BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2019100433

PARENT ON BEHALF OF STUDENT,

v.

PLEASANTON UNIFIED SCHOOL DISTRICT AND CONTRA COSTA COUNTY OFFICE OF EDUCATION.

DECISION

JANUARY 21, 2020

On, October 10, 2019, the Office of Administrative Hearings, called OAH, received a due process hearing request from Student, naming Pleasanton Unified School District and the Contra Costa County Office of Education as respondents. Administrative Law Judge, Tiffany Gilmartin, heard this matter in Pleasanton on December 3, 4, 5, 9, and 16, 2019.

Kristin Springer represented Student. Ms. Springer was assisted by Jennifer Callahan. Father attended on December 3 and 4, 2019 on Student's behalf. Shawn Olsen Brown represented Pleasanton. Mary Jude Doerphinghaus, Director of Special

Education, attended all hearing days on Pleasanton's behalf. Sally Dutcher represented the Contra Costa County Office of Education. Thomas Scruggs, Director of Student Programs attended all hearing days on the County's behalf.

At the parties' request the matter was continued until January 6, 2020 for written closing briefs. The record was closed, and the matter was submitted on January 6, 2020 when all parties timely submitted their briefs.

ISSUES

1. Did Pleasanton Unified School District, Contra Costa County Office of Education or both deny Student a free appropriate public education by failing to allow Student to attend school pursuant to the August 27, 2019 individualized education program or IEP?
2. Did Pleasanton Unified School District, Contra Costa County Office of Education or both materially fail to implement Student's August 27, 2019 IEP during the 2019-2020 school year?

On December 2, 2019, Student filed a motion to dismiss issue number one as stated in the prehearing conference order of November 26, 2019. This motion was granted on December 3, 2019, the first day of hearing.

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, referred to as FAPE, 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 FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents, 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, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see 20 U.S.C. §1415(i)(2)(C)(iii).) Here, Student holds the burden of proof on all issues. The factual statements below constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. sec. 1415; Ed. Code, sec. 56505, subd. (e)(5).)

Student was 11 years old at the time of hearing. She resided within Pleasanton's geographic boundaries at all relevant times. She has complex medical needs which impact her education. Student was born with Wolf-Hirschhorn chromosomal syndrome, which significantly impacts all areas of her development. Student is orthopedically,

cognitively, and visually impaired. She is nonverbal. Student was eligible for special education under the categories of intellectual disability and orthopedic impairment. Student was placed via the IEP process at the Mauzy School operated by the Contra Costa County Office of Education.

ISSUE 1: DID PLEASANTON UNIFIED SCHOOL DISTRICT, CONTRA COSTA COUNTY OFFICE OF EDUCATION OR BOTH DENY STUDENT A FREE APPROPRIATE PUBLIC EDUCATION BY FAILING TO ALLOW STUDENT TO ATTEND SCHOOL PURSUANT TO THE AUGUST 27, 2019 INDIVIDUALIZED EDUCATION PROGRAM?

Student contends she was denied a free appropriate public education when she was not allowed to continue to attend school due to questions involving her medical orders, specifically dosage protocols and her seizure action plan. Student alleges she was denied a FAPE from September 25, 2019 until December 3, 2019 the first day of hearing.

Pleasanton and the County allege Father obstructed the local education agency's ability to clarify the medically necessary orders required to appropriately treat Student. They assert that his obstruction is the reason Student was unable to attend school.

A free appropriate public education means special education and related services that are available to an eligible child that meets state educational standards at no charge to the parent or guardian. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) Parents and school personnel develop an individualized education program, referred to as an IEP, for an eligible student based upon state law and the IDEA. (20 U.S.C. §§ 1401(14) and (26), 1414(d)(1)(A); Ed. Code, §§ 56031,56032, 56345, subd. (a) and 56363 subd. (a); 34 C.F.R. §§ 300.17, 300.34, 300.39 Cal. Code Regs., tit. 5, § 3001, subd. (p).)

