ultimately, as explained later, this Decision holds that the January 30, 2018, IEP was fatally flawed for procedural reasons which led to a denial of FAPE during its entire period of operation. It is not necessary for the purpose of liability to determine if Student was denied a FAPE during that period on alternate substantive grounds, such as deficient goals. However, Student seeks compensatory education as a remedy for the alleged substantive FAPE denials related to the January 2018 IEP, and whether he is correct affects the scope of appropriate relief. As fashioning remedies for the specific denial of FAPE is necessary, those issues are analyzed here.

The January 2018 IEP contained goals on writing, reading, and reading comprehension and was in effect until February 2019. Student contends that the IEP should have contained additional goals. At hearing, Dr. Limones opined that the January 2018 IEP also should have contained reading goals for decoding, reading fluency, and spelling.

At least three factors substantially undermine the persuasiveness of Dr. Limones's opinion that Student needed additional reading goals. First, Dr. Limones had limited knowledge of Student and little experience interacting with him. She met him only a week before the hearing. Although she interviewed him and Parents and administered one standardized test, she could only form an opinion based upon that brief exposure and her analysis of a selection of Student's records assembled for litigation. She never observed Student in a classroom or talked to anyone at Oakland about him. She was therefore unaware of the substantial evidence of Student's reading abilities discussed later.

Second, Student's IEP team never had the benefit of Dr. Limones's analysis. Under the snapshot rule, the IEP team cannot be faulted for diverging from her opinion because it was not presented at any of its meetings.

Third, Dr. Limones's opinion about Student's needs for additional goals was premised on a mistaken understanding of IDEA requirements. Asked to define the goal of specialized academic instruction, she testified that it was to "catch a student up" to his classmates, and that a disabled student is eligible for special education if he cannot meet "grade level standards" without specialized instruction. She understood the legal requirement of a FAPE to be "sufficient educational progress," which she saw as closing the gap between Student and his classmates. This assumption pervaded Dr Limones's opinions about what goals and services Student required to receive a FAPE throughout his sixth, seventh and eighth grade years.

Dr. Limones did not explain why she thought a student with dyslexia and ADHD should or could be reading as well as a student without those disabilities. Special education law does not make that assumption, nor does it contain any requirement that

an IEP must aspire to bring a disabled student up to grade level. That argument has been rejected in numerous decisions of federal courts. (See *Houston Indep. Sch. Dist. v. Bobby R.* (5th Cir. 2000) 200 F.3d 341, 349 ["a disabled child's development should be measured not by his relation to the rest of the class, but rather with respect to the individual student . . ."]; *McKnight v. Lyon County Sch. Dist.* (D.Nev., Sept. 25, 2018, No. 3:15-cv-00614-MMD-CBC) 2018 WL 4600293, p. 6 [nonpub. opn.] (progress of autistic student sufficient for FAPE even though not passing grade level testing)); *E.G. v. Great Valley Sch. Dist*. (E.D.Pa., May 23, 2017, No. 16-5456) 2017 WL 2260707 [nonpub. opn.], p. 6; *C.S. v. Yorktown Central Sch. Dist*. (S.D.NY., March 30, 2018, 16-CV-9950 (KMK)) 2018 WL 1627262 [nonpub. opn.], pp. 21-22; *K.K. v. Alta Loma Sch. Dist*. (C.D.Cal., Jan. 29, 2013, No. CV 12–403 CAS (AGRx)) 2013 WL 393034 [nonpub. opn.], pp. 8-9 ["[U]nder the 'meaningful benefit' standard, schools are not required to provide special education services that allow disabled students to perform at the same level as the rest of the class."]; see also *Jefferson County Bd. of Educ. v. Lolita S*. (11th Cir. 2014) 581 Fed.Appx. 760, 763-764 (unattainable grade level reading goal denied FAPE); *S.B. v. New York City Dept. of Educ.* (E.D.N.Y., Sept. 28, 2017, No. 15-CV-1869) 70 IDELR 221 [nonpub. opn.] (same).)

This case is similar to *J.F. v. Shirvell* (D.Conn., Aug. 6, 2012, No. 3:11cv900 (MRK)) 2012 WL 3560911 [nonpub. opn.]. In that case, a student with a hearing disability was performing at a level behind his classmates, but making about a year's progress in a year's time. Parents argued that their child "needs to make more than one than one year's growth in one year's time in order to catch up with his typically hearing peers, who were significantly ahead of him." (*Id*. at p. 6.) The court rejected that argument, "[T]he IDEA does not guarantee students results equivalent to their nondisabled peers. It guarantees them meaningful educational progress." (*Ibid*.)

Dr. Limones's mistaken view of the requirements of special education law caused her to reject Student's rate of progress as insufficient. Asked whether Student had made sufficient gains in reading, she responded that he had not made "accelerated gains" in reading of the sort that would close the gap between him and his classmates. Dr. Limones read Student's records as showing that he was maintaining "a parallel slope" of progress with his classmates, improving at about the same rate but not "catching up" to them. Since that necessarily implies that Student was making progress in reading at roughly one grade level a year, Dr. Limones's analysis actually demonstrated that Student's progress was substantial and meaningful. Accordingly, Dr. Limones's opinion that Student required additional reading goals in January 2018 was unpersuasive.

For the reasons previously stated, Student did not prove that Oakland denied him a FAPE in the 2017-2018 school year by failing to offer him measurable goals in the areas of reading decoding, phonological processing or reading fluency. Evidence discussed later in this Decision concerning Student's actual reading abilities reinforced that conclusion.

SIXTH GRADE GOALS FOR EXECUTIVE FUNCTIONING AND ATTENTION

Relying solely on Dr. Limones's opinions, Student argues he was denied a FAPE because of Oakland's failure to provide him an executive functioning goal for organization and a goal addressing his attention.

Oakland correctly contends that any attack on the goals in the February 2017 IEP is barred by the statute of limitations. If it were not, the analysis below would apply. Oakland contends that Student's January 2018 executive functioning goal concerning

work completion and his accommodations were adequate to address his needs in the areas of executive functioning and attention. Oakland also argues that to a certain extent, Student's position wrongly implies that his diagnosed disability of ADHD can be cured or ameliorated by an IEP goal.

There is no dispute that Student's frequent lapses of attention adversely affected his education. Student acknowledged that some of his academic limitations were a product of his ADHD and manifested in a frequent loss of focus in class and out. All the Oakland teachers who testified largely attributed Student's difficulties to his attention deficit, noting that his attention wandered quickly and frequently, although he was easily redirected. Those observations are pervasive in Student's IEP's and teacher reports from the sixth and seventh grade.

