BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2021030156

PARENTS ON BEHALF OF STUDENT,

v.

LARCHMONT CHARTER SCHOOL.

DECISION

September 21, 2021

On March 3, 2021, the Office of Administrative Hearings, called OAH, received a due process hearing request from Parents and Student, collectively Student, naming Larchmont Charter School, referred to as Larchmont. On April 12, 2021, OAH granted the parties' request for a continuance. The due process hearing request also named Los Angeles Unified School District, but Student and Los Angeles Unified reached a

settlement agreement prior to the prehearing conference, and the hearing only proceeded as to Larchmont. Administrative Law Judge Elsa H. Jones heard this matter by videoconference on June 29 and 30, and July 1, 7, 8, and 28, 2021.

N. Jane Dubovy and Mandy Favaloro, Attorneys at Law, represented Student. Except for the first day of hearing, one or both Parents attended the hearing on Student's behalf. Deborah Cesario, Attorney at