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 Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176; *Endrew F. v. Douglas County School Dist.* (2017) 580 U.S. ____ [137 S.Ct. 988, 1000]; *E.F. v. Newport Mesa Unified School Dist.* (9th Cir. 2018) 726 Fed.Appx. 535.)

IEP PLACEMENT AT MAUZY SCHOOL

Student's August 27, 2019 IEP offered placement at Mauzy School, a program operated by Contra Costa that provides special day classes and services to primarily medically fragile students, through an August 27, 2019 IEP team meeting. Contra Costa and Pleasanton, are members of the Tri-Valley, special education local plan area, or SELPA. A SELPA is a consortium of schools within a geographic region that provide special education services to students residing within the regional boundaries. Contra Costa and Pleasanton entered into a memorandum of understanding on August 22, 2017. They renewed the memorandum of understanding on September 24, 2019. Pursuant to this agreement, Contra Costa and the Mauzy School would provide educational services for students placed outside of their district of residence, but lived within the SELPA.

Mauzy is not within Pleasanton's geographic boundaries. Student was transferred from her previous placement within the Pleasanton Unified School District. After Student's acceptance into Mauzy, numerous medical documents were provided to Mauzy to provide medically necessary guidance on the care, feeding, and medical needs of Student.

On July 25, 2019, prior to Student's acceptance at Mauzy, Father emailed Mauzy's school nurse, Nicole Walton, who testified at this hearing. Father intended to provide her Student's medical orders on file with Pleasanton. Mauzy's principal replied to Father and explained Student had not yet been accepted to Mauzy so the school could not accept her medical records.

The August 27, 2019 IEP offered placement at Mauzy, 1725 minutes of specialized academic instruction weekly, 60 minutes weekly of individual speech therapy, 60 minutes weekly of physical therapy, 60 minutes weekly of adaptive physical education, 30 minutes weekly of specialized vision services, 300 minutes yearly of occupational therapy, and 1725 minutes weekly of one-to-one specialized health care services by a licensed vocational nurse. At the August 27, 2017 IEP team meeting, Pleasanton's school nurse, Mary Anne Lindahl, gave Ms. Walton a copy of Student's medical orders. On the day of the IEP team meeting the computer system was not working so Pleasanton was unable to print a copy of the IEP for Father to review. Ms. Doerpinhaus, provided a copy to Father on September 6, 2019.

After Father received the IEP, Father requested numerous changes to the IEP such as changing the responsible person designee from classroom teacher to vision and classroom staff, deleting conjunctions, and renaming protocols. Father also insisted written confirmation that all of Student's equipment from her special factors page be ordered on an expedited basis prior to consenting to the IEP. On September 9, 2019, Pleasanton confirmed all equipment was ordered, present, or a substitute available until the item ordered specifically for Student was available. The nurse contracted by Pleasanton was on standby waiting for confirmation of a start date.

Several times Ms. Doerpinhaus requested a status update from Father on his completion of the registration documents for Mauzy, Student's medical orders, and consent to the IEP. On September 12, 2019, Father notified Pleasanton and Contra Costa that he had enrolled Student in a sleep study and that she would not be available to start school until September 23, 2019. Father then forwarded the registration documents and Student's medical orders to Mauzy on September 13, 2019. Father consented to the IEP on September 22, 2019.

To facilitate Student's transition, three periods of familiarization were offered. The IEP included 20 hours of Parent familiarization conducted with the school nurse, the one-to-one LVN, and Father before Student would start school each year. The purpose was to allow all medical providers to review the one-to-one LVN checklist and all of Student's medical orders to ensure the orders were executed with fidelity. The IEP provided four hours of familiarization with the teacher, physical therapist, and the one-to-one LVN to review Student's positon guide and education checklist. The IEP also included one hour of collaboration with Father, the school nurse, the one-to-one LVN, and all Student's service providers to coordinate Student's schedule, goals, pull-out schedule, brace-wearing schedule, and classroom schedule.