Student's IEP's typically contained numerous accommodations designed to aid him in executive functioning and attention. His January 2018 IEP, for example, provided for seating close to the instructor and away from doors or windows, and for extended time and retaking of tests. It also provided for shorter assignments, less homework, oral instead of long written responses, multiple or frequent movement breaks, chunking of less-preferred tasks, and a color-coded visual task tracker based on priorities. Student did not argue or prove that any of the accommodations in his IEP's were insufficient to address his needs.

The January 2018 IEP also provided for an hour a day of resource time to "provide additional time for projects and assessments and to support with executive function and focus." Typically, Student's seventh and eighth grade resource teacher Mark Airgood spent approximately ten minutes a day working on Student's organizational skills and 40 minutes working on completing assignments.

The executive functioning goal in Student's January 2018 IEP, relating to work completion, aspired to have Student increase his homework completion rate of 20 to 40 percent to 70 percent. By May 16, 2018, Student's homework completion rate had increased to 78 percent. Dr. Limones conceded at hearing that this was a substantial improvement.

Student's need for organization was addressed by the new color-coded tracking system set forth in the January 2018 IEP. Student's only criticism of that system was that it depended on a teacher to provide it, while Student should be independent in this skill. Although that is a salutary long-term goal, Dr. Limones's opinions did not establish that at Student's age and state of development, he needed to concentrate on independence rather than master organization with help to receive a FAPE.

Dr. Limones testified it was "possible" to write a goal to improve Student's attention, notwithstanding his ADHD. She proposed a goal which would have involved specifying increasingly lengthy periods in which he would pay attention, supported by "many strategies" that would include providing prompts, task lists, and visual strategies. The evidence showed, however, that Student was already receiving many attention-related prompts from his teachers, and essentially had a task list in his color-coded system of priorities. What Dr. Limones meant by visual strategies was not clear, and there was no proof that these strategies would be particularly useful for someone with ADHD. In addition, Dr. Limones seemed to assume that the effects of ADHD in the classroom could be either cured or mitigated by an annual goal. There was no proof that assumption was valid.

Dr. Limones testified that without additional goals there was no way to measure Student's progress in work completion, but for Student that was incorrect. Student's

teachers kept careful track of his homework and classwork completion for the purposes of grading him and reporting progress on his goals, and did so in the absence of the additional goals Dr. Limones would have required.

Significantly, on cross-examination, Dr. Limones stated that whether Student needed a goal concerning his attention would depend on "whether the Student was meeting grade level standards." This was a reference to her earlier testimony about the perceived legal requirement that a student received a FAPE only when his IEP sought to close the gap between him and his classmates. That perception is incorrect in relation to Student's executive functioning and attention for the same reasons that it is incorrect regarding his reading.

The evidence revealed other possible reasons Student had not made more progress in completing his homework which Dr. Limones did not consider. There were multiple teacher and assessor comments in Student's records suggesting that Student got no support at home for the completion of homework. In addition, up to the fifth grade Student was receiving daily medication for his ADHD, a mix of amphetamine and methylphenidate. But between the fifth and sixth grade, Mother terminated the medication, apparently without medical advice. She testified it made him sleepy and made no difference in his behavior, but his teachers saw a significant difference in his behavior. Student was much more agitated and distracted without the medication, and this may have had a substantial negative effect on his ability to concentrate in class or to do homework.

Finally, the evidence showed that the transition to sixth grade and middle school was very difficult for many children. They no longer had a single classroom and teacher,

but had to change classrooms and teachers throughout the day. They had to have the executive ability to bring the right texts and materials to the right classes, which frequently confused them early in the transition. Student struggled with these requirements in the first semester of the sixth grade.

Student did not prove that he was denied a FAPE by Oakland's failure to provide him additional goals for executive functioning and attention in the 2017-2018 school year. The same would be true of the first semester of the sixth grade if Student's claim concerning that period were not barred by the statute of limitations.

SIXTH GRADE SOCIO-EMOTIONAL GOALS

Student was a happy and bright young man with good school attendance. He was polite and respectful, worked hard, and enjoyed sports. He worked well in small and large groups, and was giving and generous. He acquired friends easily and had many of them.

The only evidence that Student had emotional difficulty in any of the school years at issue concerned two incidents in Student's sixth grade math class. Student's math teacher took him aside twice to criticize him for being off task, not wanting to embarrass him in front of other students. At the next IEP team meeting, Mother vehemently disagreed with the teacher's actions and demanded a functional behavior assessment and a behavior assessment plan. Oakland declined on the ground that the two incidents involved a single teacher and was better handled by other means.

Those incidents did not support Student's claim that he required a social-emotional goal. Student has apparently abandoned that position because it is not

addressed in his closing brief. Student did not prove he needed a social-emotional goal to obtain a FAPE in any of the school years at issue.

SEVENTH AND EIGHTH GRADES: GOALS FOR THE 2018-2019 AND 2019-2020 SCHOOL YEARS

Oakland offered new goals in Student's February 2019 IEP, which remained in place until the time of the hearing. The February 2019 IEP included goals on asking for clarification of assignments, reading comprehension, and the multimodal identification of text features in reading. It also adopted a wide variety of accommodations similar to the accommodations in his January 2018 IEP. Dr. Limones opined, for the same reasons as discussed previously, that the February 2019 IEP should also have contained goals for decoding, reading fluency, spelling, and executive functioning. Her testimony about decoding and reading fluency goals was unpersuasive for the same reasons.

Dr. Limones testified that Student needed a spelling goal in his January 2018 and subsequent IEP's, but Student's closing brief does not address that claim. The absence of a spelling goal is not an issue in this case, and the evidence showed that spelling played little role in Student's curriculum once he obtained speech-to-text and text-to speech equipment in the January 2018 IEP.

Student offered no reasons why he needed additional goals for executive functioning or for his social-emotional status in the February 2019 IEP, beyond the arguments already rejected. Student did not prove he was denied a FAPE by Oakland's failure to provide him additional goals for executive functioning or socio-emotional status in the 2018-2019 and 2019-2020 school years.

