

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

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CASE NO. 2021040203

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PARENTS ON BEHALF OF STUDENT,

v.

MORGAN HILL UNIFIED SCHOOL DISTRICT.

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DECISION

JULY 19, 2021

On April 5, 2021, Parents on behalf of Student filed a due process hearing request with the Office of Administrative Hearings, called OAH, naming Morgan Hill Unified School District. Administrative Law Judge Cynthia Fritz heard this matter by videoconference on June 2, 3, 14, 15, 16, and 17, 2021.

Attorney Blanca Vaughan represented Student. Parent attended all hearing days on Student's behalf. Parent was assisted by a Spanish interpreter.

Attorneys Laura Schulkind and Amy Brandt represented Morgan Hill Unified School District, called Morgan Hill. Dr. Rebecca O'Brien, Director of Special Education, attended all hearing days on Morgan Hill's behalf.

At the parties' request, OAH continued the matter for written closing briefs. On June 22, 2021, the undersigned ordered the parties to file closing briefs by July 6, 2021. On July 6, 2021, the record was closed, and the matter was submitted.

## ISSUES

At hearing, Student's issues were discussed and clarified. Neither party objected to the clarified issues. Student's issues have been reorganized for the purpose of analysis and clarity of this Decision. The administrative law judge has authority to reword and reorganize a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

1. Is Student entitled to extend the two-year statute of limitations for special education claims alleged against Morgan Hill because Parents were prevented from requesting the due process hearing due to:
  - a. specific misrepresentations that Morgan Hill had solved the problem forming the basis of the due process hearing request, including misrepresenting Student's assessment scores, failing to provide accurate information, stating that Student and Parents have no rights under the Individuals with Disabilities Education Act, called IDEA, and that Parents could not request a due process hearing, at the June 4 and December 5, 2018 meetings; and
  - b. Morgan Hill withholding information from Parents that was required to be provided to the Parents, including procedural safeguards?

2. Did Morgan Hill deny Student a free appropriate public education, called FAPE, during the 2017-2018 school year by failing to:
- a. meet its child find obligation through June 3, 2018, and failing to find Student eligible for special education under the categories of other health impairment and specific learning disability;
  - b. assess Student in academics; cognitive and intellectual functioning; language processing, development, and use; gross and fine motor; sensory integration; social emotional; autism; attention deficit activity disorder; special circumstances instructional assistant; and after Parents requested assessment;
  - c. timely provide Parents with an assessment plan within 15 days of Parents' request for assessment;
  - d. timely complete all necessary assessments and hold an individualized education program, called an IEP, team meeting within 60 days of Parents' consent to the assessments on April 11, 2018;
  - e. timely and appropriately issue a prior written notice after Parents' and Student's providers requested assessments;
  - f. file for a due process hearing after Parents disagreed with the initial assessment results;
  - g. provide Parents with procedural safeguards when legally required;
  - h. make a formal, clear, and specific FAPE offer in the June 4, 2018 service plan;
  - i. timely consider third-party assessments and reports from Kaiser Permanente and Rebekah Children's Services before developing the June 4, 2018 IEP;
  - j. consider Parents' input and Parents' request for assessments before developing the June 4, 2018 IEP;

- k. provide copies of the documents in Spanish before or during the June 4, 2018 IEP team meeting; and
  - l. develop an appropriate service plan on June 4, 2018?
3. Did Morgan Hill deny Student a FAPE during the 2018-2019 school year by:
- a. failing to assess Student in academics; cognitive and intellectual functioning; language processing, development, and use; gross and fine motor; sensory integration; social emotional; autism; attention deficit activity disorder; special circumstances instructional assistant; and after Parents requested assessment;
  - b. failing to timely provide Parents with an assessment plan within 15 days of a referral for assessment;
  - c. failing to timely and appropriately issue a prior written notice after Parents and Student's providers requested assessments;
  - d. failing to provide Parents with procedural safeguards when legally required?
  - e. predetermining the December 5, 2018 IEP offer;
  - f. failing to make a formal, clear, and specific FAPE offer at the December 5, 2018 IEP team meeting;
  - g. failing to have the required IEP team members at the December 5, 2018 IEP team meeting;
  - h. failing to provide copies of the IEP documents in Spanish during or before the December 5, 2018 IEP team meeting;
  - i. failing to consider third-party assessments and reports from Kaiser Permanente and Rebekah Children's Services before developing the December 5, 2018, IEP;

- j. failing to consider Parents' input and Parents' request for assessments before developing the December 5, 2018 IEP; and
  - k. failing to develop an appropriate IEP, address Student's unique needs, and develop appropriate and measurable goals at the December 5, 2018 IEP team meeting?
4. Did Morgan Hill deny Student a FAPE during the 2019-2020 school year by:
- a. failing to assess Student in academics; cognitive and intellectual functioning; language processing, development, and use; gross and fine motor; sensory integration; social emotional; autism; attention deficit activity disorder; special circumstances instructional assistant; and after Parents requested assessment;
  - b. failing to timely provide Parents with an assessment plan within 15 days of a referral for assessment;
  - c. failing to timely and appropriately issue a prior written notice after Parents and Student's providers requested assessments;
  - d. failing to provide Parents with procedural safeguards when legally required?
  - e. predetermining the August 21, 2019 IEP offer;
  - f. failing to make a formal, clear, and specific FAPE offer at the August 21, 2019, IEP team meeting;
  - g. failing to have the required IEP team members at the August 21, 2019 IEP team meeting;
  - h. failing to provide copies of the IEP documents in Spanish during or before the August 21, 2019 IEP team meeting;

- i. failing to timely consider third-party assessments and reports from Kaiser Permanente and Rebekah Children's Services before developing the August 21, 2019 IEP; and
  - j. failing to consider Parents' input and Parents' request for assessments before developing the August 21, 2019 IEP?
5. Did Morgan Hill deny Student a FAPE during the 2020-2021 school year through April 5, 2021, by:
- a. failing to assess Student in academics; cognitive and intellectual functioning; language processing, development, and use; gross and fine motor; sensory integration; social emotional; autism; attention deficit activity disorder; special circumstances instructional assistant; and after Parents requested assessment;
  - b. Failing to timely provide Parents with an assessment plan within 15 days of a referral for assessment;
  - c. Failing to provide Parents with procedural safeguards when legally required;
  - d. Exiting Student from special education services on October 8, 2020, without a comprehensive assessment and because Parents refused to sign the June 4, 2018 service plan; and
  - e. failing to provide Parents with complete educational records since November 3, 2020?

## 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, are to ensure:

- all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for 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 (2006); 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, 63 [126 S.Ct. 528, 163 L.Ed2d 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) Student initiated this matter and bore 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 11 years old and in the fourth grade at the time of hearing. Student resided with Parents within Morgan Hill's geographic boundaries at all relevant times. In 2017, Student was diagnosed with attention deficit hyperactivity disorder. Morgan Hill found Student eligible for special education under the categories of specific learning disability and other health impairment on December 5, 2018.

ISSUES 1(A) AND 1(B): IS STUDENT ENTITLED TO EXTEND THE TWO-YEAR STATUTE OF LIMITATIONS FOR SPECIAL EDUCATION CLAIMS ALLEGED AGAINST MORGAN HILL BECAUSE PARENTS WERE PREVENTED FROM REQUESTING THE DUE PROCESS HEARING DUE TO SPECIFIC MISREPRESENTATIONS THAT MORGAN HILL HAD SOLVED THE PROBLEM FORMING THE BASIS OF THE DUE PROCESS HEARING REQUEST, AND THAT MORGAN HILL WITHHELD INFORMATION FROM PARENTS THAT WAS REQUIRED TO BE PROVIDED TO THE PARENTS?

Student asserted that the two exceptions to the statute of limitations apply and Student is entitled to relief for claims dating back to the 2017-2018 school year. Specifically, Student claimed that Morgan Hill misrepresented information to Parent at the 2018 IEP team meetings and withheld procedural safeguards preventing Student from filing for due process hearing. Morgan Hill maintained that it did not misrepresent information and provided procedural safeguards to Parent as early as March 2018, such that no exception applies to extend the statute of limitations.

The statute of limitations for filing of due process requests in California is two years, consistent with federal law. (Ed. Code, § 56505, subd. (l); see also 20 U.S.C. § 1415(f)(3)(C).) In *Avila v. Spokane Sch. District 81* (9th Cir. 2017) 852 F.3d 936 (*Avila*), the Court found that the IDEA's statute of limitations barred claims filed more than two years after the time parents "knew or should have known" about the actions forming the basis for their complaint. (*Id.* at pp. 937, 945.) The Court held that in the IDEA's statute of limitations provision, Congress intended to enact a "discovery rule," not an "occurrence rule." (*Id.* at pp. 939-945.)

California implements the IDEA through its special education law. (*Miller v. San Mateo-Foster City Unified School Dist.* (N.D. Cal. 2004) 318 F.Supp.2d 851, 860.) Consistent with the IDEA, California has held that a claim accrues for purposes of the statute of limitations when a parent learns of the underlying facts that form a basis for the action. (Ed. Code, § 56505, subd. (j).)

Title 20 United States Code section 1415(f)(3)(D) and Education Code section 56505, subdivision (j), establish exceptions to the statute of limitations in cases in which the parent was prevented from filing a request for due process due to specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint, or the local educational agency's withholding of information from the parent that was required to be provided to the parent. (20 U.S.C. § 1415(f)(3)(D)(i) & (ii); Ed. Code, § 56505, subd. (l)(1) and (2).) The Ninth Circuit reaffirmed this rule. (*Avila, supra*, 852 F.3d 936.)

Invoking the exceptions to the statute of limitations requires a showing that the school district's misrepresentation or withholding of information caused the failure to file the due process complaint on time. Thus, where the evidence showed that the parents were fully aware of their procedural options, they cannot excuse a late filing by pointing to the school's failure to formally notify them of those options. (*D.K. v. Abington School Dist.* (3d Cir. 2012) 696 F.3d 233, 246-247.)

## MORGAN HILL DID NOT MISREPRESENT INFORMATION TO PARENT OR CLAIM TO SOLVE THE PROBLEM FORMING THE BASIS FOR THE DUE PROCESS COMPLAINT

Student asserted the statute of limitations should be extended because Morgan Hill misrepresented Student's assessment scores at two 2018 IEP team meetings, failed to provide accurate information, and stated that Student and Parents neither had IDEA rights nor the right to request a due process hearing while Student remained privately placed. Student argues that Parent delayed filing a due process hearing complaint, relying on Morgan Hill's misrepresentations. Morgan Hill maintained that it did not misrepresent information to Parent, and Morgan Hill never informed Parent that it solved the problem that formed the basis for the due process complaint.

Student failed to prove that Morgan Hill misrepresented information at the June 4 and December 5, 2018 IEP team meetings. At hearing, Parent generally found the assessment information presented at the December 2018 IEP team meeting incorrect but failed to identify anything specific such as assessment scores or data. Student failed to establish through witnesses or documentary evidence any inaccuracies in the assessment information. Even if Student had proven inaccuracies in the assessment information, Student failed to show how this amounted to Morgan Hill representing that it had solved Student's problem forming the basis of the complaint.

Parent further described that Parent did not understand acronyms listed in the IEP documents and they were not explained by Morgan Hill. Parent claimed this amounted to misrepresenting information to Parent. However, Parent failed to prove how a lack of acronym comprehension is a misrepresentation or an attempt to mislead

Parent. Parent could have asked for clarification from Morgan Hill staff or Parent's advocate, who were present at the December 2018 IEP team meeting.

Additionally, Student alleged that on December 5, 2018, El Toro Elementary principal, Darren McDonald, stated that Student did not have any IDEA rights and could not file for due process hearing because of Student's status in private school. Student pointed to the June 4, 2018 document, that Morgan Hill called a service plan, in support of the position. Parent's description of the event, however, was not corroborated by any other witness. Further, McDonald denied this allegation and described in detail how the IEP information was explained to Parent informing Parent of the difference in special education services that could be received while in public versus private school. McDonald testified thoughtfully and carefully and was knowledgeable of the IEP team meeting process. Since McDonald was a credible witness, McDonald's testimony was given significant weight. The evidence established that McDonald did not tell Parent Student had no IDEA rights.

Additionally, the language Parent pointed out to bolster Parent's interpretation of the situation was unpersuasive. The language in the service plan states "Parent/guardian(s) acknowledge, understand, and agree that as a private school child with a disability, there is no individual entitlement to receive some or all of the special education related services they would receive if enrolled in a public school. Parent/guardian(s) understand that in accordance with the Individuals with Disabilities Act (IDEA) 2004, their rights to due process do not apply in a private school setting." This language relates to filing a due process hearing complaint against a private school, not a public school. If Parent misunderstood this language, Parent could have clarified the information with Morgan Hill, Parent's advocate who was present at the December 5, 2018 IEP team meeting, or with the non-profit agency that Parent worked

with at that time who was assisting Parent in special education matters with Morgan Hill. Additionally, a misunderstanding is not a misrepresentation. Thus, Parent's assertion that Morgan Hill misrepresented information at 2018 IEP team meetings was unconvincing. Further, as discussed below, Parent received procedural safeguards while Student was attending private school explaining a parent's right to file for a due process hearing.

The evidence also established that Morgan Hill sent Parent prior written notices from May 2017 through August 2019, denying a number of Parent's requests. The notices kept Parent apprised of the nature of the dispute between the parties, rather than suggesting Morgan Hill resolved the dispute. The weight of the evidence overwhelmingly supported a finding that Morgan Hill did not make misrepresentations to Parent upon which Parent relied nor did Morgan Hill represent to Parent that it solved the dispute between the parties.

## MORGAN HILL PROVIDED PROCEDURAL SAFEGUARDS TO PARENT

Student claimed that Parent did not know how to file for due process before April 5, 2021, because Morgan Hill withheld the notice of parent's rights and procedural safeguards from Parent at the 2018 IEP team meetings, and when it provided assessment plans and prior written notices. Morgan Hill maintained it appropriately provided Parent with procedural safeguards, making Parent aware of Student's right to file a request for due process hearing as early as March 2018.

A copy of parental rights and procedural safeguards must be provided to parents of a child with a disability only one time a school year, except a copy must also be given: (1) on initial referral or parental request for evaluation; (2) upon receipt of the first state complaint; (3) upon receipt of the first due process hearing request; (4) when a decision

is made for a removal that constitutes a change in placement, and (5) upon parent request. (20 U.S.C. § 1415(d); 34 C.F.R. § 300.504(a) (2007); Ed. Code, § 56301, subd. (d)(2).)

Student failed to establish that Morgan Hill withheld procedural safeguards to Parent. At hearing, Parent maintained that Parent did not or could not recall receiving procedural safeguards at any time. However, the weight of the evidence established that Parent received procedural safeguards in Spanish on March 29, June 4, and December 5, 2018.

Shelly Ware, Morgan Hill's special education teacher and resource specialist, sent Parent an assessment plan and procedural safeguards in Spanish through electronic transmission on March 29, 2018. Ware sent the documents to Parent's preferred email address through a preferred mode of communication. Ware's testimony was corroborated through documentation and undiminished during cross-examination. Thus, it was given great weight and established Parent received copies of procedural safeguards in Spanish, Parent's primary language.

The evidence did not support Parent's contentions that Morgan Hill erroneously sent emails to the wrong address or that the emails went into a spam folder. First, Morgan Hill's information technology specialist Brandon Coelho demonstrated that, even errors described by Parent as additional periods in an email address would not impede transmission to the proper recipient. Second, the burden to check all email folders for electronic transmissions fell on Parent. Moreover, on April 11, 2018, Parent returned the signed assessment plan to Morgan Hill, demonstrating that Parent received the March 29, 2018 email, which included an assessment plan and procedural safeguards in Spanish.

Parent received procedural safeguards in Spanish at the two 2018 IEP team meetings. The IEP notes simultaneously drafted during the June 4, and December 5, 2018 IEP team meetings expressly stated Parent was provided procedural safeguards. The December 5, 2018 IEP team meeting notes specified that the procedural safeguards were offered in Spanish. This was corroborated by Morgan Hill witnesses Ware; McDonald; Maria Elena Wilde, Morgan Hill's Spanish interpreter; and Colleen Rubi, Morgan Hill's special education teacher and resource specialist; who attended one or more of the meetings and similarly testified that it is the custom and practice to offer procedural safeguards at the beginning of all Morgan Hill IEP team meetings, including Student's IEP team meetings. Wilde added that Wilde would stop the IEP team meeting and retrieve the Spanish procedural safeguards if a parent did not have them. Without exception, Ware, McDonald, Wilde, and Rubi demonstrated their extensive knowledge and experience in Morgan Hill's IEP team meeting practices. They testified uniformly in a detailed manner and in no way did examination by Student's counsel reveal weaknesses in their testimony. All of them were credible and persuasive and their testimony was corroborated by a contemporaneous document that stated the same. For these reasons, their testimony was given substantial weight. Therefore, the evidence overwhelmingly demonstrated that Parent received procedural safeguards in Spanish at the June 5, and December 5, 2018 IEP team meetings. Thus, parent was made aware of how to file a due process hearing request.

Student also asserted that Parent requested assessments on numerous occasions from May 2017 through August 2019 and Morgan Hill failed to provide procedural safeguards when denying the assessment requests. Regardless of whether Morgan Hill provided procedural safeguards on those occasions is inconsequential for the statute of

limitations analysis, as the record established that Parent received and had knowledge of the parental rights and procedural safeguards in March, June, and December 2018.

Parent, at hearing, claimed a lack of understanding of documents received by Morgan Hill, including procedural safeguards. However, Parent worked with an outside agency, which provided Parent with advice, information, and aid assisting Parent with writing letters to and interacting with Morgan Hill regarding special education issues. Parent also had an advocate present at the December 5, 2018 IEP team meeting. Additionally, Morgan Hill repeatedly provided Parent with contact information to discuss any questions. The evidence did not demonstrate that Parent sought input on procedural safeguards from them, Morgan Hill, or anyone else. Thus, Parent was unpersuasive regarding this issue. Here, the evidence conclusively proved that Parent had knowledge of procedural safeguards by March 2018.

Student failed to demonstrate by a preponderance of the evidence that Morgan Hill misrepresented information that it had solved Student's problems forming the basis of the complaint or withheld required information which prevented Student from filing a request for due process hearing earlier than April 5, 2021. Therefore, Student failed to meet the burden of proving that either exception to the two-year statute of limitations applied and that the statute of limitations should be extended. Accordingly, the time period at issue in this matter was determined to be April 5, 2019, through April 5, 2021.

After the undersigned administrative law judge announced the statute of limitations ruling, the remaining issues were clarified and reframed to reflect the time period at issue. Neither party objected to the clarified and reframed issues after given the opportunity to raise concerns. For purposes of clarity, the undersigned consolidated some issues and addressed issues out of order in this Decision.

ISSUES 2(A) THROUGH 2(L), AND 3(E) THROUGH 3(L): DID MORGAN HILL DENY STUDENT A FAPE DURING THE 2017-2018 AND 2018-2019 SCHOOL YEARS?

As discussed in Issue 1, Student failed to prove by a preponderance of the evidence that either of the two exceptions for extending the statute of limitations applied in this matter. Thus, the statute of limitations was not extended. Issue 2, in its entirety, alleged violations during the 2017-2018 school year. Accordingly, issue two is outside the statute of limitations time period and is barred. Issue 3, subsections (e) through (k) allege procedural violations that occurred at the December 5, 2018 IEP team meeting and before April 5, 2019. Thus, Issue 3, subsections (e) through (k), are outside the statute of limitations and are barred.

ISSUE 5(D): DID MORGAN HILL DENY STUDENT A FAPE DURING THE 2020-2021 SCHOOL YEAR THROUGH APRIL 5, 2021, BY EXITING STUDENT FROM SPECIAL EDUCATION SERVICES ON OCTOBER 8, 2020, WITHOUT A COMPREHENSIVE ASSESSMENT AND BECAUSE PARENTS REFUSED TO SIGN THE JUNE 4, 2018 SERVICE PLAN?

Student claimed that Morgan Hill denied Student a FAPE when it impermissibly exited Student from special education services on October 8, 2020, without assessing Student and because Parents refused to sign the June 4, 2018 IEP. Morgan Hill conceded that Parent consented to special education eligibility but maintained that Parent failed to consent to any special education services at any time, after repeated efforts to gain consent. Thus, Morgan Hill argued, Student was not a special education Student, and it could not exit Student from special education. The October 8, 2020

letter to Parent, Morgan Hill maintained, was informing Parent that it would discontinue any further attempts to gain consent for special education services, and that Student's status remained as a general education student.

The Education Code, United States Code, and Code of Federal Regulations require a school district to seek to obtain informed consent from the parent of a child before providing special education and related services to the child and must make reasonable efforts to obtain informed consent from the parent for the initial provision of special education and related services. (20 U.S.C. §§ 1414(a)(1)(D)(i)(II); 34 C.F.R. § 300.300(b)(1) and (2) (2008); Ed. Code, § 56346, subd. (a).) A school district will not be considered in violation of the requirement to make a FAPE available to a child because of the failure to provide child with special education and related services for which the parent refused or failed to provide consent. (20 U.S.C. §§ 1414(a)(1)(D)(ii)(II-III)(aa) and 14150(b); 34 C.F.R. § 300.300(b)(3) (2008.); Ed. Code, §§ 56346, subd. (b), and 56506, subd. (e).

The evidence established that Morgan Hill found Student eligible under the special education categories of specific learning disability and other hearing impairment on December 5, 2018, and Parent agreed in writing to Student's special education eligibility the same day. The evidence further established that Parent disputed the services offered to Student and types of assessments that needed to be conducted and has never agreed to any special education services or consented to any IEP at any time. Because Parent has never consented to any special education services, Morgan Hill maintained that Student has never been a special education student.

Morgan Hill's argument is misplaced. Once Parent consented to Student's special education eligibility on December 5, 2018, Student's special education rights attached as Parent agreed to the initial provisions of special education. The dispute here was not over eligibility or that Parent did not consent to special education. In fact, the evidence overwhelmingly showed that both parties agreed Student was eligible for special education and wanted Student to receive services. Here, the dispute is over the types of related services and supports offered to Student, and what assessments should be conducted.

Once a child is found eligible for special education, unless specific statutory exceptions apply, a local educational agency shall evaluate a child with a disability before determining that the child is no longer a child with a disability. (20 U.S.C. § 1414 (c)(5)(A).) Once the local educational agency properly completes the reassessment, it is required to develop an appropriate IEP or disqualify the student if the reassessment demonstrated that the child was no longer eligible for special education services. (See *U.S. ex rel. A.O. v. Los Gatos-Saratoga Joint Union High School Dist.* (9th Cir. 2007) 484 F.3d 1230, 1233.)

The evidence demonstrated that on October 8, 2020, Morgan Hill sent a letter with a copy of parental rights and procedural safeguards to Parent informing Parent that based upon its attempts to gain consent to special education services, and Parent's refusals, it would discontinue any further attempts, and Student would be treated as a general education Student. However, as already determined, Student was a special education student at that time. Thus, Morgan Hill failed to assess Student to exit Student from special education eligibility as legally required. Accordingly, Student

proved by the preponderance of the evidence that Morgan Hill impermissibly exited Student from special education on October 20, 2020, which is a procedural violation under the IDEA.

Procedural violations of the IDEA only constitute a denial of FAPE if they: (1) impeded the student's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2); see *N.B. v. Hellgate Elementary Sch. Dist., ex rel. Bd. of Directors, Missoula County, Mont.* (9th Cir. 2008) 541 F.3d 1202, 1208, quoting *Amanda J. ex rel. Annette J. v. Clark County Sch. Dist.* (9th Cir. 2001) 267 F.3d 877, 892.)

Morgan Hill's failure to properly exit Student from special education and related services denied Student a FAPE. By Morgan Hill circumventing the exiting process, Parent's participation was impeded because Parent was not given the opportunity to attend an exit IEP team meeting and give input. Further, Morgan Hill impacted Student's education and Student's ability to receive a FAPE because Student was no longer eligible to receive special education and related services. Accordingly, Student proved by a preponderance of the evidence that Morgan Hill denied Student a FAPE by impermissibly exiting Student from special education on October 20, 2020 through April 5, 2021..

ISSUE 5(A): DID MORGAN HILL DENY STUDENT A FAPE DURING THE 2020-2021 SCHOOL YEAR, THROUGH APRIL 5, 2021, BY FAILING TO ASSESS STUDENT IN ACADEMICS; COGNITIVE AND INTELLECTUAL FUNCTIONING; LANGUAGE PROCESSING, DEVELOPMENT, AND USE; GROSS AND FINE MOTOR; SENSORY INTEGRATION; SOCIAL EMOTIONAL; AUTISM; ATTENTION DEFICIT ACTIVITY DISORDER; SPECIAL CIRCUMSTANCES INSTRUCTIONAL ASSISTANT; AND AFTER PARENTS REQUESTED IT?

As discussed in Issue 5, subsection (d), Student proved that Morgan Hill impermissibly exited Student without conducting a reassessment which denied Student a FAPE. Thus, Student also proved by the preponderance of the evidence that Morgan Hill denied Student a FAPE by failing to assess Student before exiting Student on October 20, 2020.

ISSUES 3(A) AND 4(A): DID MORGAN HILL DENY STUDENT A FAPE FROM APRIL 5, 2019, THROUGH THE END OF THE 2019-2020 SCHOOL YEAR, BY FAILING TO ASSESS STUDENT IN ACADEMICS; COGNITIVE AND INTELLECTUAL FUNCTIONING; LANGUAGE PROCESSING, DEVELOPMENT, AND USE; GROSS AND FINE MOTOR; SENSORY INTEGRATION; SOCIAL EMOTIONAL; AUTISM; ATTENTION DEFICIT ACTIVITY DISORDER; SPECIAL CIRCUMSTANCES INSTRUCTIONAL ASSISTANT; AND AFTER PARENTS REQUESTED IT?

Student contended that Morgan Hill failed to assess Student in academics; cognitive and intellectual functioning; language processing, development, and use;

gross and fine motor; sensory integration; social emotional; autism; attention deficit activity disorder; and special circumstances instructional assistant.

Morgan Hill maintained that it appropriately assessed Student for special education eligibility, resulting in an initial IEP dated June 4, 2018. Morgan Hill argued that it did not suspect further disabilities warranting assessment at any time during the April 5, 2019 through April 5, 2021 statutory time frame.

A local educational agency must assess a special education student in all areas of suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. (20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4) (2006); Ed. Code, § 56320, subd. (f).) A school district's failure to conduct appropriate assessments or to assess in all areas of suspected disability is a procedural violation. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1031-1033. (*Park*).)

A disability is "suspected," and a child must be assessed, when the district is on notice that the child has displayed symptoms of that disability or that the child may have a particular disorder. (*Timothy O. v. Paso Robles Unified School District* (9th Cir. 2016) 822 F.3d 1105, 1119-21.) That notice may come in the form of concerns expressed by parents about a child's symptoms, opinions expressed by informed professionals, or other less formal indicators, such as the child's behavior.

Morgan Hill first assessed Student for special education and related services after Parent requested an assessment due to concerns with academics and behavior, which resulted in a psychoeducation assessment report dated May 31, 2018, conducted by Doctor Gail Waxman, a Morgan Hill school psychologist.

Waxman administered tests in the areas of academics, intellectual functioning and cognition, fine motor and visual motor processing, auditory processing, and social emotional, and adaptive skills in May 2018. Waxman determined that Student had significant signs of dyslexia, processing, and attention issues. Waxman recommended that Student be found eligible for special education under the category of specific learning disability due to a discrepancy between academics and intellectual functioning related to processing disorders and under a second category of other health impairment because of Student's attention deficit activity disorder diagnosis and attention issues. The evidence established that the IEP team agreed with Waxman's recommendations, and found Student eligible for special education under the categories of specific learning disability and other health impairment at the December 5, 2018 IEP team meeting.

Student argued for the first time in the closing brief that Waxman's assessments were incomplete and inaccurate. However, the quality of the completed assessments was not at issue in this case. Rather, at issue was whether Student had additional needs requiring further assessments. Even had Student intended to challenge Waxman's assessment, Student failed to proffer evidence at hearing undermining the appropriateness of the assessments. Student failed to present any evidence to refute the appropriateness of the report, any inaccuracies, or that Morgan Hill failed to assess in all suspected areas of disability. To the contrary, the un rebutted testimony of O'Brien, who holds a clinical psychology master's degree with 20 years of experience as a school psychologist, and a doctorate in education, established that the report was complete, accurate, and current.

## ACADEMICS, INTELLECTUAL AND COGNITIVE FUNCTIONING, SOCIAL EMOTIONAL AND ATTENTION DEFICIT HYPERACTIVITY DISORDER

Student failed to establish the need for further assessments in the areas of academics, intellectual and cognitive functioning, social emotional, and attention deficit hyperactivity disorder. Student argued that Student's prior performance and testing at Morgan Hill and Student's current performance and testing at private school should have informed Morgan Hill to reassess Student from April 5, 2019, through the end of the 2018-2019 school year.

At that time, Student was attending private school and Student failed to establish that Parent provided documents or information to Morgan Hill since the time of the May 2018 assessments to indicate any challenges or concerns that would require reassessments or additional assessments. Further, Morgan Hill had not interacted or observed Student since the May 2018 assessments. As such, Student failed to meet the burden of proving that Morgan Hill should have assessed Student from April 5, 2019, to the end of the 2018-2019 school year.

Parent maintained that Morgan Hill should have assessed Student during the 2019-2020 school year. Parent reenrolled Student in Morgan Hill for third grade and fourth grade, during the 2019-2020 and 2020-2021 school years. Student's third and fourth teachers, Carrie Williams and Tim Downer, respectively, reaffirmed that Student continued to have weaknesses in reading, writing, math, and attention. While Parent argued that Student's below grade level performance and low scores in third and fourth grade indicated further assessments were needed, the new information garnered from Williams and Downer's testimony and documentary evidence, was consistent with

Waxman's assessments and determinations of Student's academic and attention issues in 2018. Thus, Morgan Hill was under no obligation to reassess those areas of suspected disability covered in the existing psychoeducation report that were already known. Accordingly, Student failed to meet the burden of proof that assessments were needed in the areas of academics; cognitive and intellectual functioning; social emotional, and attention deficit activity disorder.

## AUTISM

Parent, at hearing, opined that Student may be autistic. Student presented no evidence supporting this opinion. Before hearing, Parent never advised Morgan Hill that Student may be autistic. Nor did Parent or Student request an assessment in the area of autism until the filing of the complaint. Likewise, Student presented no prior assessments, observations, or other evidence in support of this opinion.

Student argued in the closing brief that an autism assessment was necessary because Morgan Hill failed to conduct any previous formal social emotional testing. Yet, Waxman conducted social emotional testing in May 2018. Further, Student asserted that the December 5, 2018 IEP had a behavior goal that supported autism testing. However, the behavior goal was related to attention, not autism. Therefore, Student's contentions were unpersuasive. Accordingly, Student failed to demonstrate that Morgan Hill should have assessed Student in autism.

## ADAPTIVE BEHAVIOR

Parent asserted that Student needed an adaptive behavior assessment. Morgan Hill argued that no evidence suggested that Student had a suspected disability in adaptive behavior.

Parent requested an adaptive behavior assessment from Morgan Hill on June 14, 2019, which was denied on August 22, 2019. Here, the record did not support the need for an adaptive behavior assessment. The undisputed testimony by O'Brien established that adaptive behavior assessments are designed to evaluate daily living skills like dressing, feeding, or using the restroom. Parent was the only witness advocating for an adaptive behavior assessment and pointed to issues at home and Student's peer interactions before attending private school. However, the 2018 assessments did not endorse any issues with daily living skills in the educational setting. Further, Student's first and second grade teacher at Shadow Mountain Baptist School, Shawna Moore, and Williams and Downer, testified about Student's weaknesses in class and at school, but they did not include any adaptive behavior skills. Further, no other witnesses endorsed adaptive behavior as a suspected disability. Parent's testimony regarding Student's social issues at school was uncorroborated by teachers that worked with Student daily in the educational setting. Thus, Parent's testimony was unconvincing and given less weight. Therefore, Student failed to prove by a preponderance of the evidence adaptive behavior at a suspected disability in the educational setting requiring assessment during the relevant time period.

## FUNCTIONAL BEHAVIOR

Parent contends Student required a functional behavior assessment due to Student's behaviors interfering with Student's learning. Morgan Hill argued that no evidence supported that Student's behavior at school required a functional behavior assessment.

Parent requested a functional behavior assessment from Morgan Hill on August 19, 2019, which Morgan Hill denied on August 22, 2019. The unrefuted testimony

established by O'Brien stated that a functional behavior assessment is designed to assess the functions of significant behaviors that are interfering with a student's ability to make academic progress, or whose behaviors are disruptive to other students within the class. In the case of a child whose behavior impedes the child's learning or that of others, the IEP team must consider, when appropriate, "strategies, including positive behavioral interventions, strategies, and supports to address that behavior." (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i); Ed. Code, § 56341.1, subd. (b)(1).)

Student failed to prove this allegation. At the time of Parent's request, Parent generally stated that Student's behavior interfered with Student's learning and that Student had significant behaviors requiring a functional behavior assessment. At no time did Parent share with Morgan Hill any purported behaviors or problems that occurred in the classroom or at school. Parent also suggested at that time that the behavior support plan and intervention strategies in the IEP were ineffective, but the December 5, 2018 IEP did not have a behavior support plan and it was never implemented because Parent did not consent to it.

Additionally, Morgan Hill previously assessed Student in social emotional functioning in May 2018, and it did not reveal any significant behavioral issues that required further assessment which was unrefuted at hearing. Further, Student's teachers, Moore, Williams, and Downer, failed to report or observe any significant conduct of Student necessitating a functional behavior assessment. Student's teachers confirmed behavioral issues related to attention, but no teacher endorsed that this was disruptive or impeded Student or other student's abilities to progress educationally. Accordingly, Student failed to prove by a preponderance of the evidence that Morgan Hill should have suspected a disability that required a functional behavior assessment during the relevant time period.

## SPECIAL CIRCUMSTANCES INSTRUCTIONAL ASSISTANT

Parented contended that Student needed a one-to-one aide as recommended by Student's teacher Moore, at Shadow Mountain Baptist School. Morgan Hill responded that Student's behavior at school did not lead Morgan Hill to suspect a disability in this area.

Parent requested a special circumstances instructional assistant assessment from Morgan Hill on June 14, 2019, which was denied on August 22, 2019. The evidence demonstrated through Rubi and O'Brien that this assessment type determines whether a student requires aide support and the need for one-to-one assistance. Moore asserted that Student received one-to-one support while at Shadow Mountain Baptist School and believed that Student needed to continue with one-to-one support in order to progress in school.

Moore offered one-to-one aide support during class to assist Student in completing tasks and understanding assignments and advocated at hearing that it was necessary to offer Student this support in the classroom for Student to improve. Moore's testimony, however, appeared unreasoned because Moore did not have a comprehensive understanding of what special education services could be offered to Student. Moore had neither experience or training in special education nor held a special education credential or a teaching credential. Moore could not specify what disabilities Student had. Further, Moore explained that Shadow Mountain Baptist School does not have special education teachers or special education related services. Thus, Moore did not have experience with students receiving varying special education services in school. Moore, therefore, was unqualified to provide Student any special education services such as specialized academic instruction to address Student's

disabilities. Instead, Moore resorted to one-to-one instruction with no attempts to provide less intrusive supports. Moore appeared inexperienced in special education matters and therefore Moore's testimony was given less weight.

Conversely, the Morgan Hill staff that testified at hearing regarding this issue were a California credentialed special education teacher, Rubi, and O'Brien, who had extensive experience working with children receiving special education related services. They asserted that a one-to-one aide was too restrictive, and it could offer Student special education services with qualified special education teachers that could benefit Student without the need for a one-to-one assistant. Additionally, Morgan Hill teachers Williams and Downer did not endorse behaviors or deficits that Student exhibited at Morgan Hill that were extensive and would require one-to-one aide support. Morgan Hill staff appeared knowledgeable and experienced in their responses to questions on this issue. Thus, their testimony was given great weight.

The evidence further established that this information from Moore was never provided to Morgan Hill before hearing. And, even if that information had been known to Morgan Hill, it would have been insufficient to indicate a need to assess Student for one-to-one aide support because less restrictive services were not contemplated or instituted to determine if one-to-one assistance was necessary. Therefore, Student failed to meet the burden of proving that Morgan Hill should have suspected a disability in this area and assessed for a special circumstances instructional assistant during the time period at issue.

## SPEECH AND LANGUAGE INCLUDING LANGUAGE PROCESSING, DEVELOPMENT, AND USE

Student contended that Student needed a speech and language assessment because Student had oral expression problems. Morgan Hill maintained that it did not suspect a disability in this area.

Parent requested a speech and language assessment on June 14, 2018. On August 22, 2019, Morgan Hill offered to screen Student in speech and language. Rubi and O'Brien described that Morgan Hill would sometimes conduct a screening before assessment when there was no evidence of a suspected disability but to determine if there may be one that has not been previously detected. Screening before initiating a requested assessment is not a procedure recognized by California law.

Parent maintained at hearing that Student had difficulty advocating for things and needed a speech and language assessment without any further specificity. No evidence showed that this occurred at school. Moore, Williams, and Downer did not speak to any speech and language difficulties or concerns.

Student asserted in the closing brief that the December 5, 2018 IEP and Waxman's assessment demonstrated a suspected disability in speech and language. Student argued that Student had an oral expression goal in the IEP which demonstrated that Morgan Hill was aware that Student had weaknesses in speech and a suspected disability. Further, Student argued that Waxman testing revealed low and very low scores in expressive language and low scores in the Test for Auditory Process Skills, Third Edition. Student, however, failed to illicit any testimony or evidence from any source, including presenting Waxman as a witness, to describe these tests and the IEP

goal to link them to a speech and language suspected disability. The only witness with experience in psychology presented at hearing was O'Brien, and O'Brien did not endorse Student's position.

Student failed to present evidence that Student had delays in communication, articulation problems, pragmatic or receptive language deficits, vocabulary development, syntax, or morphology or showed that Student's communication or social skills were below expectancy for Student's age. Thus, Student failed to meet the burden of persuasion that Morgan Hill denied Student a FAPE for not assessing Student in speech and language, including language processing, development, and use.

## OCCUPATIONAL THERAPY INCLUDING GROSS AND FINE MOTOR AND SENSORY INTEGRATION

Student asserted that an occupational therapy assessment was warranted because of Student's poor handwriting skills. Morgan Hill responded that it did not suspect a disability in this area.

Parent requested an occupational therapy assessment on June 14, 2019. On August 22, 2019, Morgan Hill offered to screen Student in occupational therapy. Student's contention that Morgan Hill failed to assess in occupational therapy failed due to a lack of evidence presented.

At hearing, Parent worried about Student's handwriting, but no other witness endorsed the same concern. In Student's closing brief, Student argued that the 2018 psychoeducational assessment demonstrated a need for an occupational therapy assessment because Waxman determined that Student had a sensory motor processing disorder that impacted Student's mathematics calculations, basic reading skills, reading

comprehension, and written expression. A psychoeducational assessment may give some indication of a suspected disability in occupational therapy. However, Student presented no witness to interpret or opine on Waxman's assessment to establish that the testing gave rise to a suspected disability in occupational therapy. Moreover, no other witness endorsed that Student's handwriting raised a concern requiring an assessment or other deficiencies related to occupational therapy, including gross and fine motor skills, and sensory. Student failed to meet the burden of persuasion that Student had needs in the area of occupational therapy, including gross and fine motor, and sensory, which Morgan Hill should have assessed.

**ISSUES 3(C) AND 4(C): DID MORGAN HILL DENY STUDENT A FAPE FROM APRIL 5, 2019, THROUGH THE END OF THE 2019-2020 SCHOOL YEAR BY FAILING TO TIMELY AND APPROPRIATELY ISSUE A PRIOR WRITTEN NOTICE AFTER PARENTS AND STUDENT'S PROVIDERS REQUESTED ASSESSMENTS?**

Student asserted that Morgan Hill failed to provide timely and appropriate prior written notices to Student after Parents and Student's providers requested assessments. Morgan Hill contended that it timely and appropriately responded with prior written notices to Parent's requests for assessments. It further claimed that it did not receive any assessment requests from Student's providers during the statutory period. Thus, Morgan Hill argued, it could not have replied to them.

Prior written notice must be given by the public agency to the parents of an individual with exceptional needs "upon initial referral for assessment, and a reasonable time before the public agency proposes to initiate or change, or refuses to initiate or change, the identification, evaluation, or educational placement of the pupil, or the

provision of a free appropriate public education to the child.” (Ed. Code, § 56500.4, subd. (a); *see also* 20 U.S.C. § 1415(b)(3), (4) & (c)(1); 34 C.F.R. § 300.503 (2006).)

The notice must contain:

- a description of the action refused by the agency;
- an explanation for the refusal, along with a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the refusal;
- a statement that the parents of the disabled child are entitled to procedural safeguards, with the means by which the parents can obtain a copy of those procedural safeguards;
- sources of assistance for parents to contact;
- a description of other options that the IEP team considered, with the reasons those options were rejected, and
- a description of the factors relevant to the agency’s refusal. (20 U.S.C. § 1415(c)(1); 34 C.F.R. § 300.503(b); Ed. Code, §56500.4.

The notice must be given in “a reasonable time before” the district actually changes the student’s placement or the provision of FAPE to the student. (34 C.F.R. § 300.503(a) (2006).) This is to ensure that the parents have enough time to assess the change and voice their objections or otherwise respond before the change takes effect. (*C.H. v. Cape Henlopen School Dist.* (3rd Cir. 2010) 606 F.3d 59, 70.) When a failure to give proper prior written notice does not actually impair parental knowledge or participation, the violation is not a substantive harm under the IDEA. (*Ibid.*)

## STUDENT FAILED TO PROVE THAT MORGAN HILL DENIED STUDENT A FAPE BY PROVIDING AN UNTIMELY OR LEGALLY NONCOMPLIANT PRIOR WRITTEN NOTICE IN RESPONSE TO PARENT'S JUNE AND AUGUST 2019 ASSESSMENT REQUESTS

Parent presented a June 14, 2019 letter to Morgan Hill requesting speech and language, occupational therapy, adaptive behavior, and one-to-one assistance assessments for Student. At that time, Morgan Hill was in summer recess until the 2019-2020 school year began on August 15, 2019. On August 19, 2019, Parent requested a functional behavioral assessment. The evidence established that Morgan Hill sent a prior written notice in response to both letters on August 22, 2019.

Morgan Hill timely provided the prior written notice to Student. Parent's first assessment request during the statutory period occurred during the 2019 summer break and Morgan Hill responded to Parent seven days after the 2019-2020 school year began, and three days after Parent's August 19, 2019 assessment request. Morgan Hill was under no obligation to respond during school vacation as stated in Issue 3(b), 4(b) and 5(b) below. (Ed. Code, §§ 56043, subd. (a); 56321, subd. (a).) Thus, its response time was reasonably.

Morgan Hill's August 22, 2019 prior written notice was legally compliant. On August 22, 2019, Morgan Hill sent the prior written notice to Parent and agreed to conduct speech and language and occupational therapy screeners, while declining the one-to-one, adaptive behavior, and functional behavior assessments. Thus, the prior written notice addressed all of Parent's requests for assessments.

Morgan Hills' prior written notice contained the legally required content in that it provided a description of what it refused, the reasons for the refusal, and the factors relevant to the refusals. It also described other options considered, and how Parent could receive a copy of the parental rights' documentation, along with who to contact from Morgan Hill for assistance. Student failed to present through any witnesses or documentation any insufficiencies, inappropriateness, or untimeliness of the prior written notice sent to Parent. Further, the evidence established that the August 22, 2019 prior written notice was sent to Parent on August 22, 2019 in Student's backpack and later emailed to Parent on August 27, 2019.

Student, however, did prove that Morgan Hill failed to send Parent a Spanish version of the prior written notice, because it was not produced at hearing. This amounted to a procedural violation under the IDEA. However, under these circumstances, it did not amount to a denial of FAPE. Student presented no evidence regarding how this impeded parental participation or Student's education or ability to receive a FAPE. Here, Parent's testimony established that Parent understood the actions Morgan Hill had refused to take in regard to Parent's June and August 2018 assessment requests. And the evidence established that Morgan Hill had previously sent Parent prior written notices in Spanish on November 8, 2017, January 30, 2018, April 25, 2018. Thus, Parent was familiar with the Spanish prior written notice forms. Further, the April 25, 2018 prior written notice declined some of the same assessments including speech and language, occupational therapy, and adaptive behavior. Accordingly, Student did not prove by a preponderance of the evidence that Morgan Hill's failure impeded parental participation or Student's education, such that it denied Student a FAPE.

## STUDENT FAILED TO ESTABLISH PARENT PROVIDED THE NOVEMBER 2019 KAISER PERMANENTE ASSESSMENT REQUEST AND DECEMBER 2018 REBEKAH CHILDREN'S SERVICES PLAN TO MORGAN HILL

Student introduced a Kaiser Permanente letter, dated November 7, 2019, requesting special education assessment, and a December 15, 2018 Rebekah Children's Services Integrated Treatment Plan. Parent claimed that Parent provided these letters to Morgan Hill during the statutory period and Morgan Hill failed to respond to them.

Student, however, failed to establish that Morgan Hill received the letters. Parent's description of how the Kaiser Permanente letter was sent to Morgan Hill was vague and did not speak to the person who received it or how Parent provided the letter. Student gave no description of how the Rebekah Children's Services letter was provided to Morgan Hill. Further, Parent's testimony was unsupported by other evidence. No Morgan Hill witness that was questioned about the letters had any recollection of them. Student presented no proof of any documentation by Morgan Hill confirming receipt or discussing the letters. In addition, the letters did not have a date stamp or handwritten receipt date. Throughout the hearing, Student presented documents from Parent and outside resources. Many of these documents had a date stamp to show when Morgan Hill received it. Other documents had a handwritten note indicating it was received by Morgan Hill on a specific date. These letters had neither a date stamp nor a handwritten date notation on it. Thus, Parent's testimony could not be corroborated. The lack of documentation supporting Parent's position diminished Parent's testimony regarding this subject and endorsed Morgan Hill's position that the letters were never provided to it. Student therefore failed to show that Parent provided Morgan Hill with the November 7, 2019 Kaiser Permanente and the December 15, 2018

Rebekah Children's Services letters. Additionally, the December 15, 2018 letter was not an assessment request but rather a treatment plan. Thus, Student failed to prove that Morgan Hill was required to send prior written notices without any knowledge of these letters.

**ISSUES 3(B), 4(B), AND 5(B): DID MORGAN HILL DENY STUDENT A FAPE FROM APRIL 5, 2019, THROUGH APRIL 5, 2021, BY FAILING TO TIMELY PROVIDE PARENT ASSESSMENT PLANS WITHIN 15 DAYS OF REFERRAL FOR ASSESSMENT?**

Student asserted in the closing brief that Morgan Hill should have provided Parent with assessment plans within 15 days of Parent's June 14 and August 19, 2019 assessment requests. Morgan Hill responded by stating that it properly provided Student with prior written notices to Parent's assessment requests.

If a district decides to assess a student, it must give the parent a written assessment plan within 15 calendar days of referral, not counting calendar days between the pupil's regular school sessions or terms or calendar days of school vacation in excess of five schooldays, from the date of receipt of the referral, unless the parent or guardian agrees in writing to an extension. (Ed. Code, §§ 56043, subd. (a); 56321, subd. (a).) A district may, instead, provide a timely prior written notice refusing to conduct the requested assessment. (20 U.S.C. § 1415(c); 34 C.F.R. § 300.503(b); Ed. Code, § 56500.4.) Thus, an assessment plan is not mandated in response to every request for assessment if a legally compliant prior written notice is provided to Parent

As demonstrated in Issues 3(c) and 4(c), Student failed to establish that Morgan Hill issued an inappropriate prior written notice in response to Parent's June and August

2018 assessment requests that denied Student a FAPE. Further, Student failed to establish that the November 2019 Kaiser Permanente request for assessment was provided to Morgan Hill. Since Morgan Hill properly provided the August 22, 2019 prior written notice to Parent's June and August 2019 assessment requests, it was not required to send an assessment plan. It was also not required to send a response to the November 2019 Kaiser Permanente assessment request because Student failed to prove that it was given to Morgan Hill. Further, the December 15, 2018 Rebekah Children's Services treatment plan was not an assessment request.

Student failed to present any evidence of other assessment requests or referrals during the statutory period other than the June, August, and November 2019 requests. Accordingly, Student failed to prove by the preponderance of the evidence that Morgan Hill denied Student a FAPE by failing to timely provide Parent assessments plans within 15 days of referral for an assessment.

### **ISSUES 3(D), 4(D), AND 5(C): DID MORGAN HILL DENY STUDENT A FAPE FROM APRIL 5, 2019, THROUGH APRIL 5, 2021, BY FAILING TO PROVIDE PARENTS WITH PROCEDURAL SAFEGUARDS WHEN LEGALLY REQUIRED?**

Student asserted that Morgan Hill failed to give Parent procedural rights after Parent's assessment requests on June 14, 2019, and August 19, 2019. Morgan Hill responded that it complied with all legal requirements.

A copy of parental rights and procedural safeguards must be provided to parents of a child with a disability only one time a school year, except a copy must also be given: (1) on initial referral or parental request for evaluation; (2) upon receipt of the first state complaint; (3) upon receipt of the first due process hearing request; (4) when a decision

is made for a removal that constitutes a change in placement, and (5) upon parent request. (20 U.S.C. § 1415(d); 34 C.F.R. § 300.504(a) (2007); Ed. Code, § 56301, subd. (d)(2).)

Here, as demonstrated in Issue 1, Parent received parental rights on three separate occasions in 2018, during the initial referral for assessment in March, and at two IEP team meetings in June and December. As established in Issue 5, subsection d, the next time Morgan Hill provided Parent rights and procedural safeguards was October 20, 2020, when it exited Student from special education.

While Student provided no authority that Morgan Hill was legally required to give Parent procedural rights after each assessment request, Student proved that Morgan Hill failed to provide Parents procedural rights during the 2019-2020 school year which is a procedural violation under the IDEA.

Student, however, failed to prove that this violation denied Student a FAPE. Student presented no testimony from Parent on how this failure impacted Parent. Thus, Student failed to demonstrate that Morgan Hill's failure impeded parental participation in the IEP decision-making process. Student also presented no evidence linking the failure to provide procedural rights to even a potential impact on Student's education. Thus, Student did not meet the burden of proof that Morgan Hill denied Student a FAPE by failing to provide procedural safeguards.

ISSUES 4(E) THROUGH 4(J): DID MORGAN HILL DENY STUDENT A FAPE AT THE AUGUST 21, 2019 IEP TEAM MEETING DURING THE 2019-2020 SCHOOL YEAR BY: PREDETERMINING THE OFFER; FAILING TO MAKE A FORMAL, CLEAR, AND SPECIFIC FAPE OFFER; FAILING TO HAVE THE REQUIRED IEP TEAM MEMBERS PRESENT; FAILING TO PROVIDE COPIES OF THE IEP DOCUMENTS IN SPANISH; FAILING TO TIMELY CONSIDER THIRD-PARTY ASSESSMENTS AND REPORTS; AND FAILING TO CONSIDER PARENT'S INPUT AND PARENT'S REQUEST FOR ASSESSMENTS?

Student claimed that Morgan Hill held an IEP team meeting on August 21, 2019, and alleged numerous procedural violations that occurred at the meeting. Morgan Hill asserted that it did not convene an August 21, 2019 IEP team meeting.

Educational agencies are required to provide an opportunity for the parents of a child with a disability to participate in meetings with respect to the identification, evaluation, educational placement, and the provision of a FAPE to the child. (20 U.S.C. 1415(b).) Therefore, IEP team meetings must include the parents of a child with a disability. (20 U.S.C. § 1414(d)(1)(B)(i), 34 C.F.R. § 300.321(a)(1) (2007), Ed. Code, § 56341, subd. (b)(1).)

Student failed to establish that an August 21, 2019, IEP team meeting occurred. The uncontroverted evidence established that on August 16, 2019, Rubi, Morgan Hill's special education resource teacher, hand delivered a notice of IEP meeting to Parent set for August 21, 2019, and followed up with an email to Parent on August 19, 2019. On August 21, 2019, all IEP team meeting members except Parent were present to convene

the IEP meeting so Morgan Hill did not hold it. Although an IEP team meeting was not convened, the members present decided to send a prior written notice regarding Parent's requests for assessments and three members of the IEP team decided to conduct a home visit the following day to talk with Parent.

Student argued that this amounted to an IEP team meeting without parental consent, but Student provided no authority to support this position. Further, no documentary or testimonial evidence was presented at hearing that demonstrated an IEP team meeting occurred that day. However, the numerous communications spanning from August 2019 through February 2020 admitted as evidence showed the efforts made by Morgan Hill to set up an IEP team meeting with Parent for the 2019-2020 school year, and supported Morgan Hill's position that no IEP team meeting occurred because Parent did not attend. Thus, Student failed to establish that an IEP team meeting took place on August 21, 2019.

Accordingly, Student failed to prove by the preponderance of the evidence that Morgan Hill denied Student a FAPE for any procedural violations related to an August 21, 2019 IEP meeting including: predetermining the offer; failing to make a formal, clear, and specific offer; failing to have the required IEP team members present; failing to provide IEP documents in Spanish; failing to timely consider third-party assessments and reports; and failing to consider Parent's input and Parent's request for assessments.

ISSUE 5(E): DID MORGAN HILL DENY STUDENT A FAPE DURING THE 2020-2021 SCHOOL YEAR THROUGH APRIL 5, 2021, BY FAILING TO PROVIDE PARENTS WITH COMPLETE EDUCATIONAL RECORDS SINCE NOVEMBER 3, 2020?

Student asserted that Parent requested records from Morgan Hill on November 3, 2020, and Morgan Hill failed to provide Student's complete school records. Morgan Hill responded that no evidence was presented at hearing regarding this issue.

Under Education Code section 56043, subdivision (n), "Parent or guardian shall have the right and opportunity to examine all school records of the child and to receive complete copies within five business days after a request is made by Parent or guardian, either orally or in writing, and before any meeting regarding an individualized education program of his or her child or any hearing or resolution session pursuant to Chapter 5 (commencing with Section 56500), in accordance with Section 56504 and Chapter 6.5 (commencing with Section 49060) of Part 27." The public agency shall comply with a request for school records without unnecessary delay before any meeting regarding an individualized education program or any hearing. (Ed. Code, § 56504.)

Student failed to present evidence that Parent made a records request on November 3, 2020. Further, no evidence was presented or admitted regarding what records Morgan Hill failed to provide. Student conceded in the closing brief that no testimony was presented on this issue. Thus, Student did not prove by a preponderance of the evidence that Morgan Hill failed to provide educational records to Parents since November 3, 2020.

## ADDITIONAL CONTENTIONS NOT CONSIDERED

Student attempted to argue issues in the closing brief that were not pled in the complaint. Some allegations were within OAH's jurisdiction but not pled. Others were outside OAH's jurisdiction. This Decision only adjudicates the issues that were properly pled in Student's complaint and reviewed during the prehearing conference and hearing unless the other party agrees. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) The undersigned administrative law judge therefore did not consider any new issues raised for the first time in Student's closing brief.

## 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(a): Student is not entitled to extend the two-year statute of limitations for special education claims against Morgan Hill because Parents were not prevented from requesting a due process hearing due to specific misrepresentations that Morgan Hill had solved the problem forming the basis of the due process request. Morgan Hill prevailed on Issue1(a).

Issue 1(b): Student is not entitled to extend the two-year statute of limitations for special education claims against Morgan Hill because Parents were not prevented from requesting a due process hearing due to Morgan Hill withholding information from Parents that it was required to provide to Parents. Morgan Hill prevailed on Issue 1(b).

Issue 2(a): Student failed to prove that Morgan Hill denied Student a FAPE during the 2017-2018 school year through June 3, 2018, by failing to meet its child find obligations and finding Student eligible for special education under the categories of specific learning disability and other health impairment because this allegation was time-barred due to the statute of limitations determination. Morgan Hill prevailed on Issue 2(a).

Issue 2(b): Student failed to prove that Morgan Hill denied Student a FAPE during the 2017-2018 school year by failing to assess Student in academics; cognitive and intellectual functioning; language processing, development, and use; gross and fine motor; sensory integration; social emotional; autism; attention deficit hyperactivity disorder; special circumstances instructional assistant; and after Parents requested assessment because this allegation was time-barred due to the statute of limitations determination. Morgan Hill prevailed on Issue 2(b).

Issue 2(c): Student failed to prove that Morgan Hill denied Student a FAPE during the 2017-2018 school year by failing to timely provide Parents with an assessment plan within 15 days of Parents' request for assessment because this allegation was time-barred due to the statute of limitations determination. Morgan Hill prevailed on Issue 2(c).

Issue 2(d): Student failed to prove that Morgan Hill denied Student a FAPE during the 2017-2018 school year by failing to timely complete all necessary assessments and hold an IEP team meeting within 60 days of Parents' consent to the assessments on April 11, 2018, because this allegation was time-barred due to the statute of limitations determination. Morgan Hill prevailed on Issue 2(d).

Issue 2(e): Student failed to prove that Morgan Hill denied Student a FAPE during the 2017-2018 school year by failing to timely and appropriately issue a prior written notice after Parents and Student's providers requested an assessment because this allegation was time-barred due to the statute of limitations determination. Morgan Hill prevailed on Issue 2(e).

Issue 2(f): Student failed to prove that Morgan Hill denied Student a FAPE during the 2017-2018 school year by failing to file for due process after Parents disagreed with the initial assessment results because this allegation was time-barred due to the statute of limitations determination. Morgan Hill prevailed on Issue 2(f).

Issue 2(g): Student failed to prove that Morgan Hill denied Student a FAPE during the 2017-2018 school year by failing to provide Parents procedural safeguards when legally required because this allegation was time-barred due to the statute of limitations determination. Morgan Hill prevailed on Issue 2(g).

Issue 2(h): Student failed to prove that Morgan Hill denied Student a FAPE during the 2017-2018 school year by failing to make a formal, clear, and specific FAPE offer in the June 4, 2018 service plan because this allegation was time-barred due to the statute of limitations determination. Morgan Hill prevailed on Issue 2(h).

Issue 2(i): Student failed to prove that Morgan Hill denied Student a FAPE during the 2017-2018 school year by failing to timely consider third-party assessments and reports from Kaiser Permanente and Rebekah Children's Services before developing the June 4, 2018 IEP because this allegation was time-barred due to the statute of limitations determination. Morgan Hill prevailed on Issue 2(i).

Issue 2(j): Student failed to prove that Morgan Hill denied Student a FAPE during the 2017-2018 school year by failing to consider Parents' input and Parents' request for assessments before developing the June 4, 2018 IEP because this allegation was time-barred due to the statute of limitations determination. Morgan Hill prevailed on Issue 2(j).

Issue 2(k): Student failed to prove that Morgan Hill denied Student a FAPE during the 2017-2018 school year by failing to provide copies of the documents in Spanish on or before the June 4, 2018 IEP team meeting because this allegation was time-barred due to the statute of limitations determination. Morgan Hill prevailed on Issue 2(k).

Issue 2(l): Student failed to prove that Morgan Hill denied Student a FAPE during the 2017-2018 school year by failing to develop an appropriate service plan on June 4, 2018, because this allegation was time-barred due to the statute of limitations determination. Morgan Hill prevailed on Issue 2(l).

Issue 3(a): Student failed to prove that Morgan Hill denied Student a FAPE during the 2018-2019 school year by failing to assess Student in academics; cognitive and intellectual functioning; language processing, development, and use; gross and fine motor; sensory integration; social emotional; autism; attention deficit hyperactivity disorder; special circumstances instructional assistant; and after Parents requested an assessment because Student failed to demonstrate that Morgan Hill suspected a disability in these areas that required assessment between April 5, 2019, through the end of the 2018-2019 school year. Morgan Hill prevailed on Issue 3(a).

Issue 3(b): Student failed to prove that Morgan Hill denied Student a FAPE during the 2018-2019 school year by failing to timely provide Parents with an assessment plan within 15 days of referral for assessment because Student failed to

show that Morgan Hill was legally required to provide an assessment plan to Parents between April 5, 2019, through the end of the 2018-2019 school year. Morgan Hill prevailed on Issue 3(b).

Issue 3(c): Student failed to prove that Morgan Hill denied Student a FAPE during the 2018-2019 school year by failing to timely and appropriately issue a prior written notice after Parents and Student's providers requested an assessment because Student failed to demonstrate that any prior written notices should have been sent out between April 5, 2019, through the end of the 2018-2019 school year. Morgan Hill prevailed on Issue 3(c).

Issue 3(d): Student failed to prove that Morgan Hill denied Student a FAPE during the 2018-2019 school year by failing to provide Parents procedural safeguards when legally required because failed to prove that Morgan Hill was required to provide it to Parents between April 5, 2019, through the end of the 2018-2019 school year. Morgan Hill prevailed on Issue 3(d).

Issue 3(e): Student failed to prove that Morgan Hill denied Student a FAPE during the 2018-2019 school year by predetermining the December 5, 2018 IEP offer because this allegation was time-barred due to the statute of limitations determination. Morgan Hill prevailed on Issue 3(e).

Issue 3(f): Student failed to prove that Morgan Hill denied Student a FAPE during the 2018-2019 school year by failing to make a formal, clear, and specific FAPE offer at the December 5, 2018 IEP team meeting because this allegation was time-barred due to the statute of limitations determination. Morgan Hill prevailed on Issue 3(f).

Issue 3(g): Student failed to prove that Morgan Hill denied Student a FAPE during the 2018-2019 school year by failing to have the required IEP team members at the December 5, 2018 IEP team meeting because this allegation was time-barred due to the statute of limitations determination. Morgan Hill prevailed on Issue 3(g).

Issue 3(h): Student failed to prove that Morgan Hill denied Student a FAPE during the 2018-2019 school year by failing to provide copies of the documents in Spanish on or before the December 5, 2018 IEP team meeting because this allegation was time-barred due to the statute of limitations determination. Morgan Hill prevailed on Issue 3(h).

Issue 3(i): Student failed to prove that Morgan Hill denied Student a FAPE during the 2018-2019 school year by failing to consider third-party assessments and reports from Kaiser Permanente and Rebekah Children's Services before developing the December 5, 2018 IEP because this allegation was time-barred due to the statute of limitations determination. Morgan Hill prevailed on Issue 3(i).

Issue 3(j): Student failed to prove that Morgan Hill denied Student a FAPE during the 2018-2019 school year by failing to consider Parents' input and Parents' request for assessment before developing the December 5, 2018 IEP because this allegation was time-barred due to the statute of limitations determination. Morgan Hill prevailed on Issue 3(j).

Issue 3(k): Student failed to prove that Morgan Hill denied Student a FAPE during the 2018-2019 school year by failing to develop an appropriate IEP on December 5, 2018, by failing to address Student's unique needs and developing appropriate and measurable goals because this allegation was time-barred due to the statute of limitations determination. Morgan Hill prevailed on Issue 3(k).

Issue 4(a): Student failed to prove that Morgan Hill denied Student a FAPE during the 2019-2020 school year by failing to assess Student in academics; cognitive and intellectual functioning; language processing, development, and use; gross and fine motor; sensory integration; social emotional; autism; attention deficit hyperactivity disorder; special circumstances instructional assistant; and after Parents requested an assessment because Student failed to demonstrate that Morgan Hill suspected a disability in these areas that required assessment. Morgan Hill prevailed on Issue 4(a).

Issue 4(b): Student failed to prove that Morgan Hill denied Student a FAPE during the 2019-2020 school year by failing to timely provide Parents with an assessment plan within 15 days of a referral for assessment because Student failed to prove that Morgan Hill was required to provide one to Parents during this time period. Morgan Hill prevailed on Issue 4(b).

Issue 4(c): Student failed to prove that Morgan Hill denied a FAPE during the 2019-2020 school year by failing to timely and appropriately issue a prior written notice after Parents and Student's providers requested assessment because Student failed to demonstrate any substantive harm from the August 22, 2019 prior written notice deficiency, and that Morgan Hill was required to provide other prior written notices to Parents during this time period. Morgan Hill prevailed on Issue 4(c).

Issue 4(d): Student failed to prove that Morgan Hill denied Student a FAPE during the 2019-2020 school year by failing to provide procedural safeguards when legally required because Student failed to prove any substantive harm for Morgan Hill's failure to provide procedural safeguards during the 2019-2020 school year. Morgan Hill prevailed on Issue 4(d).

Issue 4(e): Student failed to prove that Morgan Hill denied Student a FAPE during the 2019-2020 school year by predetermining the August 21, 2019 IEP offer because Student failed to prove that an August 21, 2019 IEP meeting took place. Morgan Hill prevailed on Issue 4(e).

Issue 4(f): Student failed to prove that Morgan Hill denied Student a FAPE during the 2019-2020 school year by failing to make a formal, clear, and specific FAPE offer at the August 21, 2019 IEP team meeting because Student failed to prove that an August 21, 2019 IEP meeting took place. Morgan Hill prevailed on Issue 4(f).

Issue 4(g): Student failed to prove that Morgan Hill denied Student a FAPE during the 2019-2020 school year by failing to have the required IEP team members at the August 21, 2019 IEP team meeting because Student failed to prove that an August 21, 2019 IEP meeting took place. Morgan Hill prevailed on Issue 4(g).

Issue 4(h) Student failed to prove that Morgan Hill denied Student a FAPE during the 2019-2020 school year by failing to have the required IEP team members at the August 21, 2019 IEP team meeting because Student failed to prove that an August 21, 2019 IEP meeting took place. Morgan Hill prevailed on Issue 4(h).

Issue 4(i) Student failed to prove that Morgan Hill denied Student a FAPE during the 2019-2020 school year by failing to timely consider third-party assessments and reports from Kaiser Permanente and Rebekah Children's Services before developing the August 21, 2019 IEP because Student failed to prove that an August 21, 2019 IEP meeting took place. Morgan Hill prevailed on Issue 4(i).

Issue 4(j) Student failed to prove that Morgan Hill denied Student a FAPE during the 2019-2020 school year by failing to consider Parents' input and Parents' request for

assessments before developing the August 21, 2019 IEP because Student failed to prove that an August 21, IEP meeting took place. Morgan Hill prevailed on Issue 4(j).

Issue 5(a): Student proved that Morgan Hill denied Student a FAPE during the 2020-2021 school year by failing to assess Student in academics; cognitive and intellectual functioning; language processing, development, and use; gross and fine motor; sensory integration; social emotional; autism; attention deficit hyperactivity disorder; special circumstances instructional assistant; and after Parents requested assessment because Student failed to assess Student before exiting Student from special education on October 20, 2020. Student prevailed on Issue 5(a).

Issue 5(b): Student failed to prove that Morgan Hill denied Student a FAPE during the 2020-2021 school year by failing to timely provide Parents with an assessment plan within 15 days of a referral for assessment because Student failed to establish that any requests were made during this time period. Morgan Hill prevailed on Issue 5(b).

Issue 5(c): Student failed to prove that Morgan Hill denied Student a FAPE during the 2020-2021 school year by failing to provide Parents with procedural safeguards when legally required because Morgan Hill provided procedural safeguards on October 20, 2020, and Morgan Hill failed to demonstrate that Morgan Hill was legally required to provide them at any other time. Morgan Hill prevailed on Issue 5(c).

Issue 5(d): Student proved Morgan Hill denied Student a FAPE during the 2020-2021 school year by exiting Student from special education services on October 20, 2020, without a comprehensive assessment and because Parents refused to sign the June 4, 2018 service plan because Morgan Hill failed to assess Student before it exited Student from special education. Student prevailed on Issue 5(d).

Issue 5(e): Student failed to prove that Morgan Hill denied Student a FAPE during the 2020-2021 school year by failing to provide Parents with complete educational records since November 3, 2020, because Student failed to present any evidence related to this issue at hearing. Morgan Hill prevailed on Issue 5(e).

## REMEDIES

Morgan Hill denied Student a FAPE from October 20, 2020 through April 5, 2021, by impermissibly exiting Student from special education. Student failed to present any evidence regarding remedies. In Student's complaint, Student requested independent educational evaluations in psychoeducation, speech and language, occupational therapy, social emotional, functional behavior, adaptive behavior, assistive technology, and special circumstances instructional assistance. Student additionally requested placement at a non-public school, transportation, complete educational records, compensatory education in academic tutoring for 90 hours and educational therapy for 80 hours, a one-to-one aide, individual counseling for 90 minutes a week, speech services for 90 minutes a week, unspecified electronic equipment, a facilitator to attend all IEP team meetings, reimbursement for out-of-pocket expenses while attending private school, and attorney's fees. In Student's closing brief, Student requested independent educational evaluations in all areas stated above, special education services to be determined by the ALJ, and attorney's fees. Morgan Hill requested that all remedies be denied.

Under federal and state law, courts have broad equitable powers to remedy the failure of a school district to provide 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 administrative law judge who hears and decides a special education administrative due process matter. (*Forest Grove School Dist. v. T.A.* (2009) 557 U.S. 230, 244, fn. 11 [129 S.Ct. 2484, 174 L.Ed.2d 168].)

In remedying a FAPE denial, the student is entitled to relief that is appropriate in light of the purposes of the IDEA. (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3) (2006).) The purpose of the IDEA is to provide students with disabilities a FAPE which emphasizes special education and related services to meet their unique needs. (*Burlington, supra*, 471 U.S. at p. 374.) Appropriate relief means relief designed to ensure that the student is appropriately educated within the meaning of the IDEA. (*Student W. v. Puyallup School Dist.* (9th Cir. 1994) 31 F.3d 1489, 1497 (*Puyallup*).) 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. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.)

Since Student was impermissibly exited from special education for failing to assess Student, it is equitable to order Morgan Hill to: reinstate Student as eligible for special education under the categories of specific learning disability and other health impairment; assess Student in psychoeducation, speech and language, and occupational therapy; and hold an IEP team meeting to review the assessments.

The ordered assessments, however, cannot be the exclusive remedy in this case as Student received no special education and related services from October 2020, to April 2021. While Parent never consented to any services for Student, Student was not excluded from receiving special education and related services until October 20, 2020.

As discussed previously, once Parent accepted eligibility, Student received all rights attendant to a special education Student. Additionally, Morgan Hill assumed the corresponding obligations. Accordingly, Student is entitled to some special education and related services to compensate for those lost.

A school district may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Park, supra*, 464 F.3d at p. 1033.) 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 School Dist. No. 1* (D.Conn. 2008) 531 F.Supp.2d 245, 265; *Orange Unified School Dist. v. C.K.* (C.D.Cal. June 4, 2012, No. SACV 11-1253 JVS(MLGx)) 2012 WL 2478389, \*12.) An award of compensatory education need not provide a day-for-day compensation. (*Puyallup, supra*, 31 F.3d at pp. 1496-1497.)

Student failed to provide evidence of compensatory education including amounts or duration. It was determined that Student was deprived of the ability to receive a FAPE for 19 weeks from October 20, 2020 to April 5, 2021, excluding school vacation. The undersigned carefully considered the evidence presented in this case and the specific FAPE denial found. Ultimately, the undersigned relies upon the equitable judicial discretion to craft an appropriate compensatory education remedy.

Morgan Hill is ordered to provide 35 hours of individual specialized academic instruction, outside of the regular school day, by a credentialed special education teacher. The amount is calculated based upon the Morgan Hill 2020-2021 school calendar and December 5, 2018 IEP that offered 240 minutes a week of group specialized academic instruction. The amount is reduced to 105 minutes per week because it is individual not group instruction over twenty weeks which excludes school

vacations, which equals 35 hours. Student is entitled to utilize the compensatory education through July 31, 2023. Since Student failed to prove other areas of compensatory education are required as a remedy and no other evidence presented at hearing shows other services are required, no other compensatory education is awarded. As noted, all other requests for relief were carefully considered and denied.

Parent has previously been uncooperative with Morgan Hill in setting IEP team meetings throughout the 2019-2020 school year. Thus, the following order and schedule is set so that the parties may proceed in a timely manner.

## ORDER

1. At the start of the Morgan Hill 2021-2022 school year, Morgan Hill must reinstate Student as eligible for special education under the categories of specific learning disability and other health impairment, pending further consideration by Student's IEP team.
2. Within 5 school days of the start of the Morgan Hill 2021-2022 school year, Morgan Hill must offer an assessment plan to Parent offering to assess Student in psychoeducation, speech and language, and occupational therapy.
3. If Parent does not consent to the assessment plan within 15 calendar days of receipt of the assessment plan, Morgan Hill can assess Student in psychoeducation, speech and language, and occupational therapy without parental consent.
4. Morgan Hill must hold an IEP team meeting within 60 calendar days of parental consent of the assessment plan or within 60 calendar days of Parent failing to consent to the assessment plan.

5. The IEP team meeting will take place on a school day at 3:00 p.m. The parties are on notice to rearrange schedules to conduct the IEP team meeting in a timely manner absent exigent circumstances.
6. Within 30 calendar days of the start of Morgan Hill's 2021-2022 school year, Morgan Hill must make available a credentialed special education teacher to provide 35 hours of individual specialized academic instruction to Student after school. Morgan Hill and Parent will determine the appropriate schedule and location of service delivery. Cancellations by the special education instructor shall be made up. Scheduled absences by Student with at least 24-hour notice or verified medical absence shall be credited to Student and also made up. Any other absences by Student are forfeited. Any compensatory services not used by July 31, 2023 will be forfeited.
7. 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. Under Education Code section 56505, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within 90 days of receipt.

/s/

Cynthia Fritz

Administrative Law Judge

Office of Administrative Hearings