

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

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CASE NO. 2021040585

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PARENT ON BEHALF OF STUDENT,

v.

VENTURA UNIFIED SCHOOL DISTRICT.

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DECISION

November 5, 2021

On April 16, 2021, the Office of Administrative Hearings, called OAH, received a due process hearing request from Student, naming Ventura Unified School District as respondent. OAH continued this matter on May 28, 2021. Administrative Law Judge Claire Yazigi heard this matter via videoconference on September 8, 9, 10, 13, 14, 15, and 17, 2021.

Attorneys Coleman Alguire and Robert Burgermeister represented Student. Parent attended hearing on September 8, 9, 10, and 13, 2021 on behalf of Student. Attorney Melissa Hatch represented Ventura. Marcus Konantz, Director of Special Education, attended all hearing days on Ventura's behalf.

OAH continued the matter to October 11, 2021 for written closing briefs. The record was closed, and the matter was submitted on October 11, 2021.

## ISSUES

In this Decision, a free appropriate public education will be called a FAPE and an individualized education program will be called an IEP. At the hearing outset, the ALJ reviewed the issues stated in the July 2, 2021 Order Following Prehearing Conference, with the parties. Student narrowed the specific contentions regarding services, assessments, and goals alleged, which are reflected in Issues below. The issues have been reworded for clarity, specifically organizing by school year, but no substantive changes made. Clarification is within the discretion of the Administrative Law Judge. (*M.C. v. Antelope Valley Union High Sch. Dist.* (9th Cir. 2017) 858 F.3d 1189.)

1. Did Ventura deny Student a FAPE from March 16, 2020 through the end of the 2019-2020 school year by failing to:
  - a. Implement Student's IEP by not providing in-person specialized academic instruction and speech language services, instead assigning Student to distance learning;

- b. Assess Student prior to assigning Student to distance learning;
  - c. Offer Student necessary accommodations during distance learning;  
and
  - d. Address Student's regression resulting from distance learning?
- 2. Did Ventura deny Student a FAPE from the beginning of the 2020-2021 school year through April 16, 2021 by failing to:
  - a. Implement Student's IEP up until October 7, 2020 by not providing in-person specialized academic instruction and speech language services and instead assigning Student to distance learning;
  - b. Assess Student's ability to access distance learning;
  - c. Offer Student necessary accommodations during distance learning;
  - d. Address Student's regression resulting from distance learning;
  - e. Assess Student in occupational therapy and offer occupational therapy services in the October 7, 2020 IEP;
  - f. Offer an occupational therapy goal in Student's October 7, 2020 IEP;
  - g. Ensure that the goals in the October 7, 2020 IEP were appropriately written and measurable, specifically in:
    - i. Reading;
    - ii. Math;
    - iii. Self-help;
    - iv. English/language development;
    - v. Writing;
    - vi. Language/communication;
  - h. Offer a one to one aide in the October 7, 2020 IEP; and
  - i. Offer occupational therapy services in the October 7, 2020 IEP?

## 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 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 had the burden of proof on all issues. 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 nine years old and in third grade at the time of hearing. Student resided within Ventura's geographic boundaries at all relevant times. Student was eligible for special education under the primary category of intellectual disability and the secondary category of language or speech disorder. Student had a diagnosis of Down Syndrome.

## ISSUES 1.B. AND 2.B.: ASSESSMENT OF STUDENT'S FITNESS FOR DISTANCE LEARNING

Based on the COVID-19 outbreak and related guidance, Ventura ceased providing any instruction at all to its students from March 16, 2020 to April 3, 2020. Thereafter, Ventura did not provide instruction from April 6 through April 10, 2020 because of spring break and a board holiday. On April 13, 2020, Ventura began providing its students instruction virtually.

Student contends that Ventura had an obligation to evaluate Student for the effect Student's disabilities would have on Student's ability to access education in distance learning. Student contends that Ventura should have done so before moving to distance learning on March 16, 2020 through the end of the 2019-2020 school year, as well as during the 2020-2021 school year, when Ventura was still in distance learning. Ventura contends that Student did not require any assessment to determine Student's IEP accommodations and services in a distance learning format, any time between March 2020 and April 16, 2021.

A district must assess a child in all areas of suspected disability. (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) The areas of assessment include, if appropriate: health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. (34 C.F.R.

§ 300.304(c)(4).) School district evaluations of students with disabilities under the IDEA serve two purposes: identifying students who need specialized instruction and related services because of an IDEA-eligible disability, and helping IEP teams identify the special education and related services the student requires. (34 C.F.R. §§ 300.301 and 300.303.) Once a school district identifies a student as a child with a disability in need of special education and related services, and a parent consents to services, the school district has an ongoing duty to evaluate the needs of that student. Specifically, school districts must conduct a reevaluation if the student's educational or related service needs, including improved academic achievement and functional performance, warrant a reevaluation, or if the student's parents or teacher request a reevaluation. (20 U.S.C. § 1414(a)(2)(A); 34 C.F.R. § 300.303(a).)

Ventura already identified Student as needing special education services because of an IDEA-eligible disability, and Parent consented to eligibility and services. Parent did not, at any time covered by the complaint, request that Ventura assess Student's fitness for distance learning. Student does not allege that Student's special needs themselves had changed before or during distance learning; in essence, Student's argument is that the new circumstance of distance learning was a changed circumstance that required evaluation before implementation.

Ventura conducted a triennial reevaluation of Student in preparation for the October 9, 2019 IEP. Ventura conducted the following assessments: psychoeducation, occupational therapy, speech and language, behavior, academics, and health and

development. Student did not challenge the appropriateness of any of the 2019 assessments. Absent an agreement between a school district and a student's parents, reassessments must not occur more than once a year, or more than three years apart. (20 U.S.C. § 1414 (a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).) Three years have not yet passed since the assessments.

Student does not provide any legal authority to suggest that fitness for distance learning was an area of assessment required by law. Student did not prove Ventura had a duty to assess before implementing a distance learning program on April 13, 2020 or during the 2020-2021 school year. As a result, Student did not meet the burden of proof on this issue.

#### ISSUES 1.A. AND 2.A.: IMPLEMENTATION OF STUDENT'S THEN- OPERATIVE OCTOBER 9, 2019 IEP

STUDENT DID NOT ESTABLISH VENTURA WAS REQUIRED TO PROVIDE  
SERVICES DURING THE DISTRICT-WIDE SHUTDOWN THROUGH APRIL 10,  
2020

Student contends that Ventura failed to implement Student's IEP, from March 16, 2020 to October 7, 2020, by assigning Student to distance, rather than in-person learning. In Student's closing brief, Student also alleges that Ventura failed to implement Student's IEP by not providing the amount of instruction and services as set forth therein. This claim was not raised in the complaint. Accordingly, no determination regarding this contention is reached.

Ventura contends that it materially implemented Student's October 9, 2019 IEP throughout distance learning. Ventura also contends that, because Ventura was closed to all students from March 16, 2020 through April 10, 2020, it was not required to provide Student instruction or services during that time. Ventura asserts that it did not deny Student a FAPE by failing to implement Student's IEP.

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].)

Specialized academic instruction is an instructional service, individualized based on a student's needs, and provided by a credentialed special education teacher. (California Department of Education Special Education Guidance for Covid-19, September 30, 2020; Cal. Code Regs., tit. 5, § 3053, subd. (c); See Ed. Code, § 56001, subd. (n) and (o).)

Generally, Student was entitled to FAPE, which includes the right to have the IEP implemented. However, some limited changes arose due the COVID pandemic. On March 13, 2020, Governor Newsom issued Executive Order N-26-20. This allowed schools that closed due to the COVID-19 pandemic to provide educational opportunities to the extent feasible through distance learning or independent study. It also required the California Department of Education and Health and Human Services Agency to jointly develop guidance ensuring that, during the COVID-19 pandemic, students with disabilities receive a FAPE consistent with their IEP. On March 20, 2020, the California Department of Education, referred to as CDE, issued the mandated guidance, which it updated on April 9, 2020, and September 30, 2020.

In March 2020, the U.S. Department of Education stated that it would not waive federal requirements under the IDEA in response to the pandemic. (U.S. Dept. of Educ., Questions and Answers on Providing Services to Children With Disabilities During the Coronavirus Disease 2019 Outbreak (March 2020).) In its March 20, 2020 guidance, CDE explained that if local educational agencies could provide the special education services in a student's IEP via distance learning, CDE encouraged them to do so. However, CDE provided that local educational agencies could also consider in-home service delivery, or meeting students on school sites or other locations to deliver services. The CDE guidance explained that even when school sites were closed, local educational agencies could provide classroom-based instruction to small groups of students with disabilities with extensive needs, or to maintain the mental and physical health and safety of students. (Cal. Dept. of Educ., Special Education Guidance for COVID-19 (March 20, 2020).)

At the same time, the United States Department of Education assured school districts that compliance with the IDEA should not prevent any school from offering educational programs through distance instruction. The Department emphasized that the provision of a FAPE may include, as appropriate, special education and related services provided through distance instruction provided virtually, online, or telephonically. (United States Department of Education Office of Special Education and Rehabilitative Services, Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities, March 21, 2020, pp. 1-2.)

On April 9, 2020, CDE updated its March guidance. CDE clarified that local educational agencies were not precluded from providing in-person or in-home services in exceptional situations, to maintain the mental and physical health and safety of students and to support distance learning. Some individuals serving students with disabilities were designated essential workers, including occupational therapists, speech pathologists, behavioral health workers, workers who support vulnerable populations to ensure their health and well-being, and workers supporting K-12 schools for the purposes of distance learning. State and federal orders and guidance all supported the concept that local educational agencies could and should consider in-person supports for students in exceptional circumstances. (Cal. Dept. of Educ., Special Education Guidance for COVID-19 (April 9, 2020).)

Based on the COVID-19 outbreak and related guidance, Ventura ceased providing any instruction at all to its students from March 16, 2020 to April 3, 2020. Thereafter, Ventura did not provide instruction from April 6 through April 10, 2020 because of spring break and a board holiday. In March of 2020, the United States

Department of Education issued informal guidance suggesting that if a local educational agency closed to all students due to the COVID-19 pandemic, it was not required to provide services to students with disabilities at that time. (*USDOE Questions and Answers on Providing Services to Children with Disabilities During a Covid-19 Outbreak*, March 2020.) Therefore, Student did not establish a violation for Ventura's failure to implement Student's IEP from March 16 through April 10, 2020, as Ventura schools were closed to all students.

#### FAILURE TO IMPLEMENT STUDENT'S IEP THROUGH THE END OF THE 2019-2020 SCHOOL YEAR

Ventura resumed instruction through a distance learning model from April 13, 2020 through the remainder of the 2019-2020 school year. Student's then-operative IEP, dated October 9, 2019, offered Student in-person specialized academic instruction in a self-contained classroom for children with moderate to severe disabilities and in-person speech and language service. The IEP specified that Student needed the structure of a special education classroom due to Student's developmental delays.

Before the COVID-19 closure, Student's class consisted of eight students, a special education teacher, and at least one aide. The classroom aides lowered the student-to-adult ratio. Student received in-person push-in and pull-out speech and language services.

Ventura began distance learning the week of April 13, 2020. During distance learning, Student's classroom maintained the same student-to-instructor ratio. Alyssa Baarstad, Student's special education teacher and case manager, provided Student's

class with synchronous instruction, asynchronous instruction, or a combination of both. Synchronous instruction meant that Student received real-time instruction from an instructor or service provider via the Zoom platform. Asynchronous instruction meant that Student's teacher or service provider assigned Student work to be completed independently. Asynchronous assignments were either posted to online learning platforms like Google classroom or Unique Learning Systems, or given to Student as packets of hard copy work.

Baarstad held live Zoom sessions for her class twice a week, with each Zoom session lasting about 20 minutes. Baarstad taught lessons in areas like art and science, and each incorporated academic skills like reading, writing, and math. Baarstad also worked with Student on letter sounds and name writing. In addition to the Zoom sessions, Baarstad emailed daily prerecorded good morning routine videos, lasting anywhere from 20 to 30 minutes, that Student loved. Within the videos, Baarstad gave students options on how to participate, to customize the routine to each student's ability level. Baarstad also provided Student with asynchronous work to complete as well. Baarstad did not track asynchronous learning or take attendance, but did do weekly phone check-ins with Parent to answer questions, address concerns, discuss curriculum, and ask if Student needed any resources. Parent testified that during this time, Student struggled to access the provided lessons and required. Parent did not share with Baarstad how much Student struggled with distance learning during this time.

Kelli Mora, Student's Ventura speech language pathologist, also began providing services on April 14, 2020. Mora delivered speech and language services exclusively by way of asynchronous assignments, posted to the Google Classroom platform. Mora did

not provide Student three 15-minute direct, in-person speech and language sessions every week, as set forth in Student's then-operative IEP. Because Mora provided exclusively asynchronous speech and language services from April 13, 2020, through the remainder of the 2019-2020 school year, Mora had no way of knowing whether Student completed the asynchronous assignments or how long Student took to complete them, nor had no way to collect data on Student's progress.

Parent testified extensively and credibly about what distance learning was like for Student. While Student, by all accounts, was a sweet, helpful, social child that typically loved school, Student needed constant, often physical, redirection in order to focus, and on most days had difficulty attending virtual classes. When Student became frustrated, she would either put her head down on the table, fight with her sibling, cry, or leave the computer and no longer wanted to participate in online learning. Parent attempted to address these challenges by asking Student's teacher for a small break, giving Student a manipulative, separating Student from her sibling if they were attending class together, or remind Student to refocus by tapping Student on the shoulder. Distance learning became so difficult that Parent elected not to have Student participate in remote extended school year in the summer of 2020, even though Student's IEP offered it.

Student's private occupational therapy sessions also moved to an online format during the COVID-19 closures. JanDee Goodiss was the occupational therapist who provided private services to Student. Goodiss noticed that Parent had to use "a million" prompts to get Student on task during Zoom sessions, and that Student struggled more through Zoom sessions and was more distractible than during their in-person sessions together. Goodiss testified, emphatically and unequivocally, that the only way Student

was able to participate in the remote occupational therapy sessions was because of Parent's constant assistance and physical presence. Goodiss' testimony was consistent with Student's age and the nature of Student's disability and was credible.

Student established that Ventura failed to implement the in-person components of Student's IEP, specifically specialized academic instruction and speech and language from April 13, 2020, through the end of the 2019-2020 regular school year. Not every IEP implementation failure results in a FAPE denial. A school district violates the IDEA if it materially fails to implement a child's IEP. (20 U.S.C. § 1401(9).) A material failure occurs when there is more than a minor discrepancy between the services provided to a disabled child and those required by the IEP. (*Van Duyn, supra*, 502 F.3d 811, 815, 822.)

In this case, Student established that failing to implement in-person specialized academic instruction and speech and language was material. Given the pandemic, it was reasonable for Ventura to attempt to implement these components of Student's IEP via distance learning. However, over time, it became clear that Student was not able to access her special education and related services via this delivery model. Parent, by necessity, was responsible for implementing speech and language exclusively as all lessons were asynchronous. Similarly, Parent was required to physically assist and prompt Student during specialized academic instruction for Student to receive any benefit. Parent communicated this concern, as well as Student's computer fatigue, to Ventura toward the end of the 2019-2020 school year when she decided against enrolling Student in extended school year. Accordingly, at the end of the 2019-2020 school year, Ventura was on notice that its failure to implement Student's in-person specialized academic instruction and speech and language was material.

Ventura did not provide any legal authority that would exempt it from its obligation to provide a FAPE to Student, even during the pandemic. On the contrary, the U.S. Department of Education did not waive the obligation of local educational agencies to provide a FAPE to students with disabilities during the COVID-19 closures, and on March 20, 2020 CDE encouraged local educational agencies to consider classroom-based instruction to small groups of students with disabilities that have extensive support needs as well as in-person services.

As noted previously, it was reasonable for Ventura to attempt distance learning with Student. Parent did not initially express to Ventura Student's severe challenges Student in accessing her education. Accordingly, Student did not establish a FAPE denial for the failure to implement in-person specialized academic instruction and speech and language services from April 13, 2020, until the end of the regular school year. By the end of the school year, however, Ventura was on notice of Student's inability to access her education through distance learning without extensive and constant support from Parent. Thus, Ventura's failure to implement Student's in-person specialized academic instruction and speech and language was material by the conclusion of the 2019-2020 school year.

FAILURE TO IMPLEMENT IN-PERSON SPECIALIZED ACADEMIC  
INSTRUCTION AND SPEECH AND LANGUAGE CONTINUED UP UNTIL  
OCTOBER 7, 2020

Ventura began the 2020-2021 school year on a distance model as well. On August 21, 2020, Ventura provided Parent with an Individualized COVID-19 Distance Learning Plan. The plan outlined that Ventura would continue implementing Student's IEP through a distance learning model. The plan acknowledged that Student's IEP

offered Student in-person instruction at a school site, but would be implemented through a distance learning model instead, due to COVID-19. The plan offered Student the same amount of specialized academic instruction, but changed the delivery model. The plan offered combined synchronous live teaching via the Zoom platform and asynchronous instruction using the Canvas and Unique online learning systems. Live teaching sessions could be whole group, small group, or individual sessions. Student's speech and language services kept the same minutes as offered in Student's IEP but changed the delivery to three 15-minute group sessions weekly, using a teletherapy model.

Tomalyn Carey was Student's special education teacher and case manager at the beginning of the 2020-2021 school year, and provided Student's class both synchronous and asynchronous instruction in an exclusively distance learning format. Carey taught two hours of synchronous specialized academic instruction each day, with an early morning Zoom session and a late morning Zoom session. Synchronous instruction included whole group instruction followed by break out rooms or "centers" where students would break out into smaller, instructor- or aide-led groups to work on specific topics like language arts and math, and speech with the speech language pathologist. Students would attend a different breakout room each day for exposure to all breakout topics. In addition to this, Carey provided thirty minutes of one-to-one specialized academic instruction per week, to work on the specific goals in Student's IEP. Class Zooms also included physical, gross motor activities like yoga and stretching. In addition to synchronous instruction, Carey provided Student with three and a half to four hours of asynchronous work on non-minimum days, as reflected in Carey's sample Google Classroom schedules. Parent was the primary adult overseeing and assisting with Student's schoolwork and was most knowledgeable about Student's inability to

access asynchronous work without Parent's direct instruction. Parent established that the asynchronous assignments did not take nearly as long to complete, estimating asynchronous work averaged two hours a week.

Ventura was on notice at the beginning of the 2020-2021 school year that Student could not effectively access specialized academic instruction and speech and language services via distance learning. Furthermore, Parent communicated to Ventura, two weeks into the 2020-2021 school year, that Student was struggling and not able to learn through the distance learning format. The failure to implement Student's IEP continued into this school year. Although Ventura modified components of Student's educational delivery as discussed above, those changes did not meet Student's needs. Student established that she continued to require in-person specialized academic instruction and speech and language services. Accordingly, the evidence established that from the beginning of the 2020-2021 school year up until October 7, 2020, Ventura materially failed to implement Student's in-person specialized academic instruction and speech and language services contained in her IEP and denied her a FAPE. Student does not put at issue the failure to implement Student's IEP after October 7, 2020. Accordingly, no findings are made regarding implementing Student's IEP past that date.

#### ISSUES 1.C.: ACCOMMODATIONS DURING DISTANCE LEARNING

Student contends that Ventura denied Student a FAPE by assigning Student to distance learning without offering appropriate accommodations for distance learning. Ventura contends that it offered and provided Student with all appropriate accommodations from after the district-wide shutdown ended on April 13, 2020 through the remainder of the 2019-2020 school year, and from the beginning of the 2020-2021 school year up until October 7, 2020.

An IEP must contain a statement of the program modifications or supports that will be provided for the student to advance appropriately toward attaining annual goals and to be involved in and make progress in the regular education curriculum, and a statement of any individual accommodations that are necessary to measure the student's academic achievement and functional performance. (20 U.S.C. § 1414(d)(1)(A)(i)(IV), (VI)(aa); Ed. Code, § 56345, subds. (a)(4), (6)(A).) As a result of the COVID-19 pandemic, CDE issued guidance on March 20, 2020 that stated when providing instruction through a distance learning model, local educational agencies must create access to the instruction for students with disabilities, including planning for appropriate modifications or accommodations based on the individualized needs of each student and the differences created by the change in modality. (Cal. Dept. of Educ., Special Education Guidance for COVID-19, COVID-19 School Closures and Services to Students with Disabilities (March 20, 2020).)

Student's October 9, 2019 IEP was the operative IEP for the period between March 16, 2020 up until October 7, 2020. The IEP offered the following accommodations to Student: a visual schedule and visual cues, extended time to complete assignments, warning before transitions, loop scissors, slant board or easel, verbal encouragement, directions given one at a time, on-task reminders, alternative response modes, visuals of expectations, and increased verbal response time.

Student asserts that outside the obligation to offer and implement accommodations in an IEP, CDE guidance imposed additional obligations to create access through additional modifications or accommodations because of the change in instruction modality. Student argues generally that she received minimal accommodations during asynchronous learning and that Ventura should have provided the "necessary accommodations that were provided in [Student's] in-person classroom."

But no witness testified to any specific, additional accommodations that Student needed for the distance learning environment that Ventura did not offer or provide. Goodiss testified to accommodations she would recommend for Student's IEP, like preferential seating and being paired up with a higher functioning peer, but the recommendations were specific to the classroom environment and thus outside the scope of this issue. Accordingly, Student did not meet her burden to establish that Ventura failed to provide necessary accommodations throughout the time period at issue in this case.

#### ISSUES 1.D. AND 2.D.: STUDENT'S REGRESSION CLAIMS

Student contends that Ventura denied Student a FAPE by failing to address regression suffered as a result of being assigned to distance learning from March 16, 2020 through the end of the 2019-2020 school year, and from the beginning of the 2020-2021 school year through April 16, 2021. Student contends that Ventura knew Student was prone to regression, as evidenced by the extended school year offered in Student's IEPs.

Ventura contends that the issue of regression is not ripe for adjudication, since a regression determination may only be made once normal school operations resume, and Ventura's normal school operations did not resume until the start of the 2021-2022 school year, after the time period at issue in this matter. Ventura argues that if the regression issue is to be decided here, Student did not experience any regression as a result of distance learning during any of the applicable time period. Alternatively, Ventura contends that if any regression did occur, it has already been addressed through the implementation of Student's October 7, 2020 IEP.

On March 12, 2020, OSERS issued guidance that IEP teams would be required to make an individualized determination as to whether compensatory services were

needed to make up for any skills that may have been lost during school closure due to the COVID-19 pandemic. (Office of Special Education and Rehabilitative Services, Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak, Answer to Questions A-1, A-2, and A-3 (March 12, 2020).) OSERS reiterated this in additional guidance on March 16, 2020. (Office of Special Education and Rehabilitative Services, Fact Sheet Addressing the Risk of COVID-19 in Schools While Protecting the Civil Rights of Students (March 16, 2020).)

On March 20, 2020, CDE issued guidance that stated: “[o]nce the regular school session resumes, local educational agencies should plan to make individualized determinations, in collaboration with the IEP team, regarding whether or not compensatory services may be needed for a student.” (Cal. Dept. of Educ., Special Education Guidance for COVID-19, COVID-19 School Closures and Services to Students with Disabilities, Answer to Question 3 (March 20, 2020).) On March 21, 2020, OSERS issued further guidance that stated: “[w]here, due to the global pandemic and resulting closures of schools, there has been an inevitable delay in providing services ... IEP teams ... must make an individualized determination whether and to what extent compensatory services may be needed when schools resume normal operations.” (Office of Special Education and Rehabilitative Services, Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities, pp. 2-3 (March 21, 2020).)

Student returned to full time, in-person instruction on April 12, 2021. Student filed the complaint in this case four days later, on April 16, 2021. Neither party introduced evidence regarding whether this return to full time, in-person instruction constituted a resumption of “the regular school session” as contemplated by CDE. Even if it did, Student provides no legal authority establishing that the IEP team had an

obligation to meet instantaneously. A reasonable timeframe must be inferred into the IEP team's obligation to determine Student's regression, if any. Such a determination could not have been made within the four days between when Student returned to full in-person instruction and the time that Student filed the present complaint. If the return to full time, in-person instruction constituted a resumption of "the regular school session," the earliest that Student's regression claim could have been ripe for adjudication, then, was April 12, 2021. Student did not establish that Ventura denied Student a FAPE by failing to convene a meeting to reach this determination in the four school days between the resumption of full time, in-person instruction and the date of the filing of the present complaint.

## STUDENT'S REMAINING CLAIMS FROM OCTOBER 7, 2020 THROUGH APRIL 16, 2021

### ISSUE 2.E.: OCCUPATIONAL THERAPY ASSESSMENT

Student contends that Ventura denied Student a FAPE by failing to conduct an occupational therapy assessment before Student's annual IEP team meeting held on October 7, 2020 IEP. Ventura contends that it appropriately assessed Student's occupational therapy related needs on October 9, 2019 and had no duty to reassess before the October 7, 2020 IEP team meeting.

A district must assess a student in the area of motor ability if that is an area of suspected disability. (34 C.F.R. § 300.304(c)(4).) As discussed above, school districts must conduct a reevaluation of a student's area of disability if the student's educational or related service needs, including improved academic achievement and functional performance, warrant a reevaluation, or if the student's parents or teacher request a reevaluation. (20 U.S.C. § 1414(a)(2)(A); 34 C.F.R. § 300.303(a).) Absent an agreement

between a school district and a student's parents, reassessments must not occur more than once a year, or more than three years apart. (20 U.S.C. § 1414 (a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).)

Student underwent a triennial assessment in preparation for an October 9, 2019 IEP team meeting. Student does not challenge the legal sufficiency or appropriateness of Ventura's 2019 occupational therapy assessment. Student did not prove that Ventura should have assessed Student in occupational therapy before the October 7, 2020 IEP. Ventura conducted an occupational therapy assessment on October 9, 2019, and three years had not yet passed by the time of the October 7, 2020 IEP. As of the October 7, 2020 IEP, neither Parent nor Ventura staff requested or agreed to another occupational therapy assessment. Ventura staff, including Student's teachers, did not observe any occupational therapy need that would warrant a reevaluation, and Parent did not raise any occupational therapy concerns at that time. Student did not establish that Student was entitled to reassessment in occupational therapy before the October 7, 2020 IEP.

#### OCTOBER 7, 2020, IEP OFFER

Student's IEP team met on October 7, 2020 and developed Student's annual IEP. Ventura was still on a distance learning model at that time. Student's October 7, 2020, IEP offered placement and services, as discussed more fully below, in-person. This offer, however, could not have been implemented as written as Ventura was implementing a distance learning model at that time. In December 2020, Ventura implemented a hybrid model where Students were on campus two partial days per week and three days in distance learning. From January through February 9, 2021, Ventura returned exclusively to distance learning. From February 10, 2021, through April 11, 2021, Ventura returned to hybrid. Ventura returned to five days, in-person learning on April 12, 2021, four days

before the end the time period litigated in this matter. The disconnect between what was offered and what was able to be implemented at various times between October and April, when in-person learning resumed full time, is critical in analyzing Student's additional claims.

## ISSUE 2.F.: OCCUPATIONAL THERAPY GOAL IN STUDENT'S OCTOBER 7, 2020 IEP.

Student contends that the October 7, 2020 IEP should have contained an occupational therapy goal. Ventura contends that the October 7, 2020 IEP offered Student a FAPE in all respects, including the offer of appropriate goals.

An annual IEP must contain a statement of measurable annual goals designed both to meet the student's disability-related needs to enable the pupil to be involved in and make progress in the general curriculum; and meet each of the pupil's other educational needs that result from disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); Ed. Code, § 56345, subd. (a)(2).) Annual goals are statements that describe what a child with a disability can reasonably be expected to accomplish within a 12-month period in the child's special education program. (*Letter to Butler*, 213 IDELR 118 (OSERS 1988); United States Department of Education, Notice of Interpretation, Appendix A to 34 C.F.R., part 300, 64 Fed. Reg., pp. 12,406, 12,471 (1999 regulations).) In addition, the IEP must include description of how the child's progress toward meeting the annual goals will be measured, and when periodic reports on progress will be provided. (20 U.S.C. § 1414(d)(1)(A)(III); Ed. Code, § 56345, subd. (a)(3).) To provide a FAPE, annual goals must be appropriately ambitious in light of the student's circumstances. (*Endrew F. v. Douglas County Sch. Dist. RE-1*, *supra*, 137 S.Ct. at p. 992.)

Student's October 7, 2020 IEP did not include an occupational therapy goal. Ventura asserted that consultation services alone were sufficient to meet Student's occupational therapy needs. This was itself a service, regardless of whether Student qualified for any direct occupational therapy, and was evidence that Student had an area of identified, disability-related need. As such, Student's IEP should have included a goal that set forth the occupational therapy areas that the consultations were meant to address, how a potential need for any occupational therapy would be measured, and how and when periodic reports would be provided and by whom - teacher or occupational therapist. Student established that her needs required an occupational therapy goal or goals in the October 7, 2020, IEP.

#### ISSUE 2.G.I.-VI.: GOALS IN THE OCTOBER 7, 2020 IEP

Student contends that none of the goals in Student's October 7, 2020 IEP were appropriately written, in that they were *de minimis* goals that would not provide Student with any real progress even if Student had satisfied each goal. Student contends that none of the goals were measurable. Student contends that the goals were illusory, since they could not be achieved through distance learning. Ventura contends that it offered Student appropriate goals that were effective for Student's access to her instruction.

Student's October 7, 2020 IEP set forth goals in the following seven areas:

- reading,
- math,
- writing,
- self-help,
- English language development, and
- two language/communication goals.

Student's reading, math, self-help, and English/language development goals were all appropriate. They were appropriately ambitious, in that Student could not yet perform the tasks articulated in each goal. The goals were measurable and identified the individual responsible for measuring progress on each goal, how the child's progress toward meeting the annual goals would be measured, and when periodic reports on progress would be provided.

Student's writing goal was not measurable. It stated that Student would copy or trace words that give factual information about a familiar person, place, thing, or event when presented with picture-supported word cards with one visual/verbal prompts for four out of five trials. The goal was not measurable in that it did not indicate the percentage of accuracy for each trial to consider the goal met. Additionally, the goal merged the concepts of copying and tracing. The evidence established these are separate skills. At the time the goal was developed, Student could not perform this task, but had begun to work on tracing and copying Student's name. This goal was meant to help Student develop Student's fine motor and writing skills by expanding the number of words Student could trace or copy, and increase Student's comprehension and language skills. Student's special education teacher was responsible for implementing and measuring progress on this goal. Copying a word was a harder skill than tracing, because copying required that Student see a word and write it independently, rather than tracing over pre-formed letters. Because the goal was written as "copy or trace," Student could have met this goal by exclusively using the easier skill of tracing, versus the more difficult skill of copying, for four out of five trials. Student argues that if Student were to complete the goal for tracing, Student would have been attributed with

the skill of copying, with no distinction made between the two skills. Student established that the writing goal was inadequate because it was not clear on what Student was expected to accomplish.

Student had two language/communication goals. The first goal was for Student to include final sounds "when appropriate" at the word level with 80 percent correct for two out of three sessions as measured by observation and record. Student argues that including the words "when appropriate" in this goal would allow Student to leave off the final sound in some words, rendering the goal ineffective; Student would be considered to have reached the goal even if Student had not demonstrated the skill of including final sounds, as long as doing so was deemed appropriate. Student established that this language/communication goal was inadequate because it was not measurable.

The other language/communication goal was for Student to use "two or more word utterances" when speaking four out of five opportunities for two out of three sessions. Student argues that this goal is unclear and ambiguous. Mora testified that this goal was meant to get Student to make utterances consisting of two or more words. Student argues that this goal could be interpreted to require Student make one-word utterances, at least twice. Student established that this goal was inadequate because it was not clear on what Student was expected to accomplish. Student established that her writing goal and two language and communication goals were not measurable. Student did not establish that her reading, math, self-help, and English language development goals were inappropriate.

Student established that the October 7, 2020, IEP did not offer her FAPE in that she required an occupational therapy goal or goals and her writing and language

communication goals were not measurable. These defects interfered with her ability to access her education. Thus, Student established that she was denied a FAPE.

## ISSUE 2.H.: ONE-TO-ONE AIDE

Student contends that Ventura denied her a FAPE by failing to offer a one-to-one aide in the October 7, 2020, IEP as Ventura was on a distance learning model. Ventura contends that Student had no educational need for an in-person, one-to-one aide in the October 7, 2020 IEP.

An aide may be a required supportive service if one is "required to assist a child with a disability to benefit from special education ..." (34 C.F.R. § 300.34(a) (2006); Ed. Code, § 56363, subd. (a)s.) The October 7, 2020 IEP offered Student specialized academic instruction in a self-contained, moderate to severe special education classroom and was an offer of in-person instruction. As noted previously, despite what was written on the IEP, Student could not have accessed what was offered.

Student's IEP team was aware that Parent was providing constant physical prompting for Student to participate in synchronous instruction. During asynchronous instruction, Parent became the *de facto* teacher and service provider as Student lacked the ability to independently access her education. Whether Student required a one-to-one aide as a related service for a five day per week, in-person program, is not the question. Rather, the question is whether Student required a one-to-one aide in the home environment during both distance learning and hybrid learning to benefit from her education. The evidence so established.

Student established that by the end of the 2019-2020 school year, Ventura knew Student could not access her education through the distance learning model. The

reason Student was able to get any educational benefit at all during distance learning was because of Parent's consistent physical presence, supervision, and involvement. While other students may not have encountered an impediment to accessing education during distance learning, this was not the case here; Student required the physical presence and close monitoring of a one-to-one aide to keep Student focused and on task in order to access education during distance learning.

At the time of the October 7, 2020 IEP, Student was still in distance learning. Parent had communicated to Ventura that Student was encountering difficulty accessing her education. The IEP team itself was aware that Student struggled with focus and staying on task: one of the accommodations the team included in the October 7, 2020 IEP was the provision of on-task reminders. Distance learning became so difficult that by January 2021, Student could no longer participate in Zoom classes at all. Ventura did not object or call another IEP team meeting to remedy Student's inability to attend. The evidence established that Ventura denied Student a FAPE by not offering an in-person, one-to-one aide in the October 7, 2020 IEP for periods of distance learning. The return to partial days, or the hybrid program, did not sufficiently meet Student's need in this regard. The classroom did have educators, manipulatives, and other tools to help Student access her education without a one-to-one aide. However, the hybrid portions were limited to two partial days per week, and only for certain weeks in December, February, March, and April. The evidence established that despite the partial return to in-person learning, Student continued to need a one-to-one aide in-person at all times throughout distance learning, even while engaged in the hybrid model. This failure continued from October 7, 2020, through April 12, 2021.

## ISSUE 2.I.: OCCUPATIONAL THERAPY SERVICES IN STUDENT'S

OCTOBER 7, 2020 IEP

Sandra Johnson was the Ventura occupational therapist who attended Student's October 9, 2019 IEP team meeting and presented the results of the triennial occupational therapy assessment. Johnson received her Bachelor of Science degree in Occupational Therapy, cum laude, from Loma Linda University in 1997. Johnson was licensed by the California Board of Occupational Therapy and certified by the National Board of Certified Occupational Therapists. At the time of hearing, Johnson had worked as an occupational therapist for the preceding 24 years, as a school occupational therapist for the preceding 18 years, and began serving Ventura as a district occupational therapist for Ventura in June 2019.

Johnson explained that, based on the prior assessment results, Student did not need direct occupational therapy services and instead recommended a consultation model where an occupational therapist would consult with school personnel regarding Student "as needed." Johnson believed that the accommodations listed in the IEP were sufficient to meet Student's needs and Student did not need direct occupational therapy.

JanDee Goodiss testified on behalf of Student. Goodiss was a pediatric occupational therapist that provided private services to Student. Goodiss received her Bachelor of Science degree in Occupational Therapy from Florida International University in 1980, and had worked as an occupational therapist for over 40 years. At all times during her career, Goodiss provided occupational therapy to children. From 2005 to 2011, Goodiss worked for Ventura as an occupational therapist, providing occupational therapy to students, performing assessments, attending IEP team

meetings, and providing training to teachers. Goodiss estimated that she had performed thousands of school assessments over the span of her career. At the time of hearing, Goodiss worked at the California Hawaii Elks Major Project, and had done so since 2014. It is through that employment that Goodiss began providing private, in-home services to Student in January 2018.

Except for the year that Student's family lived out of the country from August 2018 to August 2019, Goodiss typically provided occupational therapy services to Student and Student's sibling at home for a one-hour session each week. Goodiss required Parental participation in the occupational therapy sessions and described her approach as treating "the whole child," not just focusing on isolated skills. Goodiss also explained that school physical therapy focused on functional movement, whereas Goodiss' approach focused on quality of movement.

Goodiss believed that Student exhibited needs in all occupational therapy areas, specifically

- sensory,
- fine motor,
- gross motor,
- self-care,
- vision,
- oral motor,
- language, and
- self-regulation.

Goodiss specialized in oral motor skills, and saw poor articulation skills in Student. Her sessions with Student would include any combination of gross motor activity, sensory work, oral motor skill work, and fine motor skills. An area of focus for the oral motor

skill work was Student's messy eating. Gross motor work included strengthening Student's core and addressing Student's low muscle tone and frequent falling. Sensory work included addressing Student's skin-picking and fidgeting, and sought to normalize Student's sensory systems. Fine motor work included using a fork, pencil, and small sewing scissors. Goodiss worked with Student on writing Student's name legibly, as Student could write some letters of Student's name legibly, but not others. Student had difficulty in visual motor and perceptual motor areas, in that Student had to get very close to the paper to see it. Goodiss had Student work on a vertical surface by taping a paper onto a whiteboard to improve Student's posture and ability to see. Goodiss developed her own goals for Student. One goal was for Student to place Lego bricks in a pattern, because this involved multiple skills like strength, bilateral motor, eye-hand coordination, perception, and attention. Goodiss also developed a cutting goal as well as a writing goal, where Student would be able to legibly write Student's name.

Goodiss did not perform a standardized assessment of Student. Goodiss collected data on Student through clinical observation of Student during their sessions together and believed such observations were more important than information gleaned from a standardized test. Goodiss made inferences on Student's school-based needs based on her professional knowledge as a pediatric occupational therapist, her knowledge of Student in the home setting, her experience as a former school occupational therapist for Ventura, and her review of Student's occupational therapy assessment report and IEP. During the 2020-2021 school year, Goodiss noticed that Student's skin-picking behavior worsened, and that Student was not climbing stairs as well as before. Goodiss opined that Ventura should have offered at least 30 minutes a week of occupational therapy to Student in the October 7, 2020 IEP.

Maritza Mireles was an occupational therapist for Ventura from October 2019 through the time of hearing. Mireles earned her Bachelor of Science degree in Biology from California Polytechnic State University in June of 2005 and her Master of Arts in Occupational Therapy in May of 2007. Mireles was licensed by the California Board of Occupational Therapy and certified by the National Board of Occupational Therapy, and had worked as an occupational therapist for 14 years.

Mireles joined Student's school in November of 2019, and was responsible for providing the occupational therapy consults for all relevant times covered by the present complaint. Mireles did not consult for Student's classroom from March 16, 2020 through the end of the 2019-2020 school year, but began to provide regular consultation to Student's teacher at the start of the 2020-2021 school year. As part of her consultation, Mireles would occasionally join Student's class via Zoom to observe the students and make herself available for questions. Mireles began checking into Student's physical classroom once hybrid learning began in February 2021, and did so once every two or three weeks. While Mireles did not observe any occupational therapy concerns with Student herself, Carey did communicate to Mireles a concern about Student's pencil grip and the need for specialized paper.

Mireles explained that function, not perfection, was the primary goal of school-based occupational therapy, and that the emphasis of school-based occupational therapy was on a student's ability to participate in education and learn. Mireles agreed with the determinations of the October 7, 2020 IEP team and did not believe occupational therapy services were appropriate for Student, because Student was able to access her education in the classroom setting with the accommodations set forth in her IEP. But Student's self-contained classroom was a placement rich with embedded occupational therapy supports that negated Student's need for direct occupational

therapy services. While Student may have been able to participate in class, access the school environment and receive educational benefit in the classroom setting, Student faced entirely different circumstances at home where she did not have access to such supports.

Mireles acknowledged that if Student was unable to navigate or participate in a classroom setting, or if Student was in a different placement, like a general education classroom, occupational therapy services may have been appropriate. Likewise, Student's move to distance learning required that Student's IEP team offer occupational therapy services to address this significant change in setting and supports.

Goodiss worked with Student extensively and closely, over a long period of time, on largely educationally-related occupational therapy tasks. While Goodiss did not observe Student in a classroom setting, Goodiss had experience as a Ventura occupational therapist for several years. For these reasons, her opinion that Student needed educationally related, direct occupational therapy in the distance learning setting is accorded much weight. An occupational therapy reassessment was not necessary at the time of the October 7, 2020 IEP because Ventura was on notice of Student's occupational therapy needs; Ventura's failure was not recognizing the impact the shift to distance learning had on meeting Student's identified needs. Ventura should have offered Student occupational therapy services to address the change in the circumstances and setting of Student's learning. Ventura denied Student a FAPE by failing to offer occupational therapy services in the October 7, 2020 IEP.

## ISSUE 2.C.: ACCOMMODATIONS

Student's October 7, 2020 IEP was the operative IEP from October 7, 2020 through April 16, 2021 and offered Student the same accommodations as the October 9,

2019 IEP. Student contends that Ventura denied Student a FAPE by assigning Student to distance learning without offering the supports embedded in Student's classroom as accommodations for distance learning. Ventura contends that it offered and provided Student with all appropriate accommodations from the date of the October 7, 2020 IEP to April 16, 2021.

Like Issue 1.c. above, Student did not present evidence supporting the need for additional accommodations during distance learning from October 7, 2020 through April 16, 2021. Other than providing a general list of classroom-included accommodations, Student did not establish which specific accommodations were necessary and not offered. Accordingly, Student did not meet her burden to establish that Ventura failed to provide necessary accommodations from October 7, 2020 through April 16, 2021.

## 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, subsection a: Ventura denied Student a FAPE from April 13, 2020 through the end of the 2019-2020 school year by failing to implement Student's IEP by not providing in-person specialized academic instruction and speech language services, instead assigning Student to distance learning. Student prevailed on Issue 1, subsection a.

Issue 1, subsection b: Ventura did not deny Student a FAPE from April 13, 2020 through the end of the 2019-2020 school year by failing to assess Student prior to assigning Student to distance learning. Ventura prevailed on Issue 1, subsection b.

Issue 1, subsection c: Student did not establish that Ventura denied Student a FAPE from April 13, 2020 through the end of the 2019-2020 school year by failing to offer Student necessary accommodations during distance learning. Ventura prevailed on Issue 1, subsection c.

Issue 1, subsection d: This issue was not ripe until April 12, 2020, thus neither party prevailed on Issue 1, subsection d.

Issue 2, subsection a: Ventura denied Student a FAPE from the beginning of the 2020-2021 school year up until October 7, 2020 by failing to implement Student's IEP by not providing in-person specialized academic instruction and speech language services, instead assigning Student to distance learning. Student prevailed on Issue 2, subsection a.

Issue 2, subsection b: Ventura did not deny Student a FAPE from the beginning of the 2020-2021 school year through April 16, 2021 by failing to assess Student prior to assigning Student to distance learning. Ventura prevailed on Issue 2, subsection b.

Issue 2, subsection c: Student did not establish that Ventura denied Student a FAPE from the beginning of the 2020-2021 school year through April 16, 2021 by failing to offer Student necessary accommodations during distance learning. Ventura prevailed on Issue 2, subsection c.

Issue 2, subsection d: This issue was not ripe up to April 12, 2020, thus neither party prevailed on the issue up to that time. Student did not establish that Ventura

denied Student a FAPE by failing to convene a meeting to reach a regression determination in the four school days between the resumption of full time, in-person instruction and the date of the filing of the present complaint. Ventura prevailed on Issue 2, subsection d, to the limited extent it was adjudicated.

Issue 2, subsection e: Ventura did not deny Student a FAPE from October 7, 2020 through April 16, 2021 by failing to assess Student in occupational therapy. Ventura prevailed on Issue 2, subsection e.

Issue 2, subsection f: Ventura denied Student a FAPE by failing to offer an occupational therapy goals in Student's October 7, 2020 IEP. Student prevailed on Issue 2, subsection f.

Issue 2, subsection g, items i-iv: Ventura offered appropriate reading, math, self-help, and English/language development goals in the October 7, 2020 IEP. Ventura prevailed on Issue 2, subsection g, items i-iv.

Issue 2, subsection g, items v-vi: Ventura failed to offer appropriately written and measurable writing and language/communication goals in the October 7, 2020 IEP. Student prevailed on Issue 2, subsection g, items v and vi.

Issue 2, subsection h: Ventura denied Student a FAPE from October 7, 2020 through April 16, 2021 by failing to offer Student a one-to-one aide for distance learning in the October 7, 2020 IEP. Student prevailed on Issue 2, subsection h.

Issue 2, subsection i: Ventura denied Student a FAPE from the date of the October 7, 2020 IEP through April 12, 2021 by failing to offer Student occupational therapy services during distance or hybrid learning. Student prevailed on Issue 2, subsection i.

## REMEDIES

Student prevailed on the following issues: Ventura's failure to implement Student's then-operative October 9, 2019 IEP for in-person specialized academic instruction and speech and language services starting at the end of the 2019-2020 school year. Ventura also denied Student a FAPE by failing to offer occupational therapy goals, services, appropriately written goals in writing and language/communication, and a one-to-one aide in the October 7, 2020 IEP. Student is entitled to a remedy for the denial of FAPE.

ALJs 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 (*Puyallup*)). 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.) School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Puyallup, supra*, at p. 1496.)

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.) It is an equitable remedy that depends upon a fact-specific and individualized assessment of a student's current needs. (*Puyallup, supra*, 31 F.3d at p.

1496; *Reid v. District of Columbia* (D.C.Cir. 2005) 401 F.3d 516, 524 (*Reid*.) 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.) An award of compensatory education need not provide a day-for-day compensation. (*Puyallup, supra*, at pp. 1496-1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* At p. 1496.)

Student seeks a total of 1,433.57 in compensatory education for speech and language services, specialized P.E., specialized academic instruction, occupational therapy services that Student asserts Student should have received during the relevant time periods covered by the complaint. Student also seeks, among other remedies, that Student’s IEP team receive training in appropriate goal writing.

Student did not present any expert testimony regarding the type or amount of compensatory services required to bring Student to where Student would have been absent a denial of FAPE, instead relying on a straight minute-by-minute deficit calculation. Student’s calculations are based on two alternative arguments: because assigning Student to distance learning was improper, Ventura should be responsible for compensating the entirety of instructional and service minutes as set forth in Student’s IEPs, as if Ventura had provided Student with zero instruction or service during distance learning. Alternatively, Student argues that Ventura should at least be responsible for compensating for the shortcoming of minutes of instruction and service it failed to provide under Student’s IEPs.

Student was not entitled to special education services during the district-wide shut down when Ventura was closed to all students, including those in general

education, from March 16, 2020 to April 13, 2020. But for all other relevant times covered by this complaint, Student makes a minute-for-minute deficit calculation and argues that Student is entitled to compensatory education in the amount of the difference between the amount of in-person instruction and services offered in Student's IEP and the amount of distance learning delivered.

More appropriate for a compensatory calculation under these circumstances is a qualitative analysis, taking into account that Student did receive some educational benefit during distance learning, albeit with the constant physical presence, supervision and assistance of Parent. This Order takes into account Student's age, the nature of Student's disability, and the number of compensatory hours likely to catch Student up to where Student should have been absent the denial of a FAPE, without being oppressive.

Student's need for a one-to-one aide was specific to distance learning, and Ventura has since returned to in-person instruction. During all relevant times covered by this complaint, Ventura's denial of FAPE, whether it was the failure to implement in-person instruction and services or the failure to offer a one-to-one aide for distance learning, resulted in the same harm to Student: Student was unable to access education in a distance learning format.

Considering all relevant factors, Student is awarded 80 hours of compensatory specialized academic instruction from a nonpublic agency or agencies for the denial of FAPE from April 13, 2020 through the end of the 2019-2020 school year and for the beginning of the 2020-2021 school year up until October 7, 2020. Student is awarded 120 hours of compensatory education for the denial of FAPE from October 7, 2020 through April 12, 2021, when Student returned to full in-person instruction. In sum,

Student is awarded a total of 200 hours of compensatory education to be used toward specialized academic instruction. Student is also awarded 10 hours of compensatory occupational therapy and 10 hours of compensatory speech and language services. Considering Student's young age, the nature of Student's disability, and an acknowledgement that the COVID-19 pandemic is not over, it is appropriate to make these compensatory hours available until December 31, 2024.

To the extent that this Decision awards Student compensatory education, such award is to compensate Student for a denial of FAPE, as determined in this Decision, and must not be substituted for any compensatory services Student's IEP team determines Student is owed as a result of any learning loss Student experienced as a result of the COVID-19 pandemic. This Decision does not award any compensatory education hours for specialized P.E. or lack of general education integration, as these alleged failures were not at issue at hearing.

Because of Ventura's failure to document Student's occupational therapy consult services with an occupational therapy goal in the October 7, 2020 IEP, and because of Ventura's failure to write either measurable or clear goals in the areas of writing and language/communication goals in student's October 7, 2020 IEP, goal-writing training is appropriate.

## ORDER

1. Within 45 days of this Order, Ventura must establish a contract with a certified nonpublic agency or agencies of Parents' choice, to directly fund 200 hours of in-person specialized academic instruction, 10 hours of occupational therapy, and 10 hours of speech and language services.

Within 15 days of this Order, Ventura must send Parents a list of certified nonpublic agencies in Ventura County that can provide the services ordered herein.

2. The above hours are compensatory services, awarded to make up for Ventura's denial of FAPE. Ventura cannot use the compensatory services to replace any services Student requires to receive a FAPE, or any additional compensatory services the IEP team determines Student requires to make up for the learning loss caused by the COVID-19 pandemic.
3. Once a contract is established with a certified nonpublic agency or agencies, Parents must coordinate the dates, times, and location of the educationally related services directly with the selected agency. The services may be provided at home, school, or another location determined by the nonpublic agency and Parents.
4. Student has until December 31, 2024, to use the services. Any services not used by that date will be forfeited.
5. Within six months of the date of this order, Ventura shall provide two hours of training to all Ventura employees at Student's school site that are responsible for drafting measurable IEP goals that address Students' needs. The training shall be provided by a qualified professional or professionals selected by Ventura, but not employed by Ventura. Training must be provided by professionals who are knowledgeable about the requirements and procedures for IDEA-compliant goal writing.
6. 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/

Claire Yazigi

Administrative Law Judge

Office of Administrative Hearings