Student alleged in his complaint that in his seventh and eighth grade years he also should have been offered goals in the area of auditory processing and written expression. Student does not address these claims in his closing brief. There was no evidence at hearing that Student had any auditory processing needs. The January 2018 IEP provided a goal in written expression, and the February 2019 IEP provided a goal on the use and understanding of textual features in reading and writing. Student did not challenge those goals. There was no evidence that Student required goals for written expression beyond those provided in Student's January 2018 and February 2019 IEP's. Student did not prove that he was denied a FAPE in the 2018-2019 and 2019-2020 school years due to the absence of any additional goals.

ISSUES 1.B, 2.B AND 3.B: DID OAKLAND DENY STUDENT A FAPE DURING THE 2017-2018, 2018-2019, AND 2019-2020 SCHOOL YEARS BY FAILING TO OFFER AN ADEQUATE STRUCTURED LITERACY PROGRAM?

Student contends that throughout the time period at issue, Oakland should have known that its methods of addressing his reading difficulties were not working and that he needed a structured literacy program, by which he means an intensive multi-modal, multi-sensory reading program featuring mostly one-to-one instruction. Student argues that guidelines concerning dyslexia written by the California Superintendent of Public Instruction required the use of such a program because he has dyslexia. He also argues that, as opined by Dr. Limones, his reading was so deficient that the need for such a program should have been obvious to the IEP team at all relevant times.

Oakland contends that it was not required to follow the state guidelines because they are not binding, and that Student's reading was far better than he claimed at hearing because his reading approached or reached grade level performance when he could concentrate on it.

In 2015, the Legislature added section 56335 to the Education Code to require the Superintendent of Public Instruction to develop program guidelines for dyslexia "to identify and assess pupils with dyslexia and to plan, provide, evaluate and improve educational services" to such students. (Ed. Code, § 56335, subd. (a).) The new law defined "educational services" as "an evidence-based, multisensory, direct, explicit, structured, and sequential approach to instructing pupils who have dyslexia." (*Ibid.*) However, nothing in the law required school districts to follow those guidelines. Student did not introduce the guidelines into evidence, so their application to his situation was not clearly established. Oakland did not violate section 56335 by failing to provide Student a structured literacy program.

In spring 2018, Oakland granted Student's request for an independent educational evaluation, which was conducted in fall 2018 by Dr. Pamela Mills, an educational psychologist. Her assessment informed Oakland for the first time that Student had "mixed dyslexia," and she recommended a substantial increase in specialized academic instruction time, which Oakland adopted in Student's February 2019 IEP. She also recommended an hour a day of instruction emphasizing phonics, which Oakland did not adopt for reasons related to the least restrictive environment, but Dr. Mills did not recommend a structured literacy program. Before Dr. Mills' report, the IEP team had no reason to believe that Student had dyslexia.

Since February 2017, Student's primary eligibility category has been other health impairment, which resulted from his ADHD. Specific learning disability was only added as an eligibility category in October 2018 after Dr. Mills's assessment identified his dyslexia. All of the Oakland teachers who testified, and the underlying documents written during the period at issue, confirmed that Student's ADHD seriously degraded his school performance. The consistent testimony of Student's teachers was that his reading difficulties were based primarily in his ADHD-related inattention, not his fundamental ability to read. That testimony also showed that he could read at grade level when he could concentrate.

Taggie Lee Bowers, a resource teacher, worked with Student from the third through fifth grades. In January 2017, she conducted an educational evaluation. Student was so fidgety and distracted at the beginning of the evaluation that she sent him back to class, rather than test him in that condition. Student had not taken his ADHD medication that morning. When he returned to resume the evaluation, she administered the Woodcock-Johnson III Test of Achievement, on which he performed poorly because he was distracted. She also administered the Wide Range Achievement Test Revision 4, on which he did substantially better because he concentrated. He was quick to sound out words, but in his haste confused words such as jewelry with jewel, and imagine with imagination. In her report and at hearing, Ms. Bowers stressed that his difficulty in decoding words was due to ADHD-related haste and inattention, and when he could concentrate he could decode.

Abbey Gmeiner was Student's resource teacher and case manager in sixth grade. In the resource room, she had him read out loud from unfamiliar grade level texts, and he did it fluently. He had no difficulties with words or jargon that were not typical of his

age group. She would have noticed difficulties with decoding and did not see them. His occasional comprehension struggles were a function of inattention, not an inability to read. Ms. Gmeiner saw Student reading for fun in the library and at recesses.

Mr. Airgood, Student's current resource teacher, had Student read aloud in the seventh grade resource room, and sometimes "cold," from seventh grade texts being used in Student's general education history, English and science classes. Student had a tendency to be "superquick," speed up and make mistakes, but when he slowed down his reading was "fine" and did not show any difficulties with decoding. Mr. Airgood observed that in his 30 years of special education teaching he has noticed that about 15 percent of resource students have difficulties with decoding. He would have recognized any difficulties Student had with decoding, but he did not see them in Student's reading as long as Student was able to slow down and concentrate. Student sometimes struggled with the specialized jargon of science class, but no more than other students. Student was able to read unfamiliar words.

Jana Maiuri was Student's sixth grade general education English teacher. She confirmed that Student tended to rush through the novels she assigned, had a poor tolerance for delay, and had to be frequently slowed down. As an accommodation, Student sat next to her. She assigned Shakespeare's *Measure for Measure*, and when Student could slow down and concentrate, he could comprehend that and other assigned texts in a grade-appropriate way. He enjoyed English and loved Shakespeare. With special education supports, he could access the curriculum.

Erica Hutter was Student's general education English teacher in seventh and eighth grades. She taught her class using multiple modalities, for example by using

sound, video, role-playing and repeated reading aloud. By the middle of seventh grade, Student was able to independently complete the work she assigned to him. Left alone, his attention quickly wandered and he daydreamed. So Ms. Hutter sat Student next to her, where she could reach out and touch him, put a hand on his desk, or stand by him when his attention wandered. Those methods were successful, and he was easily redirected.

After Student was absent the day the class studied the novel *A Step from Heaven*, Ms. Hutter took him aside and had him read the portion of the novel he had missed. He read it "cold" and fluently, without decoding errors, and answered her comprehension questions appropriately. He demonstrated deep critical thinking about the text and understood the material in a grade-appropriate way.

Matthew Steigerwald was Student's history teacher in seventh and eighth grades, where Student's primary problem was his need for redirection. When Student read aloud from material assigned to the class, his reading was fluent and he made no more than one or two decoding errors, which was typical for the students in the class. Student had grade-appropriate insight. Mr. Steigerwald opined that "It's just getting him to do it" that was the problem because of his distractibility.