On September 16, 2019, Ms. Walton confirmed she received Student's medical orders from Father. She further requested Father sign a parent's request for having specialized physical health care services provided form from the Contra Costa County Office of Education. That form would authorize Mauzy's school nurse or designated one-to-one LVN to provide health care services to Student such as bolus gastrostomy feeding, provide seizure and respiratory care, and administer medications. Father

returned the form to Ms. Walton on September 18, 2019, where he specifically excluded consent for Contra Costa and Mauzy to communicate with Student's physician. Father attached an addendum where he directed he would be the sole communication link between Mauzy and Student's physicians.

Student's first day of attendance at Mauzy was Monday, September 24, 2019. Father and Student were greeted by principal, Vanessa Horeis, Ms. Walton, the nursing agency supervisor, and the one-to-one aide hired to provide nursing care for Student. Student, Father, and the designated one-to-one LVN and supervisor begun Student's familiarization period. Prior to Student and Father leaving for the day, the nursing agency supervisor and Ms. Walton raised concerns with Father about information discovered upon reviewing Student's medical orders. Before school ended that day, Ms. Horeis, who testified at hearing, emailed Father and requested an IEP team meeting be convened the following Monday, September 30, 2019. The meeting was to address the concerns Ms. Walton and the nursing staff supervisor identified during the record review. Father declined to meet.

On September 25, 2019, Student arrived for her second day of school. Student learned upon arrival that the nursing agency had not dispatched the one-to-one LVN pending the resolution of the medical orders question. Student returned home that day as there was not an available one-to-one nursing aide to provide care. Ms. Horeis contacted Father and requested he provide consent to allow Ms. Walton to speak to Student's physician. Father responded, Student's maternal grandmother, not he, was the provider of Student's medical insurance. Father alleged, Pleasanton in the past failed to follow protocol and Kaiser, Student's medical insurer, placed a flag prohibiting third parties from communicating with their physicians about Student. Therefore, Father could not provide consent.

STUDENT'S SEIZURE ACTION PLAN

One of the areas of primary concern for Ms. Walton and the nursing agency was the medical order regarding Student's seizure action plan. The medical directive was to provide suction by placing a soft bulb tip syringe on Student's lips, immediately inside her cheek, but not inside her teeth or throat, to expectorate excess saliva and to prevent Student from choking or aspirating during a seizure.

On Saturday, September 28, 2019, Father provided to Ms. Walton an updated seizure action plan and a letter from her Kaiser physician, Rick Weisser, who testified at hearing. To address Mauzy's concerns about Student's seizure action plan, Dr. Weisser's letter described signs and symptoms of Student's seizures and also detailed protocols for if she was having an active seizure, such as suctioning excess saliva or removing her back brace and foot orthotics. Dr. Weisser's letter further explained why Student required saliva suctioning during a seizure. Student's medical condition, specifically her inability to swallow or spit during a seizure, creates a risk of aspiration during a seizure if the superficial saliva is not suctioned out. Dr. Weisser recommended the excess saliva be removed with a soft tip syringe to prevent choking. Dr. Weisser was unaware Father was not the Kaiser subscriber. Dr. Weisser knew of no flags on Student's account. Had Mauzy or Ms. Walton contacted Dr. Weisser, he would have spoken to her about Student's seizure plan.

Ms. Lindahl, Student's former school nurse, had been Student's school nurse since she enrolled at Pleasanton. At one point, Ms. Lindahl was able to communicate directly with Kaiser. In 2011, Ms. Lindahl wrote a letter to Student's physician requesting clarification on administering Student's immunization, over-the-counter medication order, and dosage clarification for Student's anti-seizure medication. Ms. Lindahl had experienced similar confusion over Student's seizure action plan. Ms. Lindahl did not

agree with the seizure action plan directive regarding suctioning, but implemented it because it worked for Student.

