

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2021010505

PARENT ON BEHALF OF STUDENT,

v.

LONG BEACH UNIFIED SCHOOL DISTRICT.

DECISION

July 22, 2021

On January 15, 2021, the Office of Administrative Hearings, called OAH, received a due process hearing request from Student, naming Long Beach Unified School District. OAH granted Student's motion to amend the complaint on April 7, 2021. Administrative Law Judge Linda Johnson heard this matter via videoconference in San Diego, California on June 2, 3, 8, and 9, 2021.

Attorney Bruce Bothwell represented Student. Parent attended all hearing days on Student's behalf. Cynthia Yount represented Long Beach. Dr. Kenneth Owens, Special Education Administrator, attended most hearing days on Long Beach's behalf.

Dr. Wendy Rosenquist, Special Education Administrator, attended the hearing on the afternoons of June 8, and 9, 2021, on Long Beach's behalf.

At the parties' request, OAH continued the matter to July 7, 2021 for closing briefs. Briefs were timely received, the record was closed, and the matter was submitted on July 7, 2021.

ISSUES

A free appropriate public education is referred to as FAPE. An individualized education program is referred to as an IEP. At the start of the hearing, prior to opening statements, Student withdrew Issues 9, 12, and 14 from the Order Following Prehearing Conference. Long Beach did not object to Student withdrawing Issues 9, 12, and 14. For clarity, Issues 2, 3, and 4 from the Order Following Prehearing Conference have been combined as have Issues 10, 11, and 13. The issues have been renumbered accordingly. There have been no other changes to the issues.

1. Did Long Beach deny Student a FAPE by failing to conduct an appropriate triennial evaluation prior to the January 30, 2019 IEP team meeting?
2. Did Long Beach deny Student a FAPE in the January 30, 2019 IEP by failing to offer:
 - a. An appropriate placement,
 - b. Appropriate specialized academic instruction, and
 - c. Appropriate academic goals?
3. Did Long Beach procedurally deny Student a FAPE by failing to initiate a due process proceeding to determine whether the January 30, 2019 IEP offered Student a FAPE?

4. Did Long Beach procedurally deny Student a FAPE by failing to convene an annual IEP team meeting on or before January 30, 2020?
5. Did Long Beach procedurally deny Student a FAPE by failing to have an IEP in place at the beginning of the 2020-2021 school year?
6. Did Long Beach procedurally deny Student a FAPE by predetermining Student's December 15, 2020 IEP?
7. Did Long Beach deny Student a FAPE in the December 15, 2020 IEP by failing to offer:
 - a. An appropriate placement,
 - b. Appropriate specialized academic instruction, and
 - c. Appropriate academic goals?

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, referred to as FAPE, to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, and 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, 57-58, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) Student was the petitioning party and had the burden of proof. The factual statements in this Decision 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 14 years old and in eighth grade at the time of hearing. Student resided within Long Beach's geographic boundaries at all relevant times. Student was eligible for special education under the category of autism.

ISSUE 1: DID LONG BEACH DENY STUDENT A FAPE BY FAILING TO CONDUCT AN APPROPRIATE TRIENNIAL EVALUATION PRIOR TO THE JANUARY 30, 2019 IEP TEAM MEETING?

Student contends Long Beach's triennial reevaluation was inappropriate because the psychoeducational triennial review did not contain standardized assessment measures of Student. Student argues Long Beach should have either adopted the recommendations in the independent educational evaluation conducted a year earlier or insisted on conducting standardized assessments of Student. Student further contends

that because Parent disagreed with the triennial review and requested an independent educational evaluation, and Long Beach did not respond to the request, Student should prevail on this issue.

Long Beach contends it conducted a comprehensive triennial reevaluation that appropriately informed the IEP team in its determination of present levels of performance, development of appropriate goals, and determination of the appropriate placement for Student in the least restrictive environment.

A FAPE 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 IEP for an eligible student based upon state law and the IDEA. (20 U.S.C. §§ 1401(14), 1414(d)(1); and see Ed. Code, §§ 56031, 56032, 56341, 56345, subd. (a), and 56363, subd. (a); 34 C.F.R. §§ 300.320, 300.321, and 300.501.)

When formulating an IEP, a school district "must comply both procedurally and substantively with the IDEA." (*ML v. Federal Way Sch. Dist.* (9th Cir. 2005) 394 F.3d 634, 644 (citing *Rowley, supra*, 458 U.S. at 206-207).) Procedural errors do not automatically result in a denial of FAPE. Procedural violations result in a denial of FAPE only if it (1) impedes the child's right to a FAPE, (2) significantly impedes the parents' opportunity to participate in the decision making process regarding the provision of a FAPE to their child, or (3) causes a deprivation of educational benefits. (20 U.S.C. § 1415(t)(3)(E)(ii); see, *W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23*, (9th Cir. 1992) 960 F.2d 1479, 1484 (Target Range).)

A school district must conduct a reassessment at least once every three years, unless the parent and the agency agree that it is unnecessary. (20 U.S.C.

§ 1414(a)(2)(B)(ii); 34 C.F.R. § 300.303(b)(2); Ed. Code, §§ 56043, subd. (k), 56381, subd.(a)(2).) The district must also conduct a reassessment if it determines that the educational or related service needs of the child, including improved academic achievement and functional performance, warrant a reassessment. (20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1),(2).)

Long Beach conducted a triennial assessment of Student on February 2, 2016. Long Beach developed, and provided Parent with an assessment plan, on November 14, 2018, to reassess Student for his next triennial assessment. Long Beach proposed to assess Student in health, vision, and hearing, academic performance, general intelligence, communicative status, motor abilities, social emotional status, functional behavior assessment, life skills, and assistive technology and augmentative and alternative communication. Long Beach proposed to assess Student using standardized testing, reviewing records and work samples, observations, and parents and teacher interviews.

Assessment of a student requires parental consent. To obtain parental consent, school districts must follow procedural safeguards. (20 U.S.C. § 1414(b)(2)(A)(i).) The school district must provide proper notice to the parents. (20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.304(a).

If parents do not consent to a reassessment plan, the district may request judicial override by showing at a due process hearing that it needs to reassess the student and it is lawfully entitled to do so. (20 U.S.C. § 1414(c)(3); 34 C.F.R. § 300.300(c)(1)(ii); Ed. Code, §§ 56381, subd. (f)(3), 56501, subd. (a)(3).) Without an order after a due process hearing, reassessments require parental consent. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (f)(1).)

It is well settled that Parents who want their children to receive special education services must allow reassessment by the district, with assessors of its choice. (*Johnson v. Duneland Sch. Corp.* (7th Cir. 1996) 92 F.3d 554, 558; *Andress v. Cleveland Indep. Sch. Dist.* (5th Cir.1995) 64 F.3d 176, 178-79; *Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d1307, 1315; *Dubois v. Connecticut State Bd. of Educ.* (2d Cir. 1984) 727 F.2d 44, 48.) As long as the statutory requirements for assessments are satisfied, parents may not put conditions on assessments; "selection of particular testing or evaluation instruments is left to the discretion of State and local educational authorities." (*Letter to Anonymous* (OSEP 1993) 20 IDELR 542.)

Parent partially consented to the assessment plan on December 11, 2018. Parent consented to all areas of assessment except standardized test measures in academic performance, general intelligence, and social emotional status.

School districts are required to use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that would assist in determining the educational needs of a child. (20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304(b)(1).) Assessments must use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, along with physical or developmental factors. (20 U.S.C. § 1414(b)(2)(C); 34 C.F.R. § 300.304(b)(3).) Assessments and other evaluation materials must include those that are tailored to assess specific areas of educational need. (34 C.F.R. § 300.304(c)(2).)

Tests and assessment materials must be used for the purposes for which they are valid and reliable, and must be administered by trained personnel in conformance with the instructions provided by the producer of such tests. (20 U.S.C. § 1414(b)(3)(A)(iii)-(v);

Ed. Code, § 56320, subd. (b)(2), (3).) Tests must be selected and administered to produce results that accurately reflect the student's aptitude, achievement level, or any other factors the test purports to measure. (Ed. Code, § 56320, subd. (d).)

Tests and assessment materials must be selected and administered so as not to be racially, culturally, or sexually discriminatory. (20 U.S.C. § 1414(a)(3)(A)(i); Ed. Code, § 56320, subd. (a).) The materials must also be provided and administered in the student's primary language or other mode of communication unless this is clearly not feasible. (20 U.S.C. § 1414(a)(3)(A)(ii); Ed. Code, § 56320, subd. (a).) In addition, an assessor must produce a written report of each assessment that includes:

- whether the student may need special education and related services;
 - the basis for making that determination;
 - the relevant behavior noted during the observation of the student in an appropriate setting;
 - the relationship of that behavior to the student's academic and social functioning; and
 - the educationally relevant health and development, and medical findings, if any.
- (Ed. Code, § 56327, subds. (a)-(e).)

Long Beach assessed Student in January 2019 and produced a speech and language assessment report, a school-based occupational therapy assessment report, an assistive technology assessment report, an assistive technology and augmentative alternative communication assessment report, a behavior assessment report, and a psychoeducational triennial review. Parent disagreed with the triennial review and requested an independent psychoeducational evaluation on September 30, 2019. Long Beach did not respond to Parent's request.

Student argued that because Long Beach did not respond to Parent's request for an independent psychoeducational evaluation Student is entitled to a determination that Long Beach denied him FAPE and therefore reimbursement for the independent psychoeducational evaluation Dr. Helena Johnson conducted on July 2, 2018. This argument was not persuasive or relevant to Issue 1. Student's issue focused on the appropriateness of the triennial evaluation. Student alleged Long Beach denied him a FAPE by failing to conduct an appropriate triennial evaluation prior to the January 30, 2019 IEP team meeting. Student had the burden of proof to prove the triennial evaluation was inappropriate. Student did not allege that Long Beach denied him FAPE by failing to respond to Parent's request for an independent educational evaluation nor was Long Beach's alleged failure to respond an issue raised in the complaint or at the prehearing conference, or consented to by Long Beach. (*M.C. v. Antelope Valley Union High Sch. Dist.*, (9th Cir.2017) 858 F.3d 1189, 1196; *A.W. v. Tehachapi Unified School Dist.* (E.D. Cal. March 8, 2019, No. 1:17-cv-00854-DAD-JLT) 2019 WL 1092574, *6, *affd.* (9th Cir. 2020) 810 Fed.Appx. 588.)

SPEECH AND LANGUAGE, SCHOOL-BASED OCCUPATIONAL THERAPY,
ASSISTIVE TECHNOLOGY, AUGMENTATIVE ALTERNATIVE
COMMUNICATION, AND BEHAVIOR ASSESSMENT

Student failed to meet Student's burden by a preponderance of evidence that Long Beach denied Student a FAPE by conducting inappropriate speech and language, school-based occupational therapy, assistive technology, augmentative alternative communication, or behavior assessments. All five of those reports met all legal standards. Long Beach assessed Student in those areas using a variety of assessment tools and strategies. The tests and assessment materials were used in a valid and

reliable manner and the assessors were trained and followed testing protocols. (20 U.S.C. § 1414(b)(3)(A)(iii)-(v); Ed. Code, § 56320, subd. (b)(2), (3).) The assessments were conducted in Student's primary language and were not racially, culturally, or sexually discriminatory. (20 U.S.C. § 1414(a)(3)(A); Ed. Code, § 56320, subd. (a).)

Additionally, Long Beach produced written reports in each area that addressed the need for services and the basis for making that determination. The reports also noted Student's relevant behavior and the relationship of that behavior to his academic and social functioning. (Ed. Code, § 56327, subds. (a)-(e).) Student did not prove Long Beach procedurally violated the IDEA by failing to conduct appropriate speech and language, school-based occupational therapy, assistive technology, augmentative alternative communication, or behavior assessments as part of the triennial evaluation prior to the January 30, 2019 IEP team meeting. (*Target Range, supra*, 960 F.2d 1479, 1484.)

PSYCHOEDUCATIONAL TRIENNIAL REVIEW

Student did not meet his burden of proof that Long Beach failed to conduct an appropriate psychoeducational assessment. Jillian Tague, Long Beach school psychologist, conducted the psychoeducational triennial review for Student. Prior to conducting the assessment, Tague called Parent to clarify her partial consent to the assessment plan. Parent confirmed she did not consent to any standardized testing because Student had recently been assessed by Dr. Johnson on July 2, 2018. Parent and Long Beach did not agree that a triennial evaluation was unnecessary but agreed to a triennial reevaluation that did not include standardized testing. (20 U.S.C. § 1414(a)(2)(B)(ii); 34 C.F.R. § 300.303(b)(2); Ed. Code, §§ 56043, subd. (k), 56381, subd. (a)(2).)

Tague did not conduct any standardized assessments for Student's triennial review. Instead she interviewed Parent, reviewed Student's records and teacher reports, and conducted classroom observations. Tague produced a four-page report consisting of background information, academic skills, social and adaptive behavior, and a summary and recommendations. Tague used information from Student's current classroom teacher to determine his academic skills. Tague reviewed Dr. Johnson's July 2, 2018 independent educational evaluation in creating her triennial review. Tague included in her triennial review the scores from Dr. Johnson's independent educational evaluation. Tague's report addressed the need for services and the basis for making that determination. The report also noted Student's relevant behavior and the relationship of that behavior to his academic and social functioning. (Ed. Code, § 56327, subds. (a)-(e).) Long Beach reviewed the triennial review assessment report at the January 30, 2019 IEP team meeting.

Based on Tague's report, and input from Student's teachers, Long Beach updated Student's present levels of performance and baselines for his triennial IEP goals. Student's argument that Long Beach should have fully or substantially adopted Dr. Johnson's recommendations is not supported by law. The law does not require Long Beach to accept the recommendations of an independent assessor's report. Long Beach was only required to consider Dr. Johnson's independent psychoeducational evaluation, which Tague did in her triennial review. (*G.D. v. Westmoreland Sch. Dist.* (1st Cir. 1991) 930 F.2d. 942, 947.) Although Tague did not conduct any standardize testing, Tague utilized a parent interview, teacher reports, classroom observations, and reviewed records, including Dr. Johnson's July 2, 2018 independent educational evaluation, to gather relevant functional, developmental, and academic information that assisted in

determining Student's educational needs. (20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304(b)(1).)

Student failed to meet his burden that Long Beach denied him a FAPE by failing to conduct an appropriate triennial evaluation prior to the January 30, 2019 IEP team meeting.

ISSUE 2: DID LONG BEACH DENY STUDENT A FAPE IN THE JANUARY 30, 2019 IEP BY FAILING TO OFFER AN APPROPRIATE PLACEMENT, APPROPRIATE SPECIALIZED ACADEMIC INSTRUCTION, AND APPROPRIATE ACADEMIC GOALS?

Student contends the January 30, 2019 IEP offer of group specialized instruction in a moderate to severe special day class was not appropriate to meet Student's needs. Student contends he required one-to-one academic instruction to learn. Student also contends the academic goals were not sufficiently challenging for Student to make educational progress. Long Beach contends the January 30, 2019 IEP offered Student a FAPE and was designed to meet Student's unique needs, reasonably calculated to confer meaningful educational benefit and to enable Student to make progress appropriate in light of his circumstances.

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 Sch. Dist. v. Rowley* (1982) 458 U.S. 176, 201-204; *Endrew F. v. Douglas County Sch. Dist. RE-1* (2017) 580 U.S. ____ [137 S.Ct. 988, 1000] (Endrew).)

An IEP is a written statement for each child with a disability that should include:

- the child's present levels of academic achievement and functional performance;
- a statement of measurable annual goals;
- a description of how the child's progress on the annual goals will be measured;
- a statement of special education and related services;
- any program modifications or supports necessary to allow the child to make progress;
- an explanation of the extent to which the child will not be educated with nondisabled children in general education classes; and
- the frequency, location, and duration of the services. (20 U.S.C. § 1414(d)(1)(A); Ed. Code, § 56345, subd (a).)

PLACEMENT AND SPECIALIZED ACADEMIC INSTRUCTION

Long Beach offered Student three hours and 45 minutes per day of specialized academic instruction in a group setting in a moderate to severe special day class with a functional curriculum. The minutes amounted to Student receiving all his academic instruction in a group setting in the moderate to severe special day class. The January 30, 2019 IEP did not specify what moderate to severe special day class Long Beach offered, or how many students would be in the class. Long Beach did not offer any one-to-one academic instruction or explain if Student would receive any one-to-one academic instruction.

During Student's fifth-grade year, the 2017-2018 school year, he was in Rhonda Hildreth's mild to moderate special day class. Hildreth testified at hearing. Her opinions offered at hearing were generally credible based upon her education, experience, and knowledge of Student as his teacher.

Hildreth opined Student's greatest areas of need were in social behavior and language. Student needed one-to-one instruction and modeling for all new concepts and was easily distracted. Student sat directly in front of Hildreth with his one-to-one behavior aide. Because of Student's proximity to Hildreth, she was able to prompt him and provide one-to-one instruction. By the end of the 2017-2018 school year, Hildreth saw an improvement in Student's skills in the areas of reading, mathematics, and attending to whole group instruction. When asked if Student required a moderate to severe special day class, Hildreth opined that it would be more appropriate because of Student's lack of functional communication. Hildreth's opinion about Student needing a moderate to severe special day class and a functional curriculum was less persuasive than Student's functioning in the mild to moderate special day class because she never taught or observed a moderate to severe special day class.

Dr. Johnson conducted an independent psychoeducational evaluation on July 2, 2018. Dr. Johnson recommended one-to-one instruction because it was extremely difficult for Student to hold onto information which made learning difficult. Dr. Johnson opined whole group learning reinforced Student's self-stimming behavior and he would be more distracted in a moderate to severe special day class because the majority of the instruction would be whole group. Dr. Johnson did not recommend placement in a moderate to severe special day class as Student was capable of learning and did not require a functional curriculum to learn.

During Student's sixth-grade year, the 2018-2019 school year, he was in Gillian Waldenfels's mild to moderate special day class for English language arts and mathematics. Waldenfels had about seven students in her classroom for each subject. Waldenfels opined that Student benefited from one-to-one instruction but he also made progress on his goals with small group instruction. Student was highly

distractible, stemmed frequently, and was lost in group instruction. Waldenfels did not think Student required all instruction in a one-to-one format as he was making progress in English language arts and mathematics. Waldenfels opined Student needed a more functional curriculum.

Tague disagreed with Dr. Johnson's recommendation that Student required exclusively one-to-one instruction. Tague opined Student would benefit from a smaller group setting in a moderate to severe special day class and a functional skills curriculum with imbedded social skills. The law does not require Long Beach to accept the recommendations of an independent assessor's report. Long Beach was only required to consider Dr. Johnson's independent psychoeducational evaluation. (*G.D. v. Westmoreland Sch. Dist.* (1st Cir. 1991) 930 F.2d. 942, 947.) However, Tague did not conduct any standardize testing or rely on Dr. Johnson's evaluation to form her opinion. Tague was unsure of how many other students may be in the moderate to severe special day class or how much individual instruction Student would receive. Consequently, Tague's opinion was less persuasive than Dr. Johnson's opinion.

Student needed one-to-one instruction to learn. Although Waldenfels did not agree that Student required exclusively one-to-one instruction, both Hildreth and Waldenfels agreed that Student needed some one-to-one instruction to learn. The January 30, 2019 IEP also acknowledged that Student required one-to-one instruction to learn. However, Long Beach did not offer Student any one-to-one specialized academic instruction. Student proved Long Beach denied him a FAPE by only offering specialized academic instruction in a group setting.

Long Beach offered the specialized academic instruction in a moderate to severe special day class. Tague, Hildreth, and Waldenfels all opined that a moderate to severe

special day class would be appropriate for Student, but none of them could describe the moderate to severe special day class or how it would provide Student with individual instruction. Dr. Johnson observed Student in Hildreth's classroom and conducted standardized assessments to determine Student's needs. Dr. Johnson provided detailed testimony that Student was easily distracted and lost during whole group instruction. Dr. Johnson concluded that a moderate to severe special day class would not be appropriate for Student because the functional curriculum would not offer educational benefit based on his cognitive levels, and his distractibility and self-stimulatory behaviors would inhibit his participation in classroom instruction. Tague, Hildreth, and Waldenfels all opined that the moderate to severe special day class was more appropriate because Student would benefit from a functional curriculum. Dr. Johnson's conclusion that Student did not require a functional curriculum in a moderate to severe special day class was more persuasive than Tague, Hildreth, or Waldenfels' opinion because neither Tague, Hildreth, or Waldenfels could explain why Student needed a functional curriculum when he was making progress toward his annual goals in the mild to moderate special day class. The evidence established that based upon student's cognitive ability and distractibility, a moderate to severe special day class was not an appropriate placement. Student could make appropriate progress in a mild to moderate special day class.

Student proved Long Beach denied him a FAPE by offering placement in a moderate to severe special day class.

ACADEMIC GOALS

The IEP must show a direct relationship between the present levels of performance, the goals, and the specific educational services to be provided. (Cal. Code

Regs., tit. 5, § 3040, subd. (b).) An IEP must contain a statement of measurable academic and functional annual goals, designed to meet the child's needs related to a disability, to enable the child to be involved in and make progress in the general education curriculum. (20 U.S.C. § 1414(d)(1)(A)(i)(II); 34 C.F.R. § 300.320(a)(2)(i); Ed. Code, § 56345, subd. (a)(2).)

LANGUAGE ARTS GOALS WERE NOT APPROPRIATE

Long Beach drafted two language arts goals for Student, a comprehension goal and a sequencing goal. Long Beach's proposed language arts goals did not have a direct correlation to baselines and Student's present levels of performance. (Cal. Code Regs., tit. 5, § 3040, subd. (b).) Student's language arts present level of performance and baseline was that he could decode words at the third-grade level and correctly answer comprehension questions at a first-grade level when the story was read to him and he had visual prompts. Student could not put events in correct order but could answer what happened first about 50% of the time after reading a first-grade level text or having a first-grade level text read to him.

Long Beach's proposed language arts goals were not reasonably calculated to enable Student to receive educational benefit. Student's previous comprehension goal provided that Student would read a text at the end of first grade level and answer who, what, and where questions with 80% accuracy. Long Beach's proposed comprehension goal asked Student to increase his functional reading skills by following along while a first-grade level text was read to him and answering detail comprehension questions with picture multiple choice answers and prompting to remain on task. Long Beach's proposed comprehension goal did not have a direct relationship to the present levels of performance because the goal no longer asked Student to read text and his baseline

established he could already answer comprehension questions when a first-grade level story was read to him.

Similarly, Long Beach's proposed sequencing goal was not sufficiently challenging. The proposed sequencing goal asked Student to increase his functional reading skills by following along while a first-grade level text was read to him then sequencing the three main events in the story with pictures and sentences and prompting to remain on task. Again, the proposed goal did not require Student to read a passage but simply follow along.

Dr. Johnson reviewed Student's comprehension and sequencing goals and opined they were not sufficiently challenging as neither goal required Student to read, both were auditory goals. Student's previous goals asked him to read a passage, and his baseline and present level of performance acknowledged he could decode words at a third-grade level. However, Long Beach's proposed goals only asked him to listen to a first-grade text, not read. Student's sixth grade teacher Waldenfels drafted the goals and acknowledged they were not written at a sixth-grade level as Student was not performing at a sixth-grade level. Waldenfels did not offer any reasoning for removing the requirement that Student read for his language arts goals. Waldenfels could not explain how the goals were sufficiently challenging given his present level of performance and goal baselines.

MATHEMATICS AND WRITING GOALS WERE APPROPRIATE

Long Beach drafted two mathematics goals for Student, a money calculation goal and a word problem goal. Student's previous mathematics goals were in the areas of using a calculator, money, and time. Student met his previous money goal and was

progressing toward his time goal with 70% accuracy. Student achieved 70% of his calculator goal. Dr. Johnson opined that both new goals were appropriate but Long Beach should have drafted another goal in the area of time because Student did not achieve his time goal. Dr. Johnson did not provide any explanation for Student needing a time goal other than Student did not meet his previous time goal. Dr. Johnson's opinion on Student's time goal was not persuasive. Student did not provide any additional evidence as to why he needed additional mathematics goals. Student did not meet his burden that Long Beach denied him a FAPE by failing to provide appropriate mathematics goals.

Long Beach drafted one writing goal for Student. Student met his previous writing goal of writing three sentences about a story with pictures. Student's writing present level of performance and baseline was that using a graphic organizer and one-to-one adult support he could write a multi-sentence paragraph about a narrative experience. Student could write or type three simple three-to-five-word sentences.

Long Beach's proposed writing goal asked Student to type at least one paragraph with at least five sentences that are each comprised of at least five words. Dr. Johnson opined the writing goal was appropriate but suggested that Student may not have met his previous goal. Dr. Johnson did not provide any support for her opinion that Student required additional writing goals, and Student did not present any evidence as to why he needed additional writing goals. Student did not meet his burden that Long Beach denied him a FAPE by failing to provide appropriate writing goals.

Long Beach's proposed language arts goals were not appropriate, however, the proposed mathematics and writing goal were appropriate.

ISSUE 3: DID LONG BEACH PROCEDURALLY DENY STUDENT A FAPE BY FAILING TO INITIATE A DUE PROCESS PROCEEDING TO DETERMINE WHETHER THE JANUARY 30, 2019 IEP OFFERED STUDENT FAPE?

Student contends Long Beach denied him a FAPE by failing to file for due process to defend its offer of a moderate to severe special day class. Student further contends Long Beach should have made a determination if the moderate to severe special day class was a necessary component of the IEP and initiated a due process proceeding by August 28, 2019, when Parent gave the 10-day notice of intent to place Student at Davidson Learning Center. Student acknowledges that Long Beach's failure to initiate a due process proceeding is a procedural violation and contends the moderate to severe special day class Long Beach offered was not appropriate. However, Student argues in the alternative that if this Decision finds the offer appropriate then Student alleges Long Beach denied him FAPE for almost two years in its failure to initiate a due process proceeding.

Long Beach contends Student failed to timely file this issue as Student's initial complaint, filed on January 15, 2021, did not include this issue. Long Beach further contends Student failed to cite any authority to support his allegation that the District was required to file for due process to determine whether the January 30, 2019 IEP offered Student a FAPE because Student remained in a mild to moderate special day class and received educational benefit.

Long Beach's argument that this issue is untimely is without merit. If an amendment is sought after the statute of limitations has run, the amended complaint will be deemed filed as of the date of the original complaint provided recovery is sought in both pleadings on the same general set of facts. (*Austin v. Massachusetts Bonding &*

Insurance Co. (1961) 56 Cal.2d 596, 600; *Grudt v. City of Los Angeles* (1970) 2 Cal.3d 575, 583.) Cases applying this relation back rule have made it clear that "it is the sameness of the facts rather than the rights or obligations arising from those facts that is determinative." (*Lamont v. Wolfe* (1983) 142 Cal. App.3d 375, 378.) Thus, amendments alleging a new theory of liability against the defendant have been found to relate back to the original complaint, so long as the new cause of action is based on the same set of facts previously alleged. (*Ibid.*) Because Student's claim is based on the same general facts, it relates back to the date the original complaint was filed and is deemed to have been filed as of January 15, 2021, the date of the original complaint.

The California Education Code requires that if the parent consents in writing to special education and related services for the child but does not consent to all of the components of the IEP, those components to which the parent has consented shall be implemented so as not to delay providing instruction and services to the child. (Ed. Code, § 56346, subd. (e).) However, if the public agency determines that the proposed special education program component to which the parent does not consent is necessary to provide a free appropriate public education to the child, a due process hearing shall be initiated by the public agency to seek an order declaring that its offered IEP constitutes a FAPE. (Ed. Code, § 56346, subd. (f); *I.R. v. Los Angeles Unified Sch. Dist.* (9th Cir. 2015) 805 F.3d 1164, 1167-1168 (I.R.).)

In *I.R.*, *supra*, 805 F.3d at p. 1169, the court clarified that Education Code section 56346, subdivision (f), requires a school district to "expeditiously" request a due process hearing when a district determines, for a student who is already receiving special education and related services, any portion of an IEP to which a parent does not consent is necessary to provide the student with a FAPE. The Ninth Circuit explained, "if, in the school district's judgement, the child is not receiving a FAPE, the district must act with

reasonable promptness to correct that problem by adjudicating the differences with the parents. The reason for this urgency is that it is the child who suffers in the meantime." (*Id.* at p. 1170.)

Student's annual IEP team meeting took over a month to complete. Long Beach held Student's annual IEP team meeting on January 30, 2019, and continued the meeting to March 6, 2019. Long Beach did not finalize the IEP and FAPE offer until the March 6, 2019 IEP team meeting. Parent consented to portions of the IEP but did not consent to the moderate to severe placement offered in the January 30, 2019 and March 6, 2019 IEP. Between March 6, 2019, and the end of the 2018-2019 school year on June 13, 2019, Student remained in the mild to moderate special day class where he received specialized academic instruction. Student did not return to a Long Beach school for the 2019-2020 school year, instead, Student attended Davidson Learning Center beginning in September 2019 and continuing through the date of the due process hearing.

Parent never consented to the moderate to severe special day class placement Long Beach offered in the January 30, 2019 IEP. Long Beach also never initiated a due process proceeding to implement the portion of the IEP Parent did not consent to. Long Beach attempted to argue that because Student remained in a mild to moderate special day class and made progress Long Beach did not have an obligation to initiate a due process proceeding. This argument is not persuasive and counter to the requirements of Education Code section 56346, subdivision (e). (*Id.* at p. 1170.) While Long Beach is allowed some time to determine if the component Parent did not consent to is necessary for Student to receive FAPE, as was the case in *I.R.*, Long Beach had almost two years to make that determination. Long Beach committed a procedural

violation by failing to initiate a due process proceeding to implement the portion of the January 30, 2019 IEP Parent did not consent to.

However, Student failed to prove Long Beach's procedural violation amounted to a denial of FAPE as Student received meaningful educational benefit in the mild to moderate program. Student made academic progress between March 6, 2019, and June 13, 2019. Student's 2018-2019 end of the school year IEP goal progress report showed he was making adequate progress to meet his annual goals in all academic areas. Amanda Daun was Student's teacher at Davidson Learning Center from January 2020 through March 2021. Student made significant progress working with Daun. When Student started at Davidson Learning Center, he was placed at a beginning first grade level for academics. During the almost two years Student attended Davidson Learning Center he progresses almost two full grade levels. At the time of the hearing Student was close to transitioning to a third-grade level curriculum.

Additionally, Student proved in Issue 2 that the January 30, 2019 IEP denied Student a FAPE by failing to offer an appropriate placement, appropriate specialized academic instruction, and appropriate language arts goals. Student required one-to-one specialized academic instruction to learn which Long Beach did not offer in the January 30, 2019 IEP. While Long Beach committed a procedural violation when it failed to initiate a due process proceeding to implement its January 30, 2019 FAPE offer, that procedural violation did not result in a loss of educational opportunity or deprived him of educational benefit or prevented Parent's meaningful participation in the educational decision-making process. This is in contrast with *I.R.* as the program in which the student remained in because the school district did not file for due process did not provide the student with an educational benefit. Accordingly, Student failed to prove by

a preponderance of evidence that Long Beach denied him a FAPE by failing to file for due process to defend its January 30, 2019 IEP offer.

ISSUE 4: DID LONG BEACH PROCEDURALLY DENY STUDENT A FAPE BY FAILING TO CONVENE AN ANNUAL IEP TEAM MEETING ON OR BEFORE JANUARY 30, 2020?

Student contends Long Beach denied him FAPE by failing to convene an annual IEP team meeting on or before January 30, 2020. Student contends Long Beach's attempts to convene an IEP team meeting in September 2019 were not for the purpose of an annual IEP team meeting. Student further contends he remained a Long Beach student even though he was attended Davidson Learning Center and Long Beach was required to hold an annual IEP team meeting.

Long Beach contends once Student gave notice of his intent to enroll in a private school in Huntington Beach School District, he was no longer Long Beach's responsibility. Long Beach contends Student's annual IEP responsibilities became that of the local education agency in which the private placement, unilaterally obtained by Parents, was located.

An IEP meeting must be held at least annually. (Ed. Code, § 56343.). A school district must ensure that the IEP team revises the IEP, as appropriate, to address "any lack of expected progress toward the annual goals and in the general education curriculum, where appropriate." (20 U.S.C. § 1414 (d)(4)(A); 34 C.F.R. § 300.324(b)(2).) California law provides that an IEP team "shall meet" whenever "[t]he pupil demonstrates a lack of anticipated progress." (Ed. Code, § 56343, subd. (b).)

Long Beach held Student's annual IEP team meeting on January 30, 2019. On August 28, 2019, Parent informed Long Beach they disagreed with the offer of FAPE and intended to privately place Student at Davidson Learning Center and seek reimbursement. On September 3, 2019, Long Beach sent Parent a prior written notice regarding Parent's intent to privately place Student and seek reimbursement. Long Beach did not agree to reimburse a private placement. Parents subsequently enrolled Student at Davidson Learning Center. Although Long Beach attempted to hold another IEP team meeting in September of 2019, that proposed IEP team meeting was intended to address Parent's concerns about Long Beach's proposed placement and not an attempt to convene annual IEP team meeting.

Parent responded by email to Long Beach's request to hold an IEP team meeting on September 24, 2019. Parent explained the family was dealing with medical issues but would respond with proposed dates soon. On September 30, 2019, Student's attorney emailed Long Beach stating Student did not think an IEP team meeting to discuss Student's placement at Davidson Learning Center would be productive given that Long Beach sent a prior written notice declining to fund Student's placement. Long Beach did not respond to either correspondence. Long Beach also did not attempt to hold an annual IEP team meeting in January 2020, during the 2019-2020 school year.

Parent's refusal to attend an IEP team meeting in September 2019 to discuss Student's placement at Davidson Learning Center did not remove Long Beach's responsibility to hold an annual IEP team meeting. The IDEA does not make a district's duties contingent on parental cooperation with, or acquiescence in the district's preferred course of action. (*Anchorage Sch. Dist. v. M.P.* (9th Cir. 2012) 689 F.3d 1047,

1055.) Re-enrollment in the public school is not required to receive an IEP. It is residency, rather than enrollment, that triggers a district's IDEA obligations.

A school district must conduct an IEP team meeting for a special education student at least annually "to review the pupil's progress, the [IEP], including whether the annual goals for the pupil are being achieved, and the appropriateness of placement, and to make any necessary revisions." (Ed. Code, § 56343, subd. (d); 20 U.S.C. § 1414(d)(4)(A)(i).) The statutes make no exception for the situation in which a parent has unilaterally placed her child in a private school and is demanding reimbursement because the District allegedly failed to offer or provide a FAPE. The duty of the District to hold annual IEP team meetings continues during that period. (*Briere v. Fair Haven Grade Sch. Dist.* (D.Vt. 1996) 948 F.Supp. 1242, 1254. (*Briere*).)

Long Beach held an IEP team meeting on December 15, 2020, to review Dr. Johnson's independent educational evaluation. Student requested the IEP team meeting when he provided Dr. Johnson's report to Long Beach. The purpose of the meeting was an addendum IEP team meeting to review Dr. Johnson's assessment, not an annual IEP team meeting.

Although Student was no longer attending a Long Beach school in January 2020, he was still Long Beach's responsibility. (*Id.* at p. 1254.) Long Beach's argument that Student unenrolled from the district and became a parentally placed private school student was not persuasive. Parent sent a letter specifically disagreeing with the offer of FAPE and notifying Long Beach Parent would place Student at Davidson Learning Center and seek reimbursement. Parent's testimony was consistent with the letter she sent Long Beach that she only placed Student at Davidson Learning Center because she disagreed with the FAPE offer. Parent did not unenroll Student from Long Beach.

Long Beach was obligated to hold an annual IEP team meeting in January 2020 to review Student's progress on goals, update his present levels of performance, create new goals, and offer supports and services based upon the updated goals. A failure to hold an IEP team meeting is a procedural violation. A child is denied a FAPE only when a procedural violation results in the loss of educational opportunity or seriously infringes the parents' opportunity to participate in the IEP process. (*R.B., ex rel. F.B. v. Napa Valley Unified Sch. Dist.* (9th Cir. 2007) 496 F.3d 932,938.)

Long Beach's failure to hold IEP team meeting until it met on December 15, 2020, impeded Student's right to a FAPE and deprived Student of educational benefit. It also significantly impeded Parent's participatory rights. An annual IEP team meeting would have given Long Beach the opportunity to understand how Student was performing at the Davidson Learning Center, provided a forum for updating Student's present levels of performance and the creation of new annual goals, as well as an updated offer of special education and related services based on current information. Without an annual IEP team meeting, Long Beach could not provide Student with an updated offer based on updated information necessary to meet Student's needs. Parent could not make an informed decision regarding Student's educational placement without an IEP offer. Long Beach's failure to convene an annual IEP team meeting until December 15, 2020, denied Student a FAPE.

ISSUE 5: DID LONG BEACH PROCEDURALLY DENY STUDENT A FAPE BY FAILING TO HAVE AN IEP IN PLACE AT THE BEGINNING OF THE 2020-2021 SCHOOL YEAR?

Student contends Long Beach's failure to have an IEP in place for him at the beginning of the 2020-2021 school year significantly impeded Parent's participation in

the IEP process and impeded his right to FAPE. Long Beach contends Student was not enrolled in the district for the 2020-2021 school year therefore it was not obligated to have an IEP in place at the beginning of the school year.

A school district must have an IEP in place at the beginning of each school year for each child with exceptional needs residing within the district. (20 U.S.C. § 1414(d)(2)(A); Ed. Code, § 56334, subd. (c).) A school district's obligation to provide special education and related services do not expire; and terminate only upon one of three conditions; (1) the student ages out on his/her 22nd birthday; (2) the student graduates with a regular high school diploma; or (3) the student's parents revoke consent to the provision of special education and related services in writing. (34 C.F.R. § 300.101(a); 34 C.F.R. § 300.102 (a)(3)(i); 34. C.F.R. § 300.300(b)(4)(iii).

Here, Long Beach did not attempt to schedule an IEP team meeting to make a new FAPE offer for the 2020-2021 school year except when it attempted to schedule an IEP team meeting in September 2019 to discuss Parent's notification that she was placing Student at Davidson Learning Center and seeking reimbursement. As discussed in Issue 4, Long Beach held Student's annual IEP team meeting on January 30, 2019. Long Beach did not hold another annual IEP team meeting until almost two years later, on December 15, 2020. Student did not unenroll in Long Beach and he remained a resident of the district for the entire time period at issue.

Dr. Owens was the only witness who testified that Long Beach unenrolled Student based on the 10-day notice Parent gave. Dr. Owens had a doctoral degree in clinical psychology and had been a special education administrator for Long Beach since August 2015. Dr. Owen's answers were evasive regarding Student's 10-day notice and what Long Beach's responsibility was to Student. Considering Dr. Owen's education and

experience, he should have understood the difference between a parentally placed private school student and a situation in which a parent has unilaterally placed the student in a private school and demanded reimbursement for a denial of FAPE. (*Briere, supra*, 948 F.Supp. 1242, 1254.) However, Dr. Owen's confused the two different situations and repeatedly alleged that because Student attended a private school in a neighboring district Student was the responsibility of the neighboring district. Based on Dr. Owen's testimony, Long Beach's argument that Student unenrolled in the district was not persuasive.

Student proved Long Beach denied him FAPE by failing to have an IEP in place at the beginning of the 2020-2021 school year. Long Beach's previous FAPE offer in the January 30, 2019 IEP, was based on Student's performance in a larger special day class where he did not make the same progress as he did at Davidson Learning Center. Long Beach's failure to hold an annual IEP team meeting before the start of the 2020-2021 school year left Student without an offer of placement and services.

Additionally, by the start of the 2020-2021 school year, Student would have received a year of intensive individualized academic instruction from Davidson Learning Center. Thus, the IEP offer may have been significantly different from the January 30, 2019 offer because of the progress Student made at the Davidson Learning Center. Without an annual IEP team meeting, Student was not provided with an updated offer for the 2020-2021 school year. Thus, Parent was unable to make an informed decision regarding Student's placement, program, and services available at a Long Beach high school, and whether they would have accepted Long Beach's FAPE offer at that time. Student proved Long Beach procedurally denied Student a FAPE by failing to have an IEP in place at the beginning of the 2020-2021 school year.

ISSUE 6: DID LONG BEACH PROCEDURALLY DENY STUDENT A FAPE BY PREDETERMINING STUDENT'S DECEMBER 15, 2020 IEP?

Student contends Long Beach predetermined the December 15, 2020 IEP because Long Beach failed to develop current present levels of performance and goals and failed to update placement and services from the previous two-year old IEP. Student contends the predetermination significantly impeded Parent's participation in the IEP process and impeded Student's right to FAPE.

Long Beach contends it did not predetermine the December 15, 2020 IEP and that it considered Parent's input as well as the private evaluation in an open dialogue and revised the draft IEP accordingly during the course of the IEP team meeting.

An education agency's predetermination of an IEP seriously infringes on parental participation in the IEP process, which constitutes a procedural denial of FAPE. (*Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 392 F.3d 840, 858.) Predetermination occurs when an educational agency has made its determination prior to the IEP team meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives. (*H.B., et al. v. Las Virgenes Unified Sch. Dist.* (9th Cir. 2007) 239 Fed. Appx. 342, 344; see also, *Ms. S. ex rel G. v. Vashon Island Sch. Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131 [A school district violates IDEA procedures if it independently develops an IEP, without meaningful parental participation, then simply presents the IEP to the parent for ratification.])

Parent attended Student's December 15, 2020 IEP team meeting along with her attorney and Dr. Johnson. Long Beach special education administrator Dr. Owens, school psychologists Keller and Tague, special education teacher Zebrowski, and school

counselor Toussaint all attended. The IEP team meeting lasted approximately an hour and a half. The IEP team discussed Dr. Johnson's independent educational evaluation and the previously developed IEP goals. Long Beach updated the parent concern and general education teacher input sections in the IEP. Long Beach updated the baseline on the receptive language goal and increased the comprehension goal and sequencing goal to using a second-grade level text instead of a first-grade level text. Long Beach modified Student's word problem mathematics goal to remove the use of a calculator and instead use manipulatives and visual charts. Long Beach also increased the percentage of time Student was outside the general education classroom from 67% to 100%. However, Long Beach did not make any changes to the service hours offered.

Long Beach did not update Student's present levels of performance or make any changes to the IEP based on Dr. Johnson's evaluation. Long Beach did not review Student's progress on goals while he was privately placed, and it did not create new goals for Student based on any present levels of performance. Long Beach presented the previous IEP and FAPE offer from the January 30, 2019 IEP as a take it or leave it offer. Long Beach offered a 30-day interim IEP team meeting for Student upon entry to the public school system to consider programming for his classes and to review IEP goals.

Long Beach's failure to gather any new information prior to the December 15, 2020 IEP team meeting amounted to predetermination as the FAPE offer was identical to Long Beach's previous offer in the January 30, 2019 IEP. Long Beach did not attempt to speak to anyone at Davidson Learning Center or request any of Student's records to update the present levels of performance. Long Beach did not draft updated goals for Student. Long Beach did not make any changes to its offer of placement and services from the January 30, 2019 IEP when Student was in sixth grade to the December 15, 2020 IEP when Student was in eighth grade. This finding of predetermination cannot be

defeated by simply allowing Student's representatives to attend and speak at the November 2019 IEP. (*M.S. v. Los Angeles Unified School Dist.* (C.D. Cal. Jan. 9, 2019, Case No. 2:15-cv-05819-CAS-MRW) 2019 WL 334564, **12-13; 334564; *aff'd sub nom. M. S. by & through R.H. v. Los Angeles Unified School Dist.* (9th Cir. 2019) 913 F.3d 1119). Such "[p]redetermination violates the IDEA because the Act requires that the placement be based on the IEP, and not vice versa." (*K.D., supra*, 665 F.3d at p. 1123). Long Beach did not come to the December 15, 2020 IEP team meeting with an open mind. A school district's predetermination of an IEP seriously infringes on parental participation in the IEP process, which constitutes a procedural denial of FAPE. (*Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 392 F.3d 840, 858.). Long Beach predetermination infringed on Parent's participation and was a procedural violation that denied Student a FAPE.

ISSUE 7: DID LONG BEACH DENY STUDENT A FAPE IN THE DECEMBER 15, 2020 IEP BY FAILING TO OFFER AN APPROPRIATE PLACEMENT, APPROPRIATE SPECIALIZED ACADEMIC INSTRUCTION, AND APPROPRIATE ACADEMIC GOALS?

Student contends Long Beach denied him FAPE in the December 15, 2020 IEP by offering the same placement, services, and goals it offered nearly two years earlier. Long Beach contends the December 15, 2020 IEP offered Student FAPE and was designed to meet Student's unique needs, reasonably calculated to confer meaningful educational benefit and to enable Student to make progress appropriate in light of his circumstances.

Student proved in Issue 2 that the January 30, 2019 IEP denied Student a FAPE by failing to offer an appropriate placement, appropriate specialized academic instruction, and appropriate language arts goals. Student required one-to-one specialized academic instruction to learn which Long Beach did not offer in the January 30, 2019 IEP. Student made progress in a mild to moderate special day class and did not require a more functional curriculum in a moderate to severe special day class. Long Beach's proposed language arts goals were not reasonably calculated to enable him to make appropriate progress. Student also proved in Issue 6 that Long Beach did not change its offer of placement or services, or meaningfully update the academic goals from the January 30, 2019 IEP to the December 15, 2020 IEP. These elements of the IEP were therefore inappropriate for Student and not designed to help Student make progress under *Endrew*. (*Endrew, supra*, 580 U.S. __ [137 S.Ct. 988]).

Therefore, Long Beach denied Student a FAPE in its December 15, 2020 IEP by failing to offer an appropriate placement in a special day class, appropriate specialized academic instruction, and appropriate academic goals.

CONCLUSIONS AND PREVAILING PARTY

As required by 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.

Issue 1: Long Beach did not deny Student a FAPE by failing to conduct an appropriate triennial evaluation prior to the January 30, 2019 IEP team meeting. Long Beach prevailed on Issue 1.

Issue 2: Long Beach denied Student a FAPE in the January 30, 2019 IEP by failing to offer an appropriate placement, appropriate specialized academic instruction, and appropriate language arts academic goals. Student prevailed on Issue 2.

Issue 3: Long Beach did not deny Student a FAPE by failing to initiate a due process proceeding to determine whether the January 30, 2019 IEP offered Student FAPE. Long Beach prevailed on Issue 3.

Issue 4: Long Beach procedurally denied Student a FAPE by failing to convene an annual IEP team meeting on or before January 30, 2020. Student prevailed on Issue 4.

Issue 5: Long Beach procedurally denied Student a FAPE by failing to have an IEP in place at the beginning of the 2020-2021 school year. Student prevailed on Issue 5.

Issue 6: Long Beach procedurally denied Student a FAPE by predetermining Student's December 15, 2020 IEP. Student prevailed on Issue 6.

Issue 7: Long Beach denied Student a FAPE in the December 15, 2020 IEP by failing to offer an appropriate placement, appropriate specialized academic instruction, and appropriate academic goals. Student prevailed on Issue 7.

REMEDIES

As a remedy for FAPE violations in Issues 2, 4, 5, 6, and 7, Student requests \$84,617.50 in reimbursement for educational testing, tuition, and a uniform fee for his placement at Davidson Learning Center from August 29, 2019 through May 14, 2021. Student also requests reimbursement for tuition at Davidson Learning Center from May 17, 2020, through the end of the 2021 extended school year. Student requests compensatory education in the form of continued reimbursement for his tuition at

Davidson Learning Center for the 2021-2022 regular school year and the 2022 extended school year. As a remedy for FAPE violations in Issue 1, Student also requests \$6,000 in reimbursement for Dr. Johnson's November 11, 2020 independent psychoeducational evaluation.

Courts have broad equitable powers to remedy the failure of a school district to provide a FAPE to a disabled child. (20 U.S.C. § 1415(i)(1)(C)(iii); Ed. Code, § 56505, subd. (g); see *School Committee of the Town of Burlington, Massachusetts v. Dept. of Education* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385] (*Burlington*).) This broad equitable authority extends to an ALJ who hears and decides a special education administrative due process matter. (*Forest Grove Sch. Dist. v. T.A.* (2009) 557 U.S. 230, 244, n. 11.)

When a school district fails to provide a FAPE to a student with a disability, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (*Burlington, supra*, 471 U.S. at p. 369-371.) Parents may be entitled to reimbursement for the costs of placement or services that they have independently obtained for their child when the school district has failed to provide a FAPE. (*Ibid*; *Student W. v. Puyallup Sch. Dist.* (9th Cir. 1994) 31 F. 3d 1489, 1496 (*Puyallup*).) A school district also may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Ibid*.) Compensatory education is a prospective award of educational services designed to catch-up the student to where he should have been absent the denial of a FAPE. (*Brennan v. Regional Sch. Dist. No. 1* (D.Conn. 2008) 531 F.Supp.2d 245, 265; *Orange Unified Sch. Dist. v. C.K.* (C.D. Cal. June 4, 2012, No. SACV 11-1253 JVS(MLGx)) 2012 WL 2478389, *12.)

These are equitable remedies that courts may employ to craft “appropriate relief” for a party. An award of compensatory education need not provide “day-for-day compensation.” (Puyallup, *supra*, at pp. 1496-1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.) 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.” (Reid *ex rel.* Reid *v.* Dist. of Columbia (D.D.C. Cir. 2005) 401 F.3d 516, 524; R.P. *ex rel.* C.P. *v.* Prescott Unified Sch. Dist. (9th Cir. 2011) 631 F. 3d 1117, 1122.)

A parent may be entitled to reimbursement for placing a student in a private placement without the agreement of the local school district if the parents prove at a due process hearing that the district had not made a FAPE available to the student in a timely manner prior to the placement, and the private placement was appropriate. (Ed. Code, § 56175; 20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c); see also *Burlington*, *supra*, 471 U.S. at pp. 369-370 (reimbursement for unilateral placement may be awarded under the IDEA where the district’s proposed placement does not provide a FAPE).) The private school placement need not meet the state standards that apply to public agencies to be appropriate. (*Florence County Sch. Dist. Four v. Carter* (1993) 510 U.S. 7, 13-14, [114 S.Ct. 361].)

The ruling in *Burlington* is not so narrow as to permit reimbursement only when the placement or services chosen by the parent are found to be the exact proper placement or services required under the IDEA. (*Alamo Heights Independent Sch. Dist. v. State Board of Education* (5th Cir. 1986) 790 F.2d 1153, 1161; *J.P. ex rel. Popowitz v. Los Angeles Unified Sch. Dist.* (C.D. Cal. Feb. 16, 2011, No. CV 09-01083 MMM MANX) 2011 WL 12697384, at *23.) Although the parents’ placement need not be a “state

approved” placement, it still must meet certain basic requirements of the IDEA, such as the requirement that the placement address the child’s needs and provide them educational benefit. (34 C.F.R. § 300.148(c); *Florence County, supra*, 510 U.S. at p. 14.)

Long Beach denied Student a FAPE in the several ways discussed earlier. As such, Student is entitled to a remedy for all FAPE violations in the form of parental reimbursement for educationally related expenses. Long Beach did not deny Student a FAPE by failing to conduct an appropriate triennial evaluation prior to the January 30, 2019 IEP team meeting. Therefore, Student is not entitled to reimbursement for Dr. Johnson’s November 11, 2020 independent psychoeducational evaluation.

Reimbursement may be reduced or denied in a variety of circumstances, including whether a parent acted reasonably with respect to the unilateral private placement. (20 U.S.C. § 1412(a)(10)(C)(iii); 34 C.F.R. § 300.148(d); Ed. Code, § 56176.) These rules may be equitable in nature, but they are based in statute.

In *C.B. v. Garden Grove Unified Sch. Dist.* (9th Cir. 2011) 635 F.3d 1155 (*Garden Grove*), the Ninth Circuit set forth the standards to be applied in determining whether a private placement is appropriate for the purpose of reimbursement. There, a student had benefited substantially from a private placement, but parents were awarded only partial reimbursement because the placement did not address all of the student’s special education needs. (*Id.* at pp. 1157-1158.) The Court of Appeals held that parents were entitled to full reimbursement because the IDEA “does not require that a private school placement provide all services that a disabled student needs in order to permit full reimbursement.” (*Id.* at p. 1158.) In reaching this conclusion the Ninth Circuit relied upon a standard set forth by the Second Circuit. The Court concluded that, for a parent to qualify for reimbursement, parents need not show that a private placement furnished

every special service necessary to maximize their child's potential. They need only to demonstrate that the placement provided educational instruction specially designed to meet the unique needs of a child with a disability, supported by such services as are necessary to permit the child to benefit from instruction. (*Id.* at p. 1159 [quoting *Frank G. v. Bd. of Education* (2d Cir. 2006) 459 F.3d 356, 365 (citations and emphases omitted)]).)

Long Beach denied Student a FAPE beginning with the January 30, 2019 IEP and continuing through to January 15, 2021, when Student filed his request for due process. However, Student mitigated damages in September 2019 by enrolling in Davidson Learning Center. Parent informed Long Beach on August 29, 2019, of Student's unilateral placement and Parent's request for reimbursement. Parent timely and appropriately notified Long Beach of her intent because Parent did not agree that Long Beach offered Student a FAPE. At Davidson Learning Center Student received exclusively one-to-one instruction. Although Dr. Johnson opined Student required exclusively one-to-one instruction to learn, Student made progress in the mild to moderate special day class while at Rogers Middle School. Student did not prove he required exclusively one-to-one instruction he received at Davidson from September 2019 through extended school year 2021. Student received more individual instruction between September 2019 and March 2020 than the four to five hours Dr. Johnson recommended at hearing.

Christine Davidson owned and operated Davidson Learning Center. Davidson assessed Student before he enrolled in September 2019, and Dr. Johnson reassessed student in September 2020 both using the Woodcock-Johnson Test of Achievement. Student's grade level equivalence increased in almost every area on average by about seven months. By the time of the hearing, Student was moving to reading third-grade

level stories. Additionally, Student was intrinsically motivated to work on academics and was able to sit for up to 40 minutes and attend to a task. Student showed that he received educational benefit from Davidson Learning Center.

Considering all the relevant facts and circumstances, an appropriate remedy is for Long Beach to reimburse Parent for tuition at Davidson Learning Center from September 2019 through May 14, 2021, including a \$300 quarterly curriculum development fee, and \$1000 for the initial academic testing, in the total amount of \$84,517.50. Parent is not entitled to reimbursement for the \$100 uniform fee. These amounts were determined by the billing and payment statements provided by Student. Parent is also entitled to reimbursement for Student's tuition at Davidson Learning Center for the days Student attended, from May 17, 2021 through the end of extended school year 2021, not to exceed \$65 per hour for three hours a day, and a \$300 curriculum development fee for fourth quarter 2021. Student is not entitled to any additional compensatory education remedy as Student did not establish Long Beach's denial of FAPE warranted an additional year of attendance at Davidson Learning Center for the 2021-2022 school.

ORDER

1. Within 45 days of this Decision, Long Beach shall reimburse Parent \$84,517.50 for the cost of Student's tuition at Davidson Learning Center for the period of September 2019 through May 14, 2021, which does not include the \$100 uniform fee. No further proof of payment is required as sufficient proof was submitted at hearing.
2. Long Beach shall reimburse Parent for Student's tuition at Davidson Learning Center for the days Student attended, not to exceed \$65 per hour for three hours

a day, from May 17, 2021 through the end of extended school year 2021, and a \$300 curriculum development fee for fourth quarter 2021. Long Beach shall reimburse Parent within 45 days of its receipt of adequate documentation of payment to Davidson Learning Center.

3. All of Student's other requests for relief are 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/

Linda Johnson

Administrative Law Judge

Office of Administrative Hearings