The testimony of Student's teachers about his reading ability was credible because it was consistent among the teachers, was documented many times in Student's contemporaneous records, and was not successfully challenged on cross-examination. It deserved significant weight because Student's teachers were exposed to his reading on a nearly daily basis, and in some cases worked with him personally on his reading. Their testimony was not contradicted by anyone who had seen his

performance at school. Mother did not claim to have observed Student at school, and Dr. Limones did not contact anyone at the school. Dr. Limones did not mention this important evidence, nor does Student in his closing brief.

Student's grades confirmed that he was able to access the general education curriculum without a structured reading program. In academic courses in the sixth and seventh grades, he received almost all A's, B's, and C's. The sole notable exception was in the first semester of the sixth grade, in which he failed English because he did not turn in the assignments. In the second semester, he raised his English grade to a C.

Student's progress on his goals also confirmed that he was able to access the general education curriculum without a structured reading program. Throughout the sixth and seventh grades, Student either met most of his goals or made substantial progress toward them. His February 2017 IEP contained three goals. He met the reading comprehension goal, but not the spelling or writing goal. In response, in his January 2018 IEP, Oakland provided four new goals addressing writing, reading comprehension, reading and work completion. By April of that year, Student was making significant progress on all four goals.

Relying solely on Dr. Limones's views, Student attacks his grades in his closing brief as "highly suspect," and implies that they were inflated because they were improved by his special education accommodations. For example, in resource class, as part of his accommodations, he was given multiple opportunities to read the same text, and sometimes watched videos of the text or heard the text read aloud before he read it. In general education classes, he frequently received instruction in multiple modalities. Both Ms. Hutter and Ms. Maiuri used multiple modalities in their English classes, including sound, video, and repeated reading aloud.

While conceding that these teaching techniques are considered best practices, Student claims that their use "masked" his reading deficits. According to Dr. Limones, this method of teaching allowed students to rely on memory and context instead of reading skill to read a passage. She added that permitting a student to practice a text "invalidates" the measure of his reading ability because it provides context, background, and memory of the text. Dr. Limones testified that Student's abilities would have been more accurately measured, and his grades lower, if he were evaluated in the absence of special education and multiple modality supports.

Dr. Limones's view conflicts with the requirements of special education law. In general education, Student's teachers followed best practices in using multiple modality instruction, and in resource classes they provided individualized services and instruction tailored to assist Student in accessing the curriculum, which is just what special education law contemplates. A student who is eligible for special education by definition needs services and supports that are not available in the general education environment. (20 U.S.C. § 1401(3)(A)); Ed. Code, § 56026, subds. (a), (b).) Once having found a student eligible, a school district is required by law to provide those supports. Student provides no authority which requires the measurement of his skills and progress by discarding the benefit of these supports, and the IEP team was under no obligation to measure Student's skills or progress by doing so. In addition, this view of Student's skills, that he can perform academic tasks but still not read, is contradicted by the fact that he was sometimes called upon to read without those supports and did so successfully. As Mr. Airgood and Ms. Hutter established, Student could fluently read grade level material without decoding difficulty when it was given to him "cold," as long as he could concentrate on the task. There may be some students to whom Dr. Limones's theory applies, but Student is not one of them.

In a related argument, Student relies on Dr. Limones's opinions to argue that his progress should be measured not by his grades, but by his scores on standardized tests and by the Lexile levels of his reading material, which refers to an alternative quantitative method of measuring reading difficulty. Student does not identify any authority that would suggest an IEP team is required to measure progress by those methods. Nothing in the law required Student's IEP team to abandon reliance on Student's grades, goal progress and teachers' reports in favor of standardized test scores or Lexile levels.

In addition, as Ms. Bowen learned in her academic assessment, Student's scores on tests were quite variable depending on the state of his attention when taking them. Those scores could not have been expected to give an accurate picture of his skills. Since Dr. Limones did not contact anyone at Student's school, she was apparently unaware of the impact of his ADHD on his taking of tests. She conceded on cross-examination that at least some of Student's reading difficulties were due to Student's ADHD, and also conceded that she did not know how his ADHD affected his in-class performance on a day-to-day basis. The testimony of Student's teachers about his actual reading abilities in an academic setting was a more reliable indicator of those abilities than the standardized test scores relied upon by Dr. Limones.

Dr. Limones's views about how Student's grades and skill levels should have been measured were not before the IEP team when it made decisions about his IEP's. She did not write a report. The first time Oakland knew of Dr. Limones's opinions was at the hearing. No one at Student's IEP team meetings proposed the adoption of a structured reading program; that was a new development in this litigation.

Inherent in Dr. Limones's opinions about the measurement of Student's reading skills was the assumption that her views were so obviously correct and unavoidable that an IEP team should be required by law to anticipate them, adopt them and act on them without hearing from her. But that was far more than the law required of Student's IEP team based on this record. The team did not deny Student a FAPE by failing to abandon its usual measurements of student progress, failing to anticipate and adopt Dr. Limones's different methods of measuring progress, or failing to offer a structured reading program no one claimed at the time that Student needed.

The snapshots of information actually before Student's IEP teams when they determined his program did not indicate any need for a structured reading program. Student was achieving passing grades in his courses, was demonstrating substantial progress on his goals, and could read grade level text fluently without an unusual number of decoding errors when he concentrated. In all of the school years addressed here, the IEP team was reasonable in deciding to address Student's reading deficits by means other than a structured reading program, and did not deny him a FAPE by doing so.

ISSUE NO. 1.D: DID OAKLAND DENY STUDENT A FAPE DURING THE 2017-2018 SCHOOL YEAR BY DENYING HIS MOTHER MEANINGFUL PARTICIPATION IN THE IEP PROCESS AT THE DECEMBER 14, 2017 IEP TEAM MEETING BY FAILING TO PROVIDE ADEQUATE SPANISH TRANSLATION, AND FAILING TO PROVIDE ADEQUATE DATA IN PROGRESS REPORTS ON STUDENT'S 2017 GOALS?

ADEQUATE SPANISH TRANSLATION

Student contends that Oakland failed to provide adequate Spanish translation at the December 14, 2017 IEP team meeting, thereby depriving Parents of meaningful participation in the meeting, when a telephonic interpreter service failed to work properly.

Oakland contends that the technological failure was out of its control, that Parents had declined an available in-person interpreter, and that nothing happened at the meeting that could have injured Parents' participatory rights.

A school district must take whatever action is necessary to ensure that the parent understands the proceedings of the IEP team meeting, including arranging for an interpreter for parents whose native language is other than English. (34 C.F.R. § 300.322(e)(2006); Ed. Code, § 56341.5, subd. (i).)

Parents' native language is Spanish. In October 2017 Parents requested an IEP team meeting to discuss their concerns about grading practices and other matters. After two proposed meetings were cancelled by Parents, Oakland convened an IEP team meeting on December 14, 2017. It had difficulty finding a Spanish interpreter. At some

point before the meeting that the record does not make clear, Oakland had offered to obtain an interpreter who worked at Edna Brewer Middle School, where Student attended. Parents had stated consistently that they did not want to use any interpreter from Edna Brewer, so Oakland arranged for a telephonic interpretation service for the meeting. During the meeting, the telephone connection to the interpreter was poor, and cut in and out so frequently that Parents could not understand the conversation. They declined to proceed, stating that they preferred to wait to reconvene the meeting until Oakland could bring an in-person Spanish interpreter who was not from Edna Brewer. The meeting ended shortly after it began because of the inadequacy of the telephone service, and the notes of the meeting do not reflect that anything of substance was either discussed or decided. The meeting resumed on January 30, 2018, with an in-person Spanish language interpreter who was not from Edna Brewer.

In his closing brief Student does not argue that anything of significance was discussed or decided at the December 14, 2017 IEP team meeting. Nonetheless, he contends that, because of the defective telephone connection, Parents "were unable to be fully informed or involved in the drafting of [Student's] IEP . . ." However, there was no evidence that any drafting of Student's IEP occurred at the December 2017 meeting. Oakland did not deny Parents meaningful participation in the meeting, substantially impede Parents' participatory rights, or deny Student a FAPE, by failing to provide adequate interpreter services at the December 14, 2017 IEP team meeting.

ADEQUATE DATA IN PROGRESS REPORTS ON 2017 GOALS

In his complaint, Student alleged that Oakland failed to provide adequate reports on his progress to Parents at the December 14, 2019 IEP team meeting. Student made

no effort at hearing to prove that there were any deficiencies in these reports, he does not address the issue in his closing brief, and appears to have abandoned the argument.

An IEP must include a statement of how the student's progress toward his goals will be measured so that his progress may be reported at least annually. (20 U.S.C. § 1414(d)(1)(A)(i)(III); Ed. Code, § 56345, subd. (a)(3).)

Since Parents terminated the December 14, 2017 IEP team meeting before any substantive business was discussed, Student's contention that Oakland failed to provide adequate data at that meeting identified the wrong IEP team meeting. The December 2017 meeting was continued at the January 2018 IEP team meeting. The January 2018 annual IEP contained reports on Student's progress on each of his annual goals from the February 2017 IEP. The progress reports supplied significant information, and the IEP team discussed Student's progress on goals at the January 2018 meeting. Student does not explain why these reports were not sufficient. Student did not prove that Oakland provided inadequate data in the progress reports on his 2017 goals.

ISSUES 1.E AND 2.E: DID OAKLAND DENY STUDENT A FAPE DURING THE 2017-2018 AND 2018-2019 SCHOOL YEARS BY FAILING TO MAKE A CLEAR WRITTEN OFFER?

SIXTH GRADE: THE 2017-2018 SCHOOL YEAR

Student contends that the February 2017 IEP offer, in combination with a May 7, 2017 IEP amendment, was unclear and did not adequately inform Parents of the nature of the offer. This argument is barred by the statute of limitations for reasons already discussed.

Student also contends that the January 2018 annual IEP offer was unclear because the offered IEP contained obsolete present levels of performance, was missing the service page, and included an inapplicable signature page.

Oakland contends the January 2018 offer was not fatally vague, and if it was, any vagueness did not affect Student's education or Parents' participatory rights.

In *Union Sch. Dist. v. Smith* (1994) 15 F.3d 1519 (*Union*), the Ninth Circuit held that a district is required by the IDEA to make a clear written IEP offer that parents can understand. The Court emphasized the need for rigorous compliance with this requirement:

> We find that this formal requirement has an important purpose that is not merely technical, and we therefore believe it should be enforced rigorously. The requirement of a formal, written offer creates a clear record that will do much to eliminate troublesome factual disputes many years later about when placements were offered, what placements were offered, and what additional educational assistance was offered to supplement a placement, if any. Furthermore, a formal, specific offer from a school district will greatly assist parents in "present[ing] complaints with respect to any matter relating to the ... educational placement of the child." 20 U.S.C. § 1415(b)(1)(E).

(*Union Sch. Dist. v. Smith*, *supra*, 15 F.3d at p. 1526; see also *J.W. v. Fresno Unified Sch. Dist.* (9th Cir. 2010) 626 F.3d 431, 459-461; *Redding Elementary Sch. Dist. v. Goyne* (E.D.Cal., March 6, 2001, No. Civ. S001174) 2001 WL 34098658 [nonpub. opn.], pp. 4-5.)

Union involved a District's failure to produce any formal written offer. Since *Union* was decided, however, numerous courts have invalidated IEP's that were offered but were insufficiently clear and specific to permit parents to make an intelligent decision whether to agree, disagree, or seek relief through a due process hearing. (See, e.g., *A.K. v. Alexandria City Sch. Bd.* (4th Cir. 2007) 484 F.3d 672, 681; *Knable v. Bexley City Sch. Dist.* (6th Cir. 2001) 238 F.3d 755, 768-769; *Bend LaPine Sch. Dist. v. K.H.* (D.Ore., June 2, 2005, No. 04- 1468-AA) 2005 WL 1587241 [nonpub. opn.], p. 10; *Glendale Unified Sch. Dist. v. Almasi* (C.D.Cal. 2000) 122 F.Supp.2d 1093, 1108; *Mill Valley Elem. Sch. Dist. v. Eastin* (N.D.Cal., Oct. 1, 1999, No. 98-03812) 32 IDELR 140 [nonpub. opn.]; see also *Marcus I. v. Department of Educ.* (D. Hawai'i, May 9, 2011, No. 10–00381) 2011 WL 1833207 pp. 1, 7-8 [nonpub. opn.].) *Union* requires "a clear, coherent offer which [parent] reasonably could evaluate and decide whether to accept or appeal." (*Glendale Unified Sch. Dist. v. Almasi, supr*a, 122 F.Supp.2d at p. 1108.)

THE OBSOLETE PRESENT LEVELS OF PERFORMANCE

An annual IEP must contain a statement of the individual's present levels of academic achievement and functional performance, including the manner in which the disability of the individual affects his involvement and progress in the regular education curriculum. (20 U.S.C. § 1414(d)(1)(A)(i)(I); 34 C.F.R § 300.320 (a)(1) (2007); Ed. Code, § 56345, subd. (a)(1).) The statement of present levels of performance creates a baseline for designing educational programming and measuring a student's progress toward annual goals.

Obsolete present levels of performance in an IEP cannot fulfill their statutory purpose, and risk lowering the district's expectations for the student. In *E.S. v. Katonah-*

Lewisboro Sch. Dist. (2d Cir. 2012) 487 Fed.Appx. 619 [nonpub. opn.], a school district offered parents an IEP containing the same present levels of performance as the student's IEP from a year earlier, which were by then obsolete because the child had made substantial progress in the intervening year. (*Id.* at pp. 622-623.) The Second Circuit held that this failure to include current present levels of performance in the IEP denied the student a FAPE: "[H]aving been designed without regard for any of the progress [student] did make at Maplebrook, the . . . IEP was likely to cause [student] to regress or make only trivial advancement." (*Id.* at p. 263.)

At Student's January 30, 2018, annual IEP team meeting, Oakland produced a lengthy new IEP document. At hearing, Oakland introduced in evidence a pair of documents described as a draft and a final version of the January 30, 2018 IEP. The first version was labeled "draft" and was the version given to Parents at the meeting. The final version was fairly complete, but was printed out at least three months after the January 30, 2018 IEP team meeting because it contained typed progress reports dated April 23, 2018 on Student's goals in the January 2018 IEP. There was no evidence that Oakland gave the final version to Parents until shortly before the hearing.

Both versions of the IEP contained the same lengthy section of text purporting to describe Student's present levels of performance, complete with numerical test results, evaluations and classroom observations. With minor exceptions, these present levels were copied verbatim from Student's February 2017 triennial IEP and were obsolete by a year. Neither January 2018 IEP version contained a coherent presentation of Student's actual present levels of performance as of January 2018. Both versions of the IEP had been printed out from the Special Education Information System, a statewide database,

but that system was not operating in January 2018 when Oakland staff was preparing the IEP. The present levels of performance from the preceding year were not deleted, and those levels were improperly presented to Parents as current in January 2018. While Oakland is correct that there were scattered bits of current information in the pages containing the present levels, they were interspersed among much larger amounts of obsolete data. There was no easy way for Parents to tell the difference between the current and obsolete data, and some of the statements about Student's levels were inconsistent.

THE MISSING SERVICE PAGE

An IEP must contain a statement of the special education and related services and supplementary aids and services to be provided to the child, and a statement of the program modifications or supports for school personnel that will be provided for the child. (20 U.S.C. § 1414(d)(1)(A)(1)(IV); 34 C.F.R. § 300.320(a)(4)(2007); Ed. Code, § 56345, subd. (a)(4).) This is generally known as a "service page," and is the place where a district commonly describes, in one place, all the details of an offered individualized program.

The final version of the January 30, 2018 annual IEP, printed out months later, contained a service page, but the draft document given to Parents for signature at the IEP team meeting did not. On cross-examination, Mother testified that she "recognize[d]" the service page in the final version of the IEP, but she was not asked when or where she had first seen it.

Ms. Gmeiner attended the January 30, 2018 annual IEP team meeting and was responsible for maintaining copies of the IEP. She was confident Parents left the

meeting with the complete draft of the IEP, but her assertions were defensive and speculative. She testified that Parents "wouldn't have left without" a service page, and if there had been no service page, "we wouldn't have had services to discuss." The former statement had no apparent basis, and the latter claim was nonsensical; the notes of all the IEP's in evidence showed that the IEP team routinely discussed services without reference to a service page. Ms. Gmeiner's speculation was unpersuasive and is given no weight. Significantly, Oakland was unable to produce at hearing a complete copy of the IEP given to parents for signature.

The service page in the final copy of the January 2018 IEP was also inconsistent with the notes page of the IEP. The notes page reflected that the IEP team reached an understanding that Student's in-class or push-in services would be reduced, and that he would be pulled out of class more often than before for individual work. It stated: "Changes made to services page and educational settings page to reflect these modifications to [Student's] direct services." But the services page in Oakland's final printed version did not show any "[c]hanges made" to reflect that decision. It simply offered 300 minutes a week of specialized academic instruction. And the educational settings page raised the amount of time Student would be out of class from 11 percent the previous year to 15 percent, but did not explain the change.

Oakland's explanation of the missing service page may be correct, but it is beside the point. In its brief, Oakland admits that the service page in the draft IEP had "gone missing," probably between the file at the school and the central file in Oakland's special education office. It offers the assurance that the copy kept at the school contained the missing page, but Oakland presented no proof that the school possessed a complete

copy. And what matters to the clear offer requirement of *Union, supra,* is not what was in the various copies maintained by Oakland, but what was in the copy given to Parents, for whose protection the requirement exists. By showing that Oakland possessed only a copy of what Parents took home without a service page, Parents proved by a preponderance of evidence that Parents did not get, and did not sign, a January 2018 IEP containing a service page.

THE WRONG SIGNATURE PAGE

A parent must consent in writing to a specific educational program. Effective consent requires that "[t]he parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, *and the consent describes that activity* . . ." (34 C.F.R. § 300.9(b)(2008)(italics added); Ed. Code, § 56021.1, subd. (b).)

Oakland wrote its IEP's on a standard form from the Oakland Special Education Local Plan area. The form included a signature page which began with signature lines for the participants and then gave the parent several choices, including accepting all of the IEP, accepting part of it, or declining the initiation of services. It asked whether the school district facilitated parental involvement and added signature lines for parents only, under the choices they have made.

For reasons unknown, neither version of Student's January 2018 annual IEP contained a standard signature page. Instead, Oakland used the form for signing an amendment to an IEP, which did not present the same options for signature. It required only Parents' initials by the statement: "I agree to the contents of the amendment to the IEP dated 1/30/18." Although Mother initialed that statement, there was no such amendment.

Above the statement Mother initialed, on Oakland's copy of the draft, someone hand-printed: "Annual IEP 01-30-18 SEE NOTES." There was no evidence showing when that explanation was added to the amendment signature page, but it was most likely after Parents left the January 2018 IEP team meeting. In response to Student's records request, Oakland produced to Student's attorney a copy of the page that did not have the notation.

The notation "Annual IEP 01-30-18 SEE NOTES" did not clarify the contents of either version of the IEP. Oakland's form provides for the numbering of each page with the page number and the total page numbers, such as "page 13 of 21." Neither version of the January 2018 IEP had page numbers. It was therefore not possible for a parent, ALJ or court to know how many pages the IEP contained or whether anything was missing. The handwritten note was also inaccurate as to the draft version, because the pages that followed failed to contain a service page.

While it is true that consent need not take any particular form, consent still must adequately describe the services to which a parent consents. (34 C.F.R. § 300.9(b)(2008); Ed. Code, § 56021.1, subd. (b).) The amendment signature page did not do this. The belated handwritten notation that the page was consent for the "Annual IEP 01-30-18" therefore did not constitute adequate consent.

The use of the wrong signature page contributed substantially to making the January 30, 2018 IEP unenforceable and therefore invalid under *Union, supra*. The Ninth Circuit has insisted on rigorous enforcement of the clear offer requirement to create "a clear record that will do much to eliminate troublesome factual disputes many years later" and to assist parents in "present[ing] complaints with respect to any matter

relating to the . . . educational placement of the child." (*Union, supra*, 15 F.3d at p. 1526.) A hearing officer or court examining the version of the IEP given to Parents would be hard put to understand why Parent agreed to a non-existent amendment to an IEP dated the same day, or to determine exactly what Oakland's program commitment to Student was. The consent page offered to Parent as part of the January 2018 IEP did not adequately describe the activity consented to, in violation of federal and state law. (34 C.F.R. § 300.9(b)(2008); Ed. Code, § 56021.1, subd. (b).)

The Ninth Circuit recently re-emphasized the importance of enforceability in an IEP. In *M.C. v. Antelope Valley Union High Sch. Dist*. (9th Cir. 2017) 858 F.3d 1189, it observed:

> In enacting the IDEA, Congress was as concerned with parental participation in the *enforcement* of the IEP as it was in its *formation*. [Citing *Rowley, supra*, 458 U.S. at 205.] Under the IDEA, parental participation doesn't end when the parent signs the IEP. Parents must be able to use the IEP to monitor and enforce the services that their child is to receive.

(*Id.* at p. 1198 (emphases in original.) The draft copy of the January 2018 IEP that was given to Parents did not permit them to "monitor and enforce" the services Student was to receive.

Taken together, the serious flaws in the January 2018 annual IEP given to Parents for approval made the offer unclear, inaccurate and unenforceable. Without timely and consistent present levels of performance, Parents could not fully understand Student's

abilities or participate intelligently in agreeing or not agreeing to the offered goals, which were required to be based on current present levels of performance. Nor could they have understood exactly what program commitment Oakland was making to Student in the absence of a services page, or effectively enforced Oakland's obligations in a due process hearing in the absence of a signature page describing the services to which they consented. These defects deprived Parents of those rights during the entire time that the IEP was in effect, from January 30, 2018, until a new IEP was approved by Parents in February 2019. Because of this finding, it is unnecessary to analyze other alleged incidences of vagueness in the January 2018 IEP.

The defects in the January 30, 2018 annual IEP significantly impeded Parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to Student, deprived them of meaningful participation in the IEP process, and denied Student a FAPE from January 30, 2018 to February 11, 2019.

SEVENTH AND EIGHTH GRADES: THE 2018-2019 AND 2019-2020 SCHOOL YEARS

Student contends that the February 11, 2019 annual IEP, which governed his program at the time of the hearing, was fatally unclear because it did not describe when two large blocks of specialized academic instruction time would be used, or identify the classes from which Student would be pulled out to receive that instruction. Student also contends that the offer contained insufficient information about the frequency and duration of the services, which seems to be another way to make the same argument, since the offer of the two blocks of time had specific starting and ending dates. Oakland does not address this issue in its closing brief.

The February 11, 2019 IEP substantially increased Student's resource time, as had been recommended by Dr. Mills. It divided Student's specialized academic instruction support into two large blocks of time: one for 240 minutes a week outside of class; and one for 260 minutes a week in class. It did not further divide those blocks of time into days or specify the classes during which they would occur. The IEP offered out-of-class instruction, which was to start on March 18, 2019 and end on February 11, 2020, and was described as: "Pull out to Resource Room" for "240 min x 1 totaling 240 minutes each week." The in-class instruction, which was to start on March 18, 2019 and end on March 18, 2020, was described as "Push in support . . ." for "260 min x 1 totaling 260 minutes each week."

Student does not cite any authority requiring that an IEP state the classes from which a student will be pulled out for individual services. Such a requirement would depend on the IEP team's knowing in February of Student's seventh grade year what classes he would take in the fall. Student did not discharge his burden to prove that the absence of identification of the individual classes he would be pulled out of violated the IDEA.

Oakland's failure to divide the blocks of 240 minutes a week and 260 minutes a week into days of the week presents a closer question. A literal reading of the offer suggests that Oakland would pull Student out of class just once each week for 240 minutes, almost a full school day. That seems improbable, but the literal reading appears to be correct. Student's previous IEP's specified divisions of weekly time into smaller blocks when that was part of the offer. For example, his February 2017 IEP described the offered resource time as: "45 min x 3 Totaling: 135 min served Weekly."

Thus, when Oakland sought to divide weekly time into smaller segments it said so in the IEP, using notations like "x 3." Mother signed and was familiar with those IEP's, and there was no evidence that she did not understand the similar statements in the February 2019 IEP.

It does not seem likely that the parties intended that Student receive a single long pull out session in the resource room a week, for almost a whole school day. But it is not impossible. The record shows reason to doubt that the parties actually implemented it that way. Mr. Airgood, Student's current resource teacher, spoke of instructing him "daily." But Student has never contended in this matter that his IEP was not implemented correctly, so any divergence from the offer is not at issue here.

In light of Oakland's practice of describing Student's resource time in his IEP's, the February 2019 offer was not vague; it offered one long session a week. Student did not prove that he was denied a FAPE by Oakland's failure to specify the days of the week on which his pull-out resource time would be delivered.

ISSUE 2.I: DID OAKLAND DENY STUDENT A FAPE IN THE 2018-2019 SCHOOL YEAR BY FAILING TO ADEQUATELY MAINTAIN HIS STUDENT RECORDS?

Student contends that Oakland did not adequately maintain his records because, when those records were requested by his attorneys, the copies Oakland sent were mostly illegible. This, he argues, frustrated Parents' rights to see his records in preparation for hearing.

Oakland contends that the illegibility of any records sent to counsel did not interfere with the delivery of a FAPE to Student, with Mother's participatory rights, or with Student's ability to litigate his case.

School districts must maintain pupil records according to regulations adopted by the State Board of Education. (Ed. Code, § 49062.) Those regulations require that records for each pupil be maintained in a central file at the school the pupil attends. If they are maintained in multiple locations, the central file must identify those other locations. (Cal. Code Regs., tit. 5, § 433, subd. (b).)

Parents may obtain their children's records on request. (Ed. Code, § 49069.7.) Special education law requires that states provide such access, and California does so by establishing procedures by which those records may be requested and obtained. (20 U.S.C. § 1415(b)(1); Ed. Code, §§ 56043, subd. (n); 56504.)

In February 2019, Student's attorneys requested his records on behalf of Parents. At least some of the records Oakland sent in response were illegible because the content was too light to read. Student made a compliance complaint to the California Department of Education, attaching three pages of illegible examples. A fourth illegible page was contained in one of Student's hearing exhibits.

Student does not contend that Oakland violated the records access statutes, and this Decision does not address Oakland's compliance with record maintenance laws except insofar as it may have affected the delivery of a FAPE to Student or Parents' participatory rights. (See Ed. Code, § 56501, subd. (a).)

Student failed to prove that Oakland's maintenance of illegible records for Student had any significant consequence either to his education or Parents'

participatory rights. Mother did not testify that she was confused or otherwise troubled by any illegible records. Student managed to produce two large evidence binders before hearing that for the most part contained legible copies of his records. Oakland produced an evidence binder that also contained legible copies. Nothing that occurred at hearing suggested either that Student's records were incomplete for the purpose of the hearing or that illegible records interfered with Student's understanding or presentation of his case. Student did not prove that Oakland denied him a FAPE by failing to adequately maintain his school records.

ISSUES 1.F, 2.F, AND 3.D: DID OAKLAND DENY STUDENT A FAPE DURING THE 2017-2018, 2018-2019 AND 2019-2020 SCHOOL YEARS BY FAILING TO PROVIDE ADEQUATE SPECIALIZED ACADEMIC INSTRUCTION?

Student alleged in his complaint that for all of the years in question, Oakland offered him insufficient specialized academic instruction, also known as resource room instruction. Oakland contends that the amount of resource time it provided was adequate at all times.

SIXTH GRADE: THE 2017-2018 SCHOOL YEAR

Student alleged in his complaint that his February 2017 annual IEP offered insufficient specialized academic instruction. Student does not mention this claim in his closing brief. For the reasons discussed above, that claim is barred by the statute of limitations. Even if it were not, the analysis that follows would apply to it.

SEVENTH AND EIGHTH GRADES: THE 2018-2019 AND 2019-2020 SCHOOL YEARS

Some allegations in Student's complaint can be read to assert that the number of minutes of specialized academic instruction offered in his seventh and eighth grade years was numerically inadequate. The evidence at hearing did not support that claim, and in his closing brief Student asserts that the offered specialized academic instruction was inadequate because it was too vaguely described. That contention is addressed above. Student also contends that the amount of offered specialized academic instruction was inadequate because it did not include a structured literacy program and a curriculum for learning executive functioning skills. Those arguments are also rejected above. Student did not prove, as a separate ground for relief, that the specialized academic instruction he was offered in the seventh and eighth grades denied him a FAPE because it was inadequate.

CONCLUSIONS AND PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing Decision must indicate the extent to which each party has prevailed on each issue heard and decided. Student prevailed on Issue No. 1.e., the claim that Oakland denied Student a FAPE during the 2017-2018 school year by failing to make a clear written offer. Oakland prevailed on all other issues that were decided.

REMEDIES

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]; *Parents of Student W. v. Puyallup Sch. Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.) In remedying a FAPE denial, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3)(2006).)

The authority a district court has to order relief extends to hearing officers. (*Forest Grove Sch. Dist. v. T.A.* (2009) 557 U.S. 230, 243-244, fn. 11 [129 S.Ct. 2484; 174 L.Ed.2d 168].) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid v. District of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be fact-specific. (*Ibid.*)

In some cases, a strict one-to-one correspondence between the violation and the relief is not practicable. In *Park v. Anaheim Union High Sch. Dist.* (9th Cir. 2006) 444 F.3d 1149, for example, the student was disabled by cri du chat (5p-syndrome), a rare genetic defect not familiar to his teachers that caused him developmental delay. (*Id.* at p. 1152.) The hearing officer found there was no evidence that it would help the child to receive compensatory education directly, so awarded it instead in the form of training for his teachers so they could better address his needs. The Ninth Circuit held that training for the district's teachers was a proper form of compensatory education. (*Id.* at p. 1156.)

This case is somewhat similar to *Park, supra*, 444 F.3d 1149, in that fashioning appropriate compensation for the specific violation in an award to Student or Parents is impractical. A vague unenforceable offer that has long since been replaced cannot retroactively be made more specific or enforceable. However, a significant equitable purpose, in the interests of Oakland's present and future special education recipients,

would be served by improving Oakland's documentation of IEP offers of special education and related services, and their presentation to parents. Therefore, as compensatory education for Oakland's presentation of an unclear January 2018 annual IEP offer to Parents, which remained vague and unenforceable until February 2019, Oakland is required to improve the training of its staff in the documentation of IEP offers and their presentation to parents.

ORDER

1. Within one year of the date of this decision, Oakland shall furnish four hours of training to each of its special education case managers and resource teachers who are or may be involved in drafting IEP's and presenting them to parents. For this purpose, it shall employ a professional who is not an Oakland Unified School District employee or an employee or member of the law firm that represents the Oakland Unified School District, and may be an attorney or other independent professional familiar with the specific legal requirements of the IDEA for IEP's and familiar with the use of the Special Education Information System. The training shall address all aspects of the requirements for the documentation and presentation of clear and understandable IEP offers to parents, with emphasis on how to avoid confusing and unclear offers as a result of reliance on the Special Education Information System.
2. Starting 30 days from the date of this Order, Oakland shall number all pages of its IEP's, including all notes and signature pages, in the following manner: "1 of 24," "2 of 24," "3 of 24" and so forth.
3. All other relief requested by Student is denied.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56505, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within 90 days of receipt.

/s/
Charles Marson
Administrative Law Judge
Office of Administrative Hearings