Ms. Lindal shared Student's previous medical orders with Ms. Walton at the August 27, 2019 IEP team meeting. Ms. Walton never reviewed those orders for insight or context of medical care. During testimony, Ms. Walton announced it is never relevant to look at older orders. Ms. Walton, a school nurse with a year of experience, reviewed Dr. Weisser's September 26, 2019 medical report. Ms. Walton took no guidance from Dr. Weisser's report. Despite claiming, she as a school nurse could circumvent parental consent and contact Student's physicians directly, she did not attempt to contact Dr. Weisser for clarification. Ms. Walton did not seek counsel of a more experienced school nurse in Ms. Lindahl. Ms. Walton was provided medical orders from Student's treating physician who developed them in concert with Student's treating subspecialists. Instead, Ms. Walton pointed to the boilerplate instructions on the seizure action plan that advised that nothing should be put into a student's mouth and declared the orders unacceptable. During testimony, Ms. Walton was dismissive of medical opinions not her own. She was unable to persuasively answer questions within her scope of expertise. Ms. Walton's disregard for Student's medical history and over-reliance on her own nascent skills greatly impacted her credibility.

The nursing agency Pleasanton hired for the one-to-one LVN care reviewed Dr. Weisser's September 26, 2019 report and determined it could not complete the work as directed. Due to the gap in nursing care, Student remained out of school during this period. She received no services and no alternative arrangements were proposed either during her school absence.

Father filed for Due Process on October 10, 2019. Contra Costa provided a health assessment plan to Father on October 29, 2019. The assessment plan proposed to have a qualified physician selected by Contra Costa review the current medical authorizations and clarify the areas of question to ensure Student's treatment plan aligned with recommended school health guidance. Father did not consent to the health assessment.

Student filed a motion for stay put on November 1, 2019 requesting Student be allowed to continue her familiarization period and upon completion return to school full time. OAH granted Student's motion for stay put. On November 12, 2019, Tom Scruggs, Contra Costa County Office of Education's director of student programs informed Father Mauzy was now ready and willing to accommodate Student.

Ms. Doerpinhaus, Pleasanton's special education director, also testified at hearing. She contacted the original nursing agency, Ro Health, to obtain coverage. The original nurse had been reassigned and was no longer available. Ms. Doerpinhaus contacted a separate agency for back up coverage while permanent nursing coverage was being finalized. Ms. Doerpinhuas also arranged for a Pleasanton LVN to be reassigned to Mauzy for November 15 and 18, 2019. The permanent LVN would be available to start on November 19, 2019.

Pleasanton requested Father meet with Ms. Walton and the Ro Health nursing supervisor on November 19, 2019, while he was at Mauzy participating in the familiarization program, to clarify the on-going concerns with Student's medical orders. Later that day, the Ro Health's regional manager informed Ms. Doerpinhaus Father was unwilling to work with the selected agency and Pleasanton needed to find a different provider.

PROVIDER ACCESS

Father refused to consent to Mauzy's request to authorize Ms. Walton to communicate with Student's physician listed on her seizure action plan and medication authorization form. Father added an addendum where he said Student was a beneficiary on her maternal grandmother's insurance policy and he would not be able to provide consent for Mauzy to speak directly to her physicians. Father then contacted Doris Kwok, assistant director of special education at Pleasanton on September 25, 2019 and told Pleasanton he was not able to provide consent due to a family court custody order. Father then emailed Ms. Horeis on October 3, 2019 and also told her due to a family court order, he was prohibited from providing consent to Mauzy to speak to Student's physicians about her medical orders. During testimony Father alleged the family court judge threatened to remove Student from his custody and place her foster care if Student's medical insurance was impacted. Father's story did not withstand cross-examination. The family court order Father produced awarded father sole legal and physical custody. It was silent to any mention of Student's medical insurance or any judicial admonition. As a result, a negative inference of his credibility is made.

Father was under no obligation to consent to Pleasanton and Contra Costa's request to speak to Student's medical provider. In light of Father's failure to sign a release of information, Pleasanton and Contra Costa could have availed themselves of the assessment process to ensure Student's needs were met.

A local education agency has an obligation to reassess a student if it has received new information about a student's functioning that impacts his education or otherwise has reason to suspect that his educational and related service needs may have changed such that a reassessment is warranted. (20 U.S.C. § 1414(a)(2)(B); Ed. Code, § 56831, subds. (a)(1), (2).) If a student's parents do not consent to an assessment plan, the

school district can conduct the reassessment only by showing at a due process hearing that it needs to reassess that student and it is lawfully entitled to do so. (20 U.S.C. § 1414(c)(3); 34 C.F.R. § 300.300(a)(i), (c)(ii); Ed. Code, § 56381, subd. (f)(3), 56501, subd. (a)(3).

Contra Costa provided Father an assessment plan on October 29, 2019 seeking to conduct a health assessment by a qualified physician to develop a school-based medical treatment plan that aligned Student medical orders with the best practice guidelines within a school setting. Father did not consent to or return the assessment plan. A local education agency must give the parents 15 days to review, sign and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).) Contra Costa and Pleasanton could have filed for a due process hearing to pursue their requested assessment by November 13, 2019 after allowing Father 15 days to provide consent.

NO DENIAL OF FAPE FROM AUGUST 27, 2019 THROUGH SEPTEMBER 24, 2019

Here Student pled Pleasanton and Contra Costa denied her a FAPE by prohibiting her from attending school pursuant to the August 27, 2019 IEP. Pleasanton and Contra Costa were prepared for Student to attend school at Mauzy beginning September 6, 2019. Pleasanton and Contra Costa had a nurse on standby, ready to provide Student's IEP nursing services, and confirmation that all equipment Student needed would be available for her use as of September 9, 2019. Father did not consent until Sunday, September 22, 2019. Any claims that Pleasanton or Contra Costa prevented Student from attending school are unpersuasive. Pleasanton and Contra Costa were prepared to offer Student an education. Student's placement and services were pre-staged for her arrival. Once Father consented to her IEP on September 22, 2019, Student began school on September 24, 2019.

DENIAL OF FAPE SEPTEMBER 25, 2019 THROUGH NOVEMBER 14, 2019

Pleasanton and Contra Costa failed to ensure Student could safely attend school because her full-time nursing services were not provided. Student left school on September 25, 2019 and did not return. After Father consented to Student's IEP, she was entitled to all IEP programs and services within her IEP. While Pleasanton and Contra Costa were engaged in a dispute with Father over Student's nursing services, Student did not receive any of her IEP programs and services. Further, Pleasanton or Contra Costa also failed to provide any alternate educational program. Accordingly, Student met her burden she was denied FAPE during this period.

NO DENIAL OF FAPE FROM NOVEMBER 15 THROUGH DECEMBER 3, 2019

Following the November 7, 2019 OAH stay put order, Contra Costa and Pleasanton demonstrated they were prepared and ready to provide for Student's return to Mauzy on November 15, 2019. Pleasanton arranged for a district LVN to cover school days before the contracted nurse could start. A contracted nurse was hired and ready to perform her duties beginning November 19, 2019. Father refused the contracted nursing services Pleasanton had arranged and requested a different agency. Student did not meet her burden that she was prevented from returning to school, and thus denied a FAPE from November 15, 2019 through the first day of hearing, December 3, 2019.

RESPONSIBLE LOCAL EDUCATION AGENCY

Under Education Code section 48200, determines the local education agency responsible for providing a special education program. Pursuant to this section, a school district is responsible for providing a FAPE to all eligible students between the

ages of six and eighteen whose parent or legal guardian resides within the jurisdictional boundaries of the school district, subject to several specified exceptions. (*Union School District v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1525, fn. 1.) Here, there is no dispute that the Student resides with Parents within the jurisdictional boundaries of Pleasanton under Educational Code section 48200.

Student alleges Pleasanton and Contra Costa should be jointly and severally liable for providing Student a FAPE. Student provided no authority to support her position. Student cited an OAH decision where joint and several liability was found. OAH cases are not precedential. Student further failed to address the unique circumstances of the case, such as the local education agency and the county office of education filed a joint response, put on a joint defense, and were represented by the same attorney. None of these facts are applicable here. Student further cites the Memorandum of Understanding, referred to as an MOU, between Pleasanton and Contra Costa. The document address interim placements into county programs, student services, including IEP team meeting scheduling, notices, and coordination. The document is silent to which agency is responsible for providing a FAPE.

Pleasanton argues the MOU relieved it of its FAPE obligation because it required Contra Costa to provide most of Student's services. Pleasanton's argument is not persuasive for two reasons. Pleasanton provided no evidence the MOU shifted its obligation to provide Student a FAPE, nor did Contra Costa accept the obligation subject to the agreement. And, two, Pleasanton was responsible for providing Student's nursing services and the failure of the nursing services is central to Student's failure to implement the claim.

A recipient that operates a public elementary or secondary education program or activity shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's disability. (34 C.F.R. § 104.33.) A recipient may place a handicapped person or refer such a person for aid, benefits, or services other than those that it operates or provides as its means of carrying out the requirements of this subpart. If so, the recipient remains responsible for ensuring that the requirements of this subpart are met with respect to any handicapped person so placed. (34 C.F.R. § 104.33(b)(3).) Education Code section 56369 states that a local educational agency may contract with another public agency to provide special education or related services to an individual with exceptional needs, not to transfer IEP responsibility. (Ed. Code, § 56369.)

Pleasanton cannot delegate its obligation to provide FAPE to Contra Costa. Pleasanton is the entity that is responsible for providing Student a FAPE. Accordingly, Pleasanton is responsible for denying Student a FAPE irrespective of the Respondents' MOU.

ISSUE 2: DID PLEASANTON UNIFIED SCHOOL DISTRICT, CONTRA COSTA COUNTY OFFICE OF EDUCATION OR BOTH MATERIALLY FAIL TO IMPLEMENT STUDENT'S AUGUST 27, 2019 IEP DURING THE 2019-2020 SCHOOL YEAR?

Student alleges she was denied a FAPE when Pleasanton and Contra Costa failed to implement her August 27, 2019 IEP. Pleasanton and Contra Costa argue Father obstructed their ability to coordinate Student's medical orders with Mauzy personnel and her physicians.

To provide a FAPE, a school district must deliver special education and related services "in conformity with" a student's IEP. (20 U.S.C. § 1401(9).) In *Van Duyn v. Baker School Dist*. (9th Cir. 2007) 481 F.3d 770, the Ninth Circuit held that failure to deliver related services promised in an IEP is a denial of FAPE if the failure is "material"; meaning that "the services a school provides to a disabled child fall significantly short of the services required by the child's IEP." (*Id*. at p. 780.) The court further held that in such a case "the materiality standard does not require that the child suffer demonstrable educational harm in order to prevail." (*Ibid*.) The court found that a district's provision of only five hours of math tutoring out of a promised 10 hours was a material failure to provide services in conformance with the student's IEP. (*Id*. at p. 781; see also *Sumter County School Dist. v. Heffernan* (4th Cir. 2011) 642 F.3d 478, 481, 485-486 [failure to provide more than 7.5 to 10 hours weekly of applied behavior analysis, out of a promised 15 hours a week, was a material failure].)

Father consented to the August 27, 2019 IEP on September 22, 2019, a Sunday. On September 23, 2019, Pleasanton confirmed the contracted LVN would be available to start the next day. On September 24, 2019, Student attended her first day of school with the contracted LVN present. Due to the disagreement over Student's medical orders, Student did not return to school after September 24, 2019.

While Student was out of school, neither Pleasanton or Mauzy provided services to Student. Neither Pleasanton or Mauzy offered an emergency IEP team meeting or proposed any alternative programming such as provided in-home services either.

Following the OAH determination of stay put on November 7, 2019, Mr. Scruggs notified Father the following business day, Mauzy was ready and willing to serve Student. Ms. Doerpinhaus arranged for a Pleasanton LVN to be reassigned to Mauzy for

November 15 and 18, 2019. A permanent LVN would be available to start from the contracted agency on November 19, 2019. Later that day, Father refused to allow the contracted agency to provide nursing services to Student going forward.

NO DENIAL OF FAPE AUGUST 27, 2019 THROUGH SEPTEMBER 24, 2019

The issue Student pled was a FAPE denial for Respondents failure to implement Student's August 27, 2019 IEP. Respondent was precluded from such implementation absent parental consent. As discussed above, Ms. Doerpinghaus provided Father the IEP on September 6, 2019. Father then requested numerous changes. Ms. Doerpinghaus made the requested changes. Father refused to consent to the IEP until every item on Student's special factors page was ordered specifically for Student. By September 9, 2019, Ms. Doerpinhaus confirmed every item. Father provided consent on September 22, 2019. As Father did not consent until September 22, 2019, there can be no denial of FAPE for an implementation claim prior to that date. Student failed to meet her burden that Pleasanton and Contra Costa failed to materially implement her IEP, and thus, denied her a FAPE from August 27, 2019 through September 24, 2019.

DENIAL OF FAPE SEPTEMBER 25, 2019 THROUGH NOVEMBER 14, 2019

Once Father consented to the IEP, Pleasanton was able to have the contracted nursing agency ready to perform services on September 24, 2019. Student attended her first day of school on September 24, 2019. As a result of a disagreement over medical orders, Pleasanton and Contra Costa failed to ensure necessary nursing services which prohibited Student from being able to return to school after September 24, 2019. Pleasanton and Contra Costa did not provide Student with any part of her IEP program and services during this dispute. Student met her burden, Pleasanton and Contra Costa failed to materially implement her IEP during this time period.

NO DENIAL OF FAPE NOVEMBER 15 THROUGH DECEMBER 3, 2019

Once the OAH stay put order was issued, Contra Costa informed Father that Mauzy was ready and willing to have Student start school immediately. Pleasanton arranged for a district LVN to provide nursing services that would allow Student to attend school on November 15, 2019. Pleasanton further arranged for the district LVN to provide nursing services on November 18, 2019 while the nursing agency was finalizing staffing. The nursing agency was prepared to begin services on November 19, 2019. That same day, Father informed the nursing supervisor he would not work with them and wanted a different agency.

The IDEA does not give parents the right to make unilateral decisions regarding programs or service providers used to implement a student's IEP so long as the service providers meet student's unique needs. *Swanson v. Yuba City Unified School District* WL WL 6039024 (E.D. Cal. 2016). Pleasanton and Contra Costa were prepared to provide Student with an education and all services starting November 15, 2019. Student never attended school. On November 19, 2019 Father refused the nursing services Pleasanton arranged. Student failed to meet her burden that Pleasanton and Contra Costa materially failed to implement Student's IEP from November 15, 2019 through December 3, 2019.

TRIAL BY CONSENT AND EVIDENCE OUTSIDE THE RECORD

In Student's closing brief, Student asserted for the first time that due to the doctrine of Trial by Consent, she be permitted to allege a denial of FAPE because Father was not permitted meaningful parental participation in the IEP implementation process.

She asserts that his parental participation in the implementation process was hampered due to the following:

- Ms. Walton should have contacted Student's physicians who wrote the medical orders; and,
- Pleasanton and Contra Costa never called a proper meeting to change Student's IEP;
- And, Pleasanton and Contra Costa did not follow up regarding the independent health assessment.

All parties participated in a prehearing conference on November 26, 2019 where the due process issues were addressed and clarified by the parties and the ALJ. Father never claimed he was denied meaningful parental participation in the IEP implementation process on any basis.

Student asserts trial by consent is recognized by the Ninth Circuit in IDEA cases. *M.C. v. Antelope Valley Union High School District* (9th Circuit 2017) 858 F.31189, 1196 (*Antelope Valley*). Under *Antelope Valley* the specific issue decided was whether parent was denied meaningful participation in the IEP development process. (*Id*. at p. 1198.) IEP development is a critical component of the IDEA. (*Ibid*.) In the instant matter there is no allegation Father was denied the opportunity to meaningfully participate in the IEP process. Student instead alleges Father was denied the opportunity to meaningfully participate in the implementation process.

This decision reaches no determination regarding the applicability of trial by consent in IDEA cases. No determination needs to be reached in the instant matter because Student does not allege a violation of the IDEA or California education law.

Student provided no authority that Father has any right to participate in the implementation process of Student's IEP process.

Should Student attempt to assert the sub-contentions as independent FAPE denials, she is not harmed by this ruling. The IDEA specifically states that nothing in the Act shall be construed to preclude a parent from filing a separate due process complaint on an issue separate from a due process complaint already filed. (20 U.S.C. § 1415(o); 34 C.F.R. § 300.513(c) (2006); Ed Code, §56509.) Therefore, although parties are precluded from re-litigating issues already heard in previous due process proceedings, parents are not precluded from filing a new due process complaint on issues that could have been raised and heard in the first case, but were not.

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.

1. Pleasanton denied student a free appropriate public education from September 25, 2019, until November 14, 2019, when Student was not allowed to attend school pursuant to her August 27, 2019 individualized education program. Student partially prevailed on Issue One.
2. Pleasanton failed to materially implement Student's August 27, 2019 IEP from September 25, 2019, until November 14, 2019. Student partially prevailed on Issue Two.

REMEDIES

Student partially prevailed on issues one and two. As a result of Pleasanton's failures, Student was deprived specialized academic instruction, speech and language, services, physical therapy, adapted physical education, specialized vision services, and occupational therapy to which Student was enrolled. In Student's closing brief she requested Pleasanton and Contra Costa be ordered to implement her IEP, and that the IEP be modified to include a back-up plan when Student's regular one-to-one LVN is absent, specialized health services, and a communication system regarding medical orders. Student further requested an independent health assessment, and 59 hours of compensatory education. Student further requested staff training on parental participation in the IEP process, changes in placement, and proper handling of gaps in service. Finally, Student requests to be declared the prevailing party.

School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.) These are equitable remedies that courts may employ to craft "appropriate relief" for a party. (*Ibid.*) An award of compensatory education need not provide "day-for-day compensation." (*Id.* at p. 1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid v. District of Columbia*, (D.D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be fact-specific and be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Ibid.*)

The undersigned ALJ carefully considered all available remedies to compensate for Student's lost educational services. Relying on the ALJ's ability to craft equitable remedies, it is determined Student is entitled to compensatory education for the lost educational services. Student missed seven hours each of speech and language services, physical therapy, and adaptive physical education for a total of 21 hours of services. Student was also entitled to 1725 minutes of specialized academic instruction weekly. Student's needs are based on functional and life goals. Student had 20 goals that address her gross motor, functional gross motor, fine motor, functional academic, pre-academic, communication skills, functional communication, social participation, functional positioning, and visual tracking. As such, it is determined equitable to award 40 hours of compensatory education for Student to utilize in speech and language, physical therapy, and adaptive physical education services. This service shall be provided by a non-public agency or certified provider of Father's choice. Pleasanton shall contract directly with Father's chosen provider. The provider and Father shall determine the appropriate schedule and location for service delivery. Student shall be allowed to access these service hours through the end of extended school year 2019-2020.

Student further requested Contra Costa be ordered to follow through on its proposed independent health assessment. Student previously argued Contra Costa's proposed health assessment was deficient due to its failure to identify the type of assessor who would conduct the assessment, and thus, the proffered assessment plan is so fatally deficient Father is unable to determine if the assessor is qualified to conduct the assessment. Student also requests Contra Costa be ordered to be implement it as an independent educational evaluation. Student's request for an independent health assessment is denied. All other requests were carefully considered and rejected.

ORDER

1. Pleasanton shall contract directly with a non-public agency or certified personnel of Father's choice to provide Student 40 hours in the areas of physical therapy, speech and language, and adaptive physical education.
2. Within 10 days of being provided contact information, Pleasanton shall contact the selected academic provider to initiate the service contract. The provider and Father shall determine the appropriate schedule and location for service delivery. Student shall be allowed to access these services hours through the end of extended school year 2019-2020.
3. All compensatory services hours shall be separate and apart from Student's IEP services. Any cancellations by the service providers shall be made up. Any scheduled absences by Student with at least 24-hour notice or verified medical absence shall also be credited to Student and made up.
4. All other requested relief 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/
Tiffany Gilmartin
Administrative Law Judge
Office of Administrative Hearings