BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2020061003

PARENT ON BEHALF OF STUDENT,

v.

ORCUTT UNION SCHOOL DISTRICT

DECISION

MARCH 17, 2021

On June 29, 2020, the Office of Administrative Hearings, called OAH, received a due process hearing request from Parent on behalf of Student, naming Orcutt Union School District. Orcutt Union School District is called Orcutt Union. On August 11, 2020, OAH granted Student's request to file an amended complaint. OAH continued the matter on September 18, 2020. Administrative Law Judith L. Pasewark heard this matter by videoconference on January 26, 27, 28, and 29, 2021.

Andrea Marcus, Attorney at Law, represented Student. Natalie Cummings and Carlos Villa-Negrette, Paralegals, attended each day with Ms. Marcus. Parent attended each day on behalf of Student. Student did not attend the hearing. Kidd Crawford,

Attorney at Law, represented Orcutt Union. Katherine Long, Special Education Director, attended on behalf of Orcutt Union. Tami Mau, School Psychologist, attended on January 29, 2021, in place of Ms. Long.

At the parties' request, the matter was continued to February 16, 2021, for written closing briefs. The record closed and the matter was submitted on February 16, 2021.

ISSUES

Student filed a request for due process complaint on October 30, 2019 in OAH Case Number 2019101249 and an amended request for due process on December 19, 2019 in OAH Case Number2019120978. OAH issued its decision on the consolidated cases on December 4, 2020, which addressed claims through December 19, 2019. Therefore, Student's relevant timeline in this matter for denial of a free appropriate public education, called FAPE, is December 20, 2019 through August 11, 2020.

1. Did Orcutt Union deny Student a FAPE by failing to timely file for due process or fund an independent psychoeducational evaluation, called an IEE, in response to Student's request on November 25, 2019?
2. Did Orcutt Union, deny Student a FAPE by failing to hold an IEP team meeting to discuss home-hospital, in response to Student's doctor's recommendations in February 2020?
3. Did Orcutt Union deny Student FAPE, by failing to provide prior written notice as to why Orcutt Union could not offer Student privately funded, medically prescribed applied behavior analysis services at school?
4. Did Orcutt Union Lake deny Student FAPE by failing to implement Student's last agreed upon IEP by not providing counseling or the amount of time in general education offered?

5. Did Orcutt Union deny parental participation in the form of enforcement of FAPE by misrepresenting an IEP document created after February 2020, as Orcutt Union's November 2019 offer of FAPE?

JURISDICTION

This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006) et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the Individuals with Disabilities Education Act, referred to as the IDEA, are to ensure:

- all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living, and
- the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, assessment, or educational placement of the child, or the provision of a free appropriate public education, referred to as FAPE, to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, and 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents, and has the burden of proof by a preponderance of the evidence. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 57-58, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see

20 U.S.C. § 1415(i)(2)(C)(iii).) Student requested this hearing; therefore, Student bears 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 eight years old and resided with his parents within the boundaries of Orcutt Union. Student initially qualified for special education and related services under the classification of other health impairment in 2017. In 2018 Student left Orcutt Union to attend a home school-based charter school. Student returned to Orcutt Union for the 2019-2020 school year

ISSUE 1: DID ORCUTT UNION DENY STUDENT A FAPE BY FAILING TO TIMELY FILE FOR DUE PROCESS OR FUND AN INDEPENDENT PSYCHOEDUCATIONAL EVALUATION IN RESPONSE TO STUDENT'S REQUEST ON NOVEMBER 25, 2019?

Student contends Orcutt Union failed to fund an independent psychoeducational evaluation requested by Student on November 25, 2019. Orcutt Union contends it agreed to fund, and remains willing to fund, the independent psychoeducational evaluation requested by Student.

A FAPE means special education and related services that are available to an eligible child that meets state educational standards at no charge to the parent or guardian. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) Parents and school personnel develop an individualized education program, referred to as an IEP, for an eligible student based upon state law and the IDEA. (20 U.S.C. §§ 1401(14), 1414(d)(1); and see Ed. Code, §§ 56031,56032, 56341, 56345, subd. (a) and 56363 subd. (a); 34 C.F.R. §§ 300.320, 300.321, and 300.501.)

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

The procedural safeguards of the IDEA provide that under certain conditions a student is entitled to obtain an independent evaluation at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502(a)(1); Ed. Code, §§ 56329, subd. (b), 56506, subd. (c).) Independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question. (34 C.F.R. § 300.502(a)(3)(i).) To obtain an independent educational evaluation, the student must disagree with an evaluation obtained by the public agency and request an independent evaluation. (20 U.S.C. 1415(b)(1); 34 C.F.R. § 300.502(b)(1) and (b)(2); Ed. Code §§ 56329(b), 56506(c).) Here, Student requested an independent psychoeducational evaluation at the IEP team meeting on November 25, 2019, after disagreeing with Orcutt Union's assessment.

The provision of an independent evaluation is not automatic. Following the student's request for an independent evaluation, the public agency must, without unnecessary delay, either file a due process complaint to request a hearing to show that its evaluation is appropriate or ensure that an independent evaluation is provided at public expense. (34 C.F.R. § 300.502(b)(2).)

The term "unnecessary delay" as used in 34 C.F.R. § 300.502(b)(2) is not defined in the regulations. It permits a reasonably flexible, though normally brief, period of time that could accommodate good faith discussions and negotiations between the parties

over the need for, and arrangements for, an independent evaluation. (*Letter to Anonymous,* 56 IDELR 175 (OSEP 2010).) Some delay in the provision of an independent evaluation is reasonable if the school district and the parents are engaging in active communications, negotiations or other attempts to resolve the matter. (*J.P. v. Ripon Unified Sch. Dist.* (E.D. Cal. April 15, 2009, No. 2:07-cv-02084-MCE-DAD.) 2009 WL 1034993.) The determination of "unnecessary delay" is a fact-specific inquiry. (See *Pajaro Valley Unified Sch. Dist. v. J.S.* (N.D. Cal. Dec. 15, 2006, C06-0380 PVT) 2006 WL 3734289 (a delay of almost three months between parent's request for an independent evaluation and district's due process filing was unreasonable where district offered no explanation or justification for its delay); *J.P. v. Ripon Unified School Dist.*, *supra*, [short citation] (two-month delay during which time district attempted to negotiate an independent evaluation agreement with parent and district filed for due process less than three weeks after negotiations came to an impasse was not unnecessarily long); *L.S. ex rel. K.S. v. Abington Sch. Dist.* (E.D. Pa. Sept. 30, 2007, No. 06-5172) 2007 WL 2851268.).)

On December 23, 2019, Orcutt Union timely agreed to fund the independent psychoeducational evaluation as requested. Orcutt Union provided Student with the guidelines for independent evaluations through the Santa Barbara County Special Education Local Plan Area. Orcutt Union provided Student with an assessment plan, and a release of information form for Parent's consent. Student, through his attorney, requested that Dr. Kimberly Dorsett, a licensed clinical psychologist at Alternative Behavior Strategies, conduct the independent psychoeducational evaluation. Orcutt Union agreed to fund Dr. Dorsett's independent evaluation less than one month after Student's request.

Dr. Dorsett assessed Student on November 11, 2019, December 13, 2019 and December 17, 2019. Dr. Dorsett began Student's evaluation before Parent requested public funding on November 25, 2019. Student's attorney provided Dr. Dorsett with an initial $2000.00 to begin the evaluation. On February 4, 2020, Student's attorney provided Orcutt Union with Dr. Dorsett's contact information. On February 21, 2020, Katherine Long, Orcutt Union's Director of Special Education, contacted Dr. Dorsett's office to initiate the independent evaluation and requested a proposed contract from Dr. Dorsett. Dr. Dorsett provided her written report, dated March 31, 2020, to Student, but not to Orcutt Union.

On April 30, 2020, Student's attorney emailed Orcutt Union's attorney, indicating Dr. Dorsett had completed the independent evaluation, and requested Orcutt Union to reimburse Student's attorney the $2000.00 she advanced, and to make arrangements to pay the balance directly to Alternative Behavior Strategies, pursuant to the invoice. Orcutt Union's attorney requested a copy of Dr. Dorsett's independent psychoeducational evaluation report from Student's attorney. Student's attorney refused to forward a copy of the independent evaluation report. Student's attorney informed Orcutt Union that she would provide a copy of the evaluation report five days before the then-pending litigation, because Student considered it to be her expert's assessment report. Nevertheless, Student's attorney forwarded the independent evaluation report to Orcutt Union's attorney on May 20, 2020.

On July 9, 2020, Student's attorney sent a follow-up email to Orcutt Union's attorney again providing a copy of Dr. Dorsett's report and the final invoice for payment. On July 27, 2020, Student's attorney again emailed Orcutt Union's attorney requesting payment, indicating payment was past due, and informing Orcutt Union's

attorney that Orcutt Union had not filed a due process complaint once the independent psychoeducational evaluation was requested on November 25, 2019.

On August 21, 2020, in a series of emails between counsel, Orcutt Union's attorney acknowledged difficulty in obtaining payment for Dr. Dorsett's independent evaluation. Independent evaluation payments were paid through the County Office of Education, which required a contract and an invoice. To issue payment, the County's special education local plan area required a contract directly with Dr. Dorsett, even if the work had been completed. Orcutt Union attempted to contact Dr. Dorset on numerous occasions, with no response. Further, once Student's attorney provided the invoice to Orcutt Union, Student's attorney's name was omitted. To obtain attorney reimbursement, the County required a written agreement with Orcutt Union requiring payment and a W9 tax form. Student's attorney provided neither of these documents to Orcutt Union. As of the filing date of Student's amended complaint, the independent psychoeducational assessment report and reimbursement to Student's attorney remained unpaid.

If a parent elects to obtain an independent evaluation by an evaluator not on the public agency's list of evaluators, the public agency may initiate a due process hearing to demonstrate that the evaluation obtained by the parent did not meet the public agency criteria applicable for independent evaluations, or there is no justification for selecting an evaluator that does not meet agency criteria. (Id.; *Letter to Parker*, 41 IDELR 155 (OSEP 2004).) If the parent obtains an independent educational evaluation at public expense or shares with the public agency an evaluation obtained at private expense, the results of the evaluation may be presented by any party as evidence at a hearing on a due process complaint. (34 C.F.R. § 300.502(c)(2).)

Student's contention that Orcutt Union was required to file a due process complaint for failing to fund Dr. Dorsett's independent evaluation is misguided for two reasons. First, federal regulations require that after a student's request for an independent evaluation, the public agency must, without unnecessary delay, either file a due process complaint to request a hearing to show that its evaluation is appropriate or ensure that an independent evaluation is provided at public expense. (34 C.F.R. § 300.502(b)(2).) In this matter, Student requested an independent psychoeducational evaluation on November 25, 2019, and Orcutt Union agreed to this request on December 23, 2019. Once provided with Dr. Dorsett's contact information, Long initiated contact and requested contract information necessary for payment by the SELPA. Dr. Dorsett completed her evaluation and submitted her evaluation report to Student's attorney on March 31, 2020. Orcutt Union did not fail to ensure that the independent evaluation was provided to Student in a timely fashion.

Second, the "without undue delay" language applies to obtaining the independent assessment in a timely fashion, not to the receipt of payment. Student did not establish that once the school district agreed to fund an independent educational evaluation, and the independent evaluation was completed and provided to the parties, that OAH had jurisdiction over the dispute. Based on the evidence, the dispute regarded Student's attorney and the independent assessor to provide reasonable required information to Orcutt Union to process payment.

An assessment of the student's educational needs must be conducted before any action is taken to place a student with exceptional needs in a special education program. (20 U.S.C. § 1414(a)(1)(A); Ed. Code, § 56320.) An assessment may be initiated by request of a parent, a State educational agency, other State agency, or local educational agency. (20 U.S.C. § 1414(a)(1)(B); Ed. Code, §§ 56302, 56029, subd. (a),

56506, subd. (b).) The IDEA uses the term "evaluation," while California Education Code uses the term "assessment." As used in this decision, the terms "assessment" and "evaluation" mean the same thing and are used interchangeably.

Had Orcutt Union's delay in payment resulted in a failure to conduct the evaluation or a delay in releasing the evaluation report to Student, Student might have had an argument suggesting a denial of FAPE. (See *L.C. v. Alta Loma School Dist.* (C.D. Cal. July 18, 2019, Case No.: 5:18-cv-01535-SVW-SHK) 2019 WL 3246505 (School district failed to make reasonable effort to determine requested independent assessor's rate.) As argued by Student, the purpose of an independent evaluation is to ensure that parents, in contesting an evaluation conducted by their child's school district, are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition (*Shaffer*, *supra,* 546 U.S. 49 at p. 60.) Here, however, Student received the benefit of a fully completed independent psychological evaluation.

Student further contends that, but for Student's attorney advancing a portion of the cost of Dr. Dorsett's evaluation, and Dr. Dorsett's completion of the evaluation prior to payment in full, Orcutt Union would have succeeded in preventing Parent from enforcement of Student's IDEA rights at hearing. The argument is speculative and disingenuous. Student's attorney proffered Dr. Dorsett's down payment to obtain the evaluation for use in Student's previous due process hearing, OAH Consolidated Cases Nos. 2019101249 and 2019120978. Dr. Dorsett started the evaluation before Student's request for an independent psychoeducational evaluation on November 25, 2019. Student received the completed evaluation report before Orcutt Union received it. Dr. Dorsett testified regarding this independent evaluation in the prior hearing. In the

present case, Dr. Dorsett's independent psychoeducational evaluation was not relevant to any of Student's other issues.

Dr. Dorsett completed her independent psychoeducational evaluation and submitted her evaluation report to Student in a timely fashion. Orcutt Union's outstanding balance owing for the independent psychoeducational evaluation did not impede Student's right to a FAPE. Orcutt Union's delay in paying for the independent assessment did not impede parental opportunity to participate in the decision-making process, nor did it deprive Student of educational benefits. Orcutt Union made reasonable effort to secure the required information to pay for the independent assessment, and the failure of Dr. Dorsett and Student's attorney to provide needed information caused the delay. Orcutt Union did not deny Student a FAPE by failing to fund Dr. Dorsett's independent psychoeducational evaluation.

ISSUE 2: DID ORCUTT UNION DENY STUDENT A FAPE BY FAILING TO HOLD AN IEP TEAM MEETING TO DISCUSS HOME-HOSPITAL IN RESPONSE TO STUDENT'S DOCTOR'S RECOMMENDATION IN FEBRUARY 2020?

Student contends Orcutt Union failed to hold an IEP team meeting upon receiving a doctor's request for home-hospital instruction on February 24, 2020. The issue as presented by Student is very narrow relating to home-hospital instruction. The time frame is February 18, 2020 to March 16, 2020.

Orcutt Union contends Student did not submit a valid request for home-hospital instruction and by March 13, 2020, Student's request was moot due to COVID-19 restrictions. Further, Orcutt Union argued that its alleged failure to convene an IEP team meeting before March 16, 2020, did not rise to a denial of FAPE.

All students may receive individual instruction in their home, a hospital or other health facility when a temporary disability that makes attendance in a regular program impossible or inadvisable. (Ed. Code, § 48206.3.) This service is different from individualized in-home placement and instruction pursuant to an IEP for purposes of providing a FAPE to a child with disabilities. (34 C.F.R. § 300.115(b)(1); 5 C.C.R. § 3051.4(d).)

On February 18, 2020, Parent, through her attorney, notified Orcutt Union that due to on-going safety and behavioral concerns, Student would not attend school. Parent's concern arose from Student's frequent elopements from the classroom as well as an incident in which staff was unable to locate Student for a short period of time. Additionally, both Parent and Orcutt Union experienced extreme difficulties dropping Student off at school and getting Student to class even with additional adult assistance. Parent requested an Application for Home-hospital Instruction. Parent requested the application the February 18, 2020. However, Parent's notification did not include any information related to an acute medical or psychological health problem. Although Student's school attendance due to safety and behavioral problems constituted a worthwhile reason to convene an IEP team meeting, those concerns did not establish medical need, and therefore did not constitute a basis for a denial of FAPE claim due to medical necessity and home-hospital instruction.

An IEP team may recommend special education and related services in the home or hospital. (5 C.C.R. §3051.4(a).) For those pupil's with exceptional needs with a medical condition, such as those related to surgery, accidents, short-term illness or medical treatment for a chronic illness, the IEP team shall review, and revise, if appropriate , the IEP whenever this is a significant change in the pupil's current medical condition. (5 C.C.R. §3051.4(c).) When recommending placement for home instruction,

the IEP team shall have in the assessment information a medical report from the attending physician and surgeon or the report of the psychologist, as appropriate, stating the diagnosed condition and certifying that the severity of the condition prevents the pupil from attending a less restrictive placement. The report shall include a projected calendar date for the pupil's return to school. The IEP team shall meet to reconsider the IEP prior to the projected date for the pupil's return to school. (5 C.C.R. §3051.4(d).)

On February 24, 2020, Student's doctor completed Orcutt Union's Application for Home-Hospital Instruction. The doctor recommended Student receive home-hospital instruction for eight weeks to receive medically necessary intensive applied behavioral therapy. Student's attorney forwarded the application to Orcutt Union's attorney on March 10, 2020. The first copy of the application did not include the name and address of the doctor completing the application. Student's attorney forwarded a revised version of the application on March 13, 2020. On March 16, 2020, all Orcutt Union schools closed pursuant to the Governor's Executive Orders due to COVID-19 concerns.

Long noted that the Application for Home-hospital Instruction indicated Student needed home-instruction for a period of eight weeks, commencing February 24, 2020. Therefore, the time frame for home instruction expired by April 25, 2020. Long considered the issue of a home-hospital instruction moot because district-wide instruction changed to in-home online instruction upon the reopening of school. Instead of discussing in-home placement, the IEP team needed to discuss planning and modification of the services and supports available to Student through distance learning due to the pandemic.

Although the Application for Home-hospital Instruction was prepared on February 24, 2020, Student did not forward the completed application to Orcutt Union

until March 13, 2020. School closed three days later and resumed at the end of April 2020 in a distance learning format for all students. Additionally, the eight-week time frame for medically necessary applied behavior therapy had concluded. Student did not submit a follow-up application to extend the time frame for home-hospital instruction. Student presented no evidence to suggest a need for home-hospital instruction to address any residual medical or health issues after the initial February 24, 2020 application. Further, Student did not obtain medically related applied behavior therapy, which was the sole basis for the request for home-hospital instruction until mid-June 2020. Therefore, the need for the home-hospital instruction never came to fruition during the period alleged in this issue.

When a pupil with an IEP experiences an acute health problem which results in his or her non-attendance at school for more than five consecutive days, upon notification of the classroom teacher or the parent, the school principal or designee shall assure that an IEP team is convened to determine the appropriate educational services. (5 C.C.R. § 3051.17 (c).)

Student failed to establish that Parent's concerns required Orcutt Union to convene an IEP team meeting based upon medical necessity. Student contends Orcutt Union offered no evidence that as of February 18, 2020, Student's goals could be or were addressed during the pre-pandemic period Student remained home. This claim was not raised in the complaint, defined as an issue at the prehearing conference or litigated at hearing and is therefore not addressed in substance by this Decision. (*A.W. v. Tehachapi Unified School Dist.* (E.D. Cal. March 8, 2019, No. 1:17-cv-00854-DAD-JLT) 2019 WL 1092574, *6, affd. (9th Cir. 2020) 810 Fed.Appx. 588.)

Orcutt Union's procedural failure to convene an IEP team meeting before March 16, 2020 did not constitute a denial of FAPE. The time frame involved consisted

of Parent's notification of intent on February 18, 2020, which required a school absence of five consecutive school days, at earliest February 25, 2020 to activate California Code of Regulations, title 5, section 3051.17, subdivision (c). COVID-19 shut the school system down a mere thirteen school days later. Using the completed Application for Home-hospital Instruction received on March 13, 2020, as the timeline, zero school days were impacted before the mandated school closure. Further, the unavailability of medically related applied behavior therapy for Student until June 2020, negated the entire reason for home-hospital instruction. Student did not establish that during this short period of time Student suffered any actual denial of educational benefit or that Parent's right to participate in the decision-making process were significantly impaired. As such, Student did not prove Orcutt Union denied Student a FAPE.

ISSUE 3: DID ORCUTT UNION DENY STUDENT FAPE BY FAILING TO PROVIDE PRIOR WRITTEN NOTICE AS TO WHY ORCUTT UNION COULD NOT ALLOW STUDENT'S PRIVATELY FUNDED, MEDCIALLY PRESCRIBED APPLIED BEHAVIOR ANALYSIS SERVICE AT SCHOOL?

Student contends Orcutt Union failed to grant Student's request to provide privately funded, medically prescribed applied behavior analysis services at school at the February 3, 2020 IEP team meeting, and thereafter failed to provide Student with prior written notice regarding its denial of request.

Orcutt Union contends prior written notice was unwarranted, as Student's request was hypothetical at the February 3, 2020 IEP team meeting. Orcutt Union contends it did not deny Student's request but deferred any decision until Student obtained a privately funded medically prescribed applied behavior analysis service, and Orcutt Union had an opportunity to consider the actual program and consult with its providers.

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.)

The notice must contain:

1. a description of the action refused by the agency;
2. 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;
3. a statement that the parents of the disabled child are entitled to procedural safeguards, with the means by which the parents can obtain acopy of those procedural safeguards;
4. sources of assistance for parents to contact;
5. a description of other options that the IEP team considered, with the reasons those options were rejected, and
6. 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.

An IEP document can serve as prior written notice as long as the IEP contains the required content of appropriate notice. (71 Fed.Reg. 46691 (Aug. 14, 2006).)

The notice must be given "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).) 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.*)

The parties have an extensive history of special education litigation between them. Parent and Orcutt Union administrators did not communicate directly, but instead relied upon their attorneys for all relevant communications. At the time of the February 3, 2020 IEP team meeting, the parties were preparing for a scheduled due process hearing in OAH Case Nos. 2019101249 and2019120978. Subsequently, by the time of this hearing, the parties were engaged in yet another due process complaint, as well as federal litigation. During the testimony in this matter, questions and objections were made which were specifically in reference to the other pending litigations. Objections were sustained unless the question proffered related to one of the five specific issues in this case. Closing briefs also included clarifications of testimony, and arguments which were directed towards their pending federal litigation. Even Student's phrasing of Issue Three that Orcutt Union *cannot allow* Student's privately funded applied behavior analysis at school, rather than *would not allow* the private services at school revealed a larger concern for Orcutt Union's policies in relation to the federal litigation rather than to the limited issue of denial of FAPE in this case. In addition, the February 3, 2020 IEP team meeting was adversarial. The recollection of the witnesses regarding those stressful events resulted in witness testimony that was clouded and self-serving. Therefore, the transcript of the February 3, 2020 IEP team meeting served as the best evidence to determine whether prior written notice was required.

At the February 3, 2020 IEP team meeting, Cummings initially asked if Orcutt Union would be open to having an applied behavior therapist come in from Autism

Learning Center to work with Student at school. Cummings asked the question as a hypothetical. Autism Learning Center was the source of Student's medically prescribed applied behavior therapy provided through his medical insurance.

Long and Orcutt Union's attorney responded Orcutt Union had the responsibility to ensure it provided educationally related services. They needed to look at the specific treatment plan from the private assessor and applied behavior therapist. Additionally, there were some confidentiality issues and safety concerns involved with having people from other agencies on campus who were not under the school district's direct control. However, nothing in the transcript suggested Orcutt Union would not consult with an outside provider to ensure there was some consistency between the different settings to make sure that what worked in one setting might crossover into the other setting for Student's educational benefit.

Student's counsel orally interpreted Long's statement as school district policy excluding privately funded applied behavior analysis programs from providing services to children at school. Student's attorney's interpretation was a misstatement of what Long had conveyed to Student's attorney. Long reiterated her previous statement and added that Orcutt Union looked carefully to determine what was exactly in Student's treatment plan that was educationally related; and what should the school district be providing, rather than the medically related therapies being provided.

Student's counsel deflected the IEP team request for more information and asked two more times if Orcutt Union would allow a private applied behavior therapist on campus for Student. The discussion continued throughout the IEP team meeting.

When Student's attorney again suggested Orcutt Union's position was that Orcutt Union was not willing to allow Student's privately provided applied behavior

therapy and a Board-Certified Behavior Analysist to support him at school at that time, Orcutt Union's attorney recapped the discussion. Specifically, Orcutt Union needed to communicate with the private program to discuss what the applied behavior therapy would look like in the school setting, determine whether it was required in the school setting to provide a FAPE, and whether training would be required to provide it. Then, if the IEP team determined Student required such a high level of support that was beyond the expertise within the Orcutt Union, the team would consider having a private provider come on campus. The issue was not whether Student needed applied behavior analysis, but whether through collaboration, could Orcutt Union implement a program using district personnel in the school setting. Arguments ensued with no further resolution.

Orcutt Union did not forward a prior written notice to Parent regarding private behavior therapy and took no further action at that time. As of February 3, 2020, Student did not have medically prescribed privately funded applied behavior therapy in the home. He did not receive such privately funded program until June 2020.

Jennifer Posey, the Clinical Director of Holdsambeck Behavioral Health, testified for Student. Student received his medically prescribed applied behavior analysis therapy through Holdsambeck. Posey held a master's degree in special education and was a board-certified behavior analysist. Posey supervised Student's therapy program. She completed a functional behavior assessment of Student in his home in April 2020. Student's therapy services began on June 11, 2020, based upon a treatment plan created at that time. Student's therapy continued throughout the COVID-19 pandemic. Posey's testimony confirmed that a great deal of Student's treatment plan could be interconnected to Student's educationally related needs. As example, the treatment plan contained goals for social emotional reciprocity, escape, asking for help, reading

emotions and participation, listening and attending to task. Posey explained the similarities between medical and educational therapies. While the level of support provided by Holdsambeck was higher, Posey did not suggest the educationally transferrable goals were beyond the expertise of a school behaviorist or could not be done through collaboration with school district personnel, which was the issue Orcutt Union needed to consider before it could appropriately respond to Student's request for private services.

34 Code of Federal Regulations, part 300.503(a) requires a school district to provide prior written notice when it 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. In this case, Orcutt Union never refused anything to Student, as argued by Student's attorney.

While the initial inquiry into private applied behavior therapy was raised as a hypothetical, Student's attorney shifted the question to an immediate demand, once Orcutt Union IEP team members indicated they had insufficient information on which to base a comprehensive response. Further, Student demanded an immediate response from Orcutt Union when Parent knew Student had not yet obtained privately medically related applied behavior therapy. Therefore, Student's demand was an exercise in futility. If Orcutt Union granted Student's demand to immediately allow Student's private applied behavior therapist to support him on campus, there was no private program or therapist at the time to provide the service.

Given the circumstances, the IEP team appropriately informed Parent and her attorney it would consider Student's request when it obtained specific information regarding the private program and therapist. Orcutt Union offered a release of information to Parent to get things started. Student did not prove that Student's inquiry

remained unanswered despite counsel's perseveration on the issue. Private services were not available on February 3, 2020, and Orcutt Union was not required to make a decision regarding a speculative change in Student's IEP to include an envisioned private program. As such, prior written notice was not required to provide further clarification to a question in a hypothetical stage.

Further, the components of the prior written notice were contained in the discussions at the February 3, 2020 IEP team meeting. Orcutt Union repeatedly explained its refusal to commit to a definitive yes or no. Orcutt Union indicated it would initiate discussions with the private provider. It offered a release of information to Parent.

Student and Parent's procedural rights were not infringed. Student's attorney attended the IEP team meeting and led the multiple discussion regarding a private applied behavior therapist supporting Student at school. Student's contention that prior written notice at the IEP team meeting was not timely and was disingenuous as well. Although Parent did not receive a copy of the IEP, which included the IEP team notes, in a timely fashion, Parent, her attorney, and her attorney's assistant all attended the IEP team meeting and each fully participated in the discussion and asked questions regarding Orcutt Union's request for more information.

Orcutt Union did not refuse to implement a change in Student's IEP which was impossible at the time. Orcutt Union's responses at the February 3, 2020 IEP team meeting were not rendered vague or incomplete where Student refused to accept the school district's responses and failed to listen to the explanations proffered during the meeting. As such, Orcutt Union members of the IEP team provided enough information pursuant to 34 Code of Federal Regulations, part 300.503(b), to constitute adequate

prior written notice, had it been required. Student did not meet Student's burden of proof on this issue.

ISSUE 4: DID ORCUTT UNION DENY STUDENT FAPE BY FAILING TO IMPLEMENT STUDENT'S LAST AGREED UPON IEP BY NOT PROVIDING COUNSELING OR THE PERCENTAGE OF TIME IN GENERAL EDUCATION OFFERED?

FAILURE TO PROVIDE COUNSELING

Student contends Orcutt Union failed to implement counseling services for both Student and Parent as contained in the last agreed upon IEP, dated August 13, 2019. Orcutt Union contends it provided Student with the counseling services provided in the IEP and offered Parent counseling services which she refused. As a result of Student's prior cases, decided December 4, 2020, Student's relevant timeline in this issue is December 20, 2019 through August 11, 2020.

A school district is responsible to provide eligible students with a FAPE by delivering special education and related services in conformity with the student's IEP. (20 U.S.C. § 1401(9)(D). IEPs are clearly binding under the IDEA, and the proper course for a school that wishes to make material changes to an IEP is to reconvene the IEP team and not to decide on its own no longer to implement part or all of the IEP. (*Van Duyn v. Baker School Dist. 5J* (9th Cir. 2007) 502 F. 3d 811, 821)(citing 20 U.S.C § 1414(d)(3)(F), 1415(b)(3).) A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP. (*Ibid*).

Student attended a home program through an independent charter school prior to the 2019-2020 school year. Student returned to Orcutt Union for the 2019-2020 school year. On August 13, 2019, Orcutt Union convened a 30-day transition IEP. Juliette Iannoli-Ballard attended the August 13, 2019 IEP team meeting as Orcutt Union's school psychologist. The August 13, 2019 IEP constituted Student's last agreed upon IEP which remained in full force and effect during the pertinent time frame of this matter. The IEP continued Student's prior placement in a general education classroom, with 30 minutes per day of specialized academic instruction. Six percent of Student's activities were outside of general education designated for related services.

The August 13, 2019 IEP offered Student 30 minutes per week of individual counseling, and 80 minutes per month of counseling for Parent. Parent expected implementation of the counseling services upon her consent to the IEP.

On November 5, 2019, Iannoli-Ballard emailed Parent to set up a schedule for the twice-monthly counseling sessions. On November 7, 2020, Parent responded she was uncomfortable with counseling provided by the school district, due to Student's filing of the prior due process complaint naming Orcutt Union. Parent indicated she was open to private counseling funded by Orcutt Union. Parent reported Iannoli-Ballard subsequently informed Parent that Iannoli-Ballard would not be providing counseling services to either her or Student.

Orcutt Union informed Parent that Lisa Alvarez, a contracted counselor would provide the counseling services. Alvarez, a counselor with Casa Pacifica, provided contracted school-based counseling for school districts. Alvarez first met Parent at the November 14, 2019 IEP team meeting. Ultimately Alvarez did not provide any counseling to Parent. Long informed Alverez that Parent did not sign the November 14, 2019 IEP and refused counseling services. Parent emphatically denied refusing

contracted counseling services. To the contrary, at the November 14, 2019 IEP team meeting, Long asked Parent if she was still interested in receiving counseling services. Parent reiterated she was still interested.

Parent also recalled that after the February 3, 2020 IEP team meeting, Parent again discussed counseling. Only at that time, did Parent indicate *she* did not want counseling from Alvarez.

Parent's significant distrust of Orcutt Union's ability to provide her with parental counseling, either through the school psychologist or contracted counselor was largely related to the history of antagonism between the parties and their unending legal proceedings. It was doubtful that Parent would participate in any counseling services offered by Orcutt Union. Nevertheless, Orcutt Union failed to provide Parent counseling between December 20, 2019 and February 3, 2020, when Parent openly declined counseling services from Alvarez. Due to the intervening Winter Break, between December 21, 2019 and January 10, 2020, Orcutt Union failed to provide Parent with only 80 minutes of parental counseling. Such failure to implement parental counseling constituted a minor discrepancy which did not rise to the level of a denial of FAPE.

Orcutt Union's obligation to provide Student with counseling is differentiated from that owing to Parent. Parent continued to maintain that Student was not receiving 30 minutes per week of counseling services. Long testified Student's counseling was implemented, and she relied upon a spreadsheet indicating the dates Iannoli's-Ballard met with Student and Parent between September 13 and November 5, 2019. The spreadsheet noted only contact dates before December 20, 2019, and constituted Orcutt Union's only record submitted at hearing to support Student's counseling. As such, Orcutt Union could not support a finding that Orcutt Union provided Student with counseling services after December 20, 2019, that is at issue in this matter.

Further, Orcutt Union's reliance on the spreadsheet undermined its counseling contention and witness credibility. The document itself was sketchy and did not specifically identify Student. It did not contain a counseling log or information regarding the session. The document indicated Iannoli-Ballard met with Student in 60 minute increments on six occasions, rather than in weekly sessions of 30 minutes each over a period of over two months, as called for in the IEP. Three of the dates in October 2019, more closely aligned to the three days Iannoli-Ballard spent with Student conducting his triennial assessment.

Iannoli-Ballard attended the November 14, 2019, and February 3, 2020 IEP team meetings. The IEP team notes for both IEP team meetings do not reflect any input from Iannoli-Ballard regarding Student's counseling sessions or progress to suggest counseling was taking place.

Parent testified under oath Student received no counseling. It is difficult to accept that Orcutt Union maintained no other records or collateral information to confirm implementation of Student's IEP other than the one, outdated spreadsheet. Upon the onset of COVID-19 restrictions, Orcutt Union provided no evidence to indicate counseling services were curtailed or that counseling was provided remotely.

The evidence supports a finding that Orcutt Union failed to implement Student's August 13, 2019 IEP provisions regarding Student counseling. This constituted a material failure to implement Student's IEP. The materiality standard does not require Student to suffer demonstrable educational harm. (*Van Duyn*, *supra,* 502 F.3d 823.) In this matter however, when correlated with his behavior issues and refusal to remain in the classroom, the lack of appropriate counseling services resulted in lack of educational benefit.

FAILURE TO IMPLEMENT TIME IN GENERAL EDUCATION

Pursuant to the August 13, 2019 IEP, the IEP team placed Student in a general education classroom, with 30 minutes per day of specialized academic instruction. Student contends that Orcutt Unions failure to appropriately address Student's elopement and maladaptive behaviors resulted in Student's physical absence from the classroom for extended periods daily, thusly resulting in a failure to implement Student's education in his general education placement.

Orcutt Union failed to address this issue beyond a general contention it offered Student appropriate supports and services to access his educational program.

Student's second grade general education teacher, Aniko Taubenheim, testified. Taubenheim was the most convincing witness at the hearing based upon her direct experiences with Student at school. Taubenheim's second grade class began at 8:35 AM and ended at 2:50 PM. Math, a non-preferred subject for Student, was taught in the morning. During the first six weeks of the 2019-2020 school year, Student would leave the classroom with an adult during math instruction. As the rigors of the curriculum increased, Student began refusing to come into the classroom. Occasionally he returned to the classroom for community building time, which was play-like. A handful of times, Student returned for his reading rotation which he enjoyed. When in class, Student hid under his desk when he did not want to work. Although a behavior intervention plan was not formally in place, Taubenheim utilized behavior interventions to work with Student. Orcutt Union assigned a dedicated aide to Student due to his elopements and refusal to come in the classroom. Taubenheim spoke daily with Student's resource teacher and did not believe Student had any difficulties attending the resource service program outside of the general education classroom.

Student's contention was further supported by the proposed behavior intervention plan contained in the November 11, 2019 IEP. Orcutt Union reported a serious need for a behavior intervention plan due to Student's eloping for 285 minutes daily, or 80% of the school day. Principal Joe Schmidt, defined Student's elopement as walking out of class but not leaving the school campus.

The evidence supports a finding that Student's non-presence in the classroom for 80 percent of the school day as a result of elopement constituted a material failure to implement Student's entire IEP. That failure prevented Student from receiving any discernable educational benefit and impeded Student's social contact with typical peers in the general education classroom. Orcutt Union presented no evidence or authority to the contrary.

Orcutt Union's continuing response defense to Student's contentions throughout the hearing was that Parent failed to provide consent to the special education and related services offered at each IEP team meeting, including a behavior intervention plan. Orcutt Union, however, cannot escape the burden of implementing Student's most recent agreed-upon and implemented IEP. If Parent's refusal to provide IEP consent was indeed the source of Orcutt Union's inability to materially implement Student's IEP, then the school district was obligated to file its own request for due process to seek approval to implement an appropriate IEP without parental consent. To that end, California Education Code, section 56346, subdivision (f), provides, in pertinent part, that if a school district "determines that the proposed special education program component to which the parent does not consent is necessary to provide" a FAPE, "a due process hearing shall be initiated." (*I.R. ex rel. E.N. v. Los Angeles Unified Sch. Dist.*, (9th Cir. 2015) 805 F.3d 1164, 1168-69.)

Orcutt Union denied Student a FAPE by failing to implement Student's last agreed upon IEP and did not provide Student counseling or maintain Student's presence in the classroom for the percentage of time offered in general education.

ISSUE 5: DID ORCUTT UNION DENY PARENTAL PARTICPATION IN THE FORM OF ENFORCEMENT A FAPE BY MISREPRESENTING A DOCUMENT CREATED AFTER FEBRUARY 3, 2020, AS ORCUTT UNION'S NOVEMBER 2019 OFFER OF FAPE?

Student contends Orcutt Union unilaterally modified the November 14, 2019 IEP document after providing it to Parent. Parent remained unaware of the altered IEP until it was subsequently misrepresented in Orcutt Union's exhibits for Student's prior due process hearing in 2019 as the November 14, 2019 IEP to which Parent refused consent. The provisions added to the November 14, 2019 IEP were never presented to Parent for consideration or IEP team discussion. Student contends that by failing to inform Parent of the additions to the IEP, Orcutt Union denied Parent her right to participate in the IEP process, thereby preventing Parent from consenting to the added provisions in the IEP and monitoring the implementation of those changes.

Orcutt Union contends it did not mislead Student. The presentation of the altered November 14, 2019 IEP at the prior hearing was an error in identifying documents. The added provisions were draft proposals memorialized for discussion at Student's next anticipated IEP team meeting. The additional provisions were in draft stage and never implemented as part of Student's IEP. Therefore, parental participation was not violated. Orcutt Union further contends that Student's claim she was unable to consent to the proposed changes is immaterial in this matter, as Student raised no

issues of denial of FAPE based upon the services offered in the November 14, 2019 IEP or any IEP thereafter.

A school district is responsible to provide eligible students with a FAPE by delivering special education and related services in conformity with the student's IEP. (20 U.S.C. § 1401(9)(D). IEPs are clearly binding under the IDEA, and the proper course for a school that wishes to make material changes to an IEP is to reconvene the IEP team and not to decide on its own to no longer implement part or all of the IEP. (*Van Duyn v. Baker School Dist. 5J* (9th Cir. 2007) 502 F. 3d 811, 821)(citing 20 U.S.C § 1414(d)(3)(F), 1415(b)(3).)

Student's contentions in Issue Five present two separate arguments, both based upon *M.C. by & through M.N. v. Antelope Valley Union High Sch. Dist.*, (9th Cir. 2017) 858 F.3d 1189 (*Antelope Valley*).)

MISREPRESENTATION OF DOCUMENT

Parent received a copy of the November 14, 2019 IEP document at the February 3, 2020 IEP team meeting. At no time did Parent consent to the content of the IEP document developed on November 14, 2019 or thereafter on February 3, 2020.

On July 30, 2020, the parties started hearing in Student's consolidated matters of OAH Case Nos. 2019120978 and 20129101249. For purposes of that hearing, Orcutt Union offered into evidence a document purporting to be the offer of FAPE presented to Parent at the November 14, 2019 IEP team meeting. Foundational testimony denoted this document as the IEP document presented to and rejected by Parent. The IEP document produced by Orcutt Union at that hearing, was not the same IEP document presented to Parent on February 3, 2020. Student contends Orcutt Union misrepresented the November 14, 2019 IEP by creating a new document after

February 3, 2020, which resulted in violation of trust necessary for collaboration within an IEP team. Orcutt Union provided testimony in the June 30, 2020 hearing that established the document presented at hearing inadvertently contained information that was not originally contained in the November 14, 2019 IEP document.

Student cites *Antelope Valley* in support of her contention. In that case, the school district made unilateral changes to Student's operative IEP and offered an altered IEP document at hearing as its defense to the claim that the IEP denied Student a FAPE. The Ninth Circuit disapproved of the school district's conduct of unilaterally changing the operative IEP document and withholding the changes from Student. The Ninth Circuit found the unilateral changes made to an operative IEP to be a per se procedural violation of the IDEA, reversed, in part, and remanded the matter back to the district court to determine whether, and to what extent the student was prejudiced by that procedural impropriety. Additionally, as contained in footnote 5, the appellate court remanded the matter to the district court for determination of whether the school district's conduct was a deliberate attempt to mislead the parents or was mere bungling on the part of the school district and its lawyers. (*Antelope Valley, supra*, 858 F.3d at p. 1197.)

OAH's December 4, 2020 decision from the prior hearing is currently on appeal. As with the remand findings in *Antelope Valley*, any determination regarding the claim of misrepresentation versus mistake is best left to the court which considered the evidence and made the findings and orders. Therefore, in this matter, the ALJ declines to make any determinations, factual or otherwise, regarding misrepresentation allegedly committed in another matter. Further, while unfortunate, the issue of whether Parent trusts Orcutt Union based upon conduct in another hearing is not relevant to the issues in the case at hand.

DENIAL OF PARENTAL PARTICIPATION

Student contends the unilateral IEP changes made after February 3, 2020, denied Parent the right to monitor and enforce implementation of Student's IEP.

> The IDEA contains numerous procedural safeguards that are designed to protect the rights of disabled children and their parents. *See* 20 U.S.C. § 1415. These safeguards are a central feature of the IDEA process, not a mere afterthought . . . ." Therefore, compliance with the IDEA's procedural safeguards 'is essential to ensuring that every eligible child receives a FAPE, and those procedures which provide for meaningful parent participation are particularly important." [citation omitted] Procedural violations that interfere with parental participation in the IEP formulation process undermine the very essence of the IDEA.

Antelope Valley, *supra*, 858 F.3d at p. 1195, (citing *Amanda J. v. Clark Cty. Sch. Dist.* (9th Cir. 2001) 267 F.3d 891, 892.)

Under the IDEA, parental participation does not end when parent signs the IEP, since parents must be able to use the IEP to monitor and enforce the services that their child is to receive when parent is unaware of the services offered to student. When a parent cannot monitor how these services are provided, a FAPE has been denied, whether or not parent had ample opportunity to participate in formulation of the IEP. (*Antelope Valley, supra,* 858 F. 3d at 1198.)

Student compares his contentions to those in *Antelope Valley.* Both cases presented unilaterally changes to the terms of an IEP document which the parent did not learn of until the first day of the due process hearing. In *Antelope Valley,* however, the school district made unilateral changes to the student's operative IEP. In the current

case, Orcutt Union made no changes to Student's operative IEP nor did Orcutt Union implement any changes to Student's IEP.

The basic uncontroverted facts embedded in each of Student's five issues contained in this complaint are (1) the August 13, 2019 IEP constituted Student's operative IEP; (2) Parent did not consent to the implementation of any IEP provisions offered after August 13, 2019; and Orcutt Union made no offers of FAPE after February 3, 2020.

As described by Long, IEP offers were often tweaked when additional information was flushed out, and improvements were made to obtain parental consent to an IEP. Proposed changes were often included in an IEP draft to be discussed at a subsequent IEP team meeting.

William Headrick, Orcutt Union's behavior specialist working with Student, added a significant amount of information and behavior plan revisions to the November 14, 2019 IEP maintained in Orcutt Union's computer software. Headrick explained that since Parent had not provided consent to the November 14, 2019 IEP, he used the IEP document in the computer program as a draft IEP document for his proposed revisions to the behavior intervention plan to be discussed at Student's next IEP team meeting. He felt it was acceptable to make proposed changes to the IEP maintained by Orcutt Union as Parent had not provided consent to any IEP since August 13, 2019.

According to Headrick, the revisions to the behavior intervention plan did not change Student's target behaviors or modify the basic behavior plan previously shared with Parent. Headrick added additional information to the IEP to provide more shaping of the behavior strategies and to provide clarity on how the behavior plan would work. The morning arrival procedures contained in the altered IEP however, had never been

discussed in an IEP team meeting and the behavior strategies proposed for getting Student from the school parking lot to class, added an additional target behavior to address. Parent indicated that, had she had been presented with this information openly and in a timely fashion, she would have consented to the implementation of the behavior intervention plan. Based upon the combative history of the parties, Parent's consent remains speculative.

The alterations to the IEP document consisted of more than mere tweaks, resulting in a modified IEP document eleven pages longer than the original. Those changes however constituted additions of draft proposals to be discussed, formally added to Student's IEP, and offered to Parent at a subsequent IEP team meeting.

Regardless, denial of FAPE cannot be determined based upon speculation. Student failed to sustain his burden of proof. Student did not establish that Parent's procedural rights of participation in the IEP process were impaired because she could not enforce implementation of IEP changes which were not part of Student's operative IEP. Nor did Student provide any evidence that Orcutt Union implemented the altered IEP without parental consent. Because Orcutt Union had not implemented the IEP changes, unlike the district in *Antelope Valley*, or made a formal offer of these IEP changes, the altered document created no new IEP provisions that required parental oversight. Parent made no contentions regarding denial of FAPE due to the content of the altered IEP document, and further stated she would have consented to implementation of the modifications. Student's primary concern regarding the altered IEP document lies in the underlying issue of misrepresentation relevant only to Student's prior case and continuing collateral litigation. Therefore, Student did not establish a procedural violation that significantly impeded on Parent's decision-making ability.

LEGAL CONCLUSIONS

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: Orcutt Union did not deny Student a FAPE by failing to timely file for due process or fund an independent psychoeducational evaluation in response to Student's request on November 25, 2019. Orcutt Union prevailed on Issue 1.

Issue 2: Orcutt Union did not deny Student a FAPE by failing to hold an IEP team meeting to discuss home-hospital instruction in response to Student's doctor's recommendation in February 2020. Orcutt Union prevailed on Issue 2.

Issue 3: Orcutt Union did not deny Student a FAPE by failing to provide prior written notice as to why Orcutt Union would not allow student's privately funded, medically prescribed applied behavior analysis service at school. Orcutt Union prevailed on Issue 3

Issue 4: Orcutt Union denied Student a FAPE by failing to implement Student's last agreed upon IEP by not providing counseling or the percentage of time in general education offered. Student prevailed on Issue 4.

Issue 5: Orcutt Union did not deny Student a FAPE in the form of denying parental participation in the enforcement of FAPE by misrepresenting a document created after February 3, 2020, as Orcutt Union's November 2019 offer of FAPE. Orcutt Union prevailed on Issue 5.

REMEDIES

Student prevailed on Issue 4. Orcutt Union denied Student a FAPE by failing to implement Student's last agreed upon IEP and did not provide Student counseling or maintain Student's presence in the classroom for the percentage of time offered in general education.

ALJ's have broad latitude to fashion appropriate equitable remedies for FAPE denials. (*School Comm. Of Burlington v. Department of Educ.* (1985) 471 U.S. 359, 370 [105 S.Ct. 1996, 85 L.Ed. 2d 385]; *Parents of Student W. v. Puyallup Sch. Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.) In remedying a FAPE denial, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516 (c)(3)(2006).) Appropriate relief means "relief designed to ensure that the student is appropriately educated within the meaning of the IDEA." (*Puyallup, supra*, 31 F.3d at p. 1497.)

COMPENSATORY REMEDIES

Compensatory education is an equitable remedy that depends upon a fact-specific and individualized assessment of a student's current needs. (*Reid v. District of Columbia* (D.C. Cir. 2005) 401 F.3d. 516, 524.) The award must 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, supra*, 401 F.3d at p. 524; *R.P. ex rel. C.P. v. Prescott Unified School Dist.* (9th Cir. 2011) 631 F.3d 1117, 1125.) Hour-for-hour relief for a denial of FAPE is not required by law. (*Puyallup, supra*, 31 F.3d at p. 1497.)

IMPLICATIONS OF 2020 COVID-19 PANDEMIC

On March 4, 2020, California Governor Gavin Newsom declared a state of emergency in California due to the threat of novel COVID-19, which mandated stay-at-home orders and the closure of public schools. On June 18, 2020 the California Department of Public Health issued guidance mandating that, subject to certain exemptions, all people in the State of California must wear face coverings in any indoor public space, when engaged in work, and while outdoors in public spaces. The Department also requires persons to maintain social distancing of at least six feet between people, when feasible. Therefore, the compensatory relief requested by Student must take into consideration the practicality of such remediation in relation to the COVID-19 mandate.

Student presented little evidence at hearing regarding the need for his requested compensatory remedies, nor did his closing brief address appropriate compensatory relief at all. Nevertheless, Orcutt Union deprived Student of educational benefit in its failure to implement his IEP, and Student should be provided compensatory relief for this deprivation.

Based upon his complaint, Student's sole basis for determining compensatory remedies lies in the number of hours Orcutt Union failed to appropriately implement his operative IEP. Student's complaint commences on December 20, 2019. Orcutt Union was in winter break between December 21, 2019, and January 10, 2020. Parent unilaterally removed Student from the school campus on February 18, 2020. Orcutt Union closed pursuant to COVID-19 mandates on March 4, 2020, with school reopening after Spring Break on April 13, 2020, via distance learning, which remained in place through the remainder of the 2019-2020 school year, ending June 5, 2020.

COUNSELING SERVICES

Student, in his complaint, requested 28 hours of non-public agency counseling for Student to make up for the counseling which was not provided as offered in the August 13, 2019 IEP. Orcutt Union failed to provide Student 30 minutes per week of counseling from December 20, 2019 through February 18, 2020, and April 13, 2020 through the end of the 2019-2020 school year on June 5, 2020. Orcutt Union was obligated to provide Student with 14 hours of school-based counseling. Orcutt Union shall provide Student with 14 hours of counseling services through a non-public agency selected by Student. In the event the service provided is under contract with Orcutt Union, then Orcutt Union School District shall arrange for direct payment of the 14 hours of counseling services. Should Student select a service provider not under contract with Orcutt Union, then Orcutt Union shall reimburse Parent for up to 14 hours of counseling, not to exceed the sum of $2500.00. Parent shall submit her requests for reimbursement in a timely manner, pursuant to Orcutt Union reimbursement requirements. Orcutt Union shall provide Parent with any such reimbursement within 60 days of request. Student shall complete all compensatory counseling on or before June 30, 2022.

Parent refused the 80 minutes per month of parental counseling at the February 3, 2020 IEP team meeting, which did not constitute a material failure to implement Student's IEP. Therefore, no further relief is granted for parental counseling.

SOCIAL SKILLS TRAINING

Student requested 40 hours of social skills training through a non-public agency to compensate Student for his loss of socialization time with his peers in the general education classroom, pursuant to his 80 percent placement in the general education

setting. Although Student did not directly reference a need for social skills training in his amended complaint, the request is not without merit. Orcutt Union failed to materially implement Student's IEP requirement for placement in a general education classroom. Student's elopements and maladaptive behaviors resulted in Student's physical absence from the general education class most of the school day. Student not only lost academic instruction, but his absence prevented him from contact with peers for social interaction and appropriate behavior modeling in the classroom.

Posey's testimony provided the most recent description of Student's deficits in the area of social skills. Student needed to develop significant social skills such as reciprocity, participation in conversations and listening, reading emotions and other peer relations which were embedded in the general education setting and exemplified by his classmates. Student's extensive absences from the classroom, materially hindered his participation in any classroom social activities or peer interactions on a daily basis.

As Student established that Orcutt Union's denial of FAPE preventing him from making meaningful educational progress as to his social skills and the amount of compensatory education required, Student is awarded 40 hours of social skills training through a non-public agency selected by Student. In the event the service provided is under contract with Orcutt Union, then Orcutt Union School District shall arrange for direct payment of the 40 hours of social skills training. Should Student select a service provider not under contract with Orcutt Union, then Orcutt Union shall reimburse Parent for up to 40 hours of social skills training, in an amount not to exceed the district's hourly rate for such social skills training. Parent shall submit her requests for reimbursement in a timely manner, pursuant to Orcutt Union reimbursement requirements. Orcutt Union shall provide Parent with any such reimbursement within

60 days of request. Student shall complete all compensatory social skills training on or before June 30, 2022.

Orcutt Union prevailed on Issues, 1, 2, 3, and 5. Therefore, Student's request for further relief is denied.

ORDER

1. Orcutt Union School District is ordered to provide Student with 14 hours of counseling services through a non-public agency selected by Student. In the event the service provided is under contract with Orcutt Union School District, then Orcutt Union School District shall arrange for direct payment of the 14 hours of counseling services, to be completed on or before June 30, 2022. Should Student select a service provider not under contract with Orcutt Union School District, then Orcutt Union School District shall reimburse Parent for up to 14 hours of counseling, not to exceed the sum of $2500.00. Parent shall submit her requests for reimbursement in a timely manner, pursuant to Orcutt Union School District reimbursement requirements. Orcutt Union School District shall provide Parent with any such reimbursement within 60 days of valid request.
2. Orcutt Union School District is ordered to provide Student with 40 hours of social skills training through a non-public agency selected by Student. In the event the service provided is under contract with Orcutt Union School District, then Orcutt Union School District shall arrange for direct payment of the 40 hours of social skills training, to be completed on or before June 30, 2022. Should Student select a service provider not under contract with Orcutt Union School District, then Orcutt Union School District shall reimburse Parent for up to 40 hours of social skills training, in an amount not to exceed the district's

hourly rate for such social skills training. Parent shall submit her requests for reimbursement in a timely manner, pursuant to Orcutt Union reimbursement requirements. Orcutt Union shall provide Parent with any such reimbursement within 60 days of valid request.

3. All other requests for relief are denied.

RIGHT TO APPEAL THIS DECISION

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

/s/
JUDITH L. PASEWARK
Administrative Law Judge
Office of Administrative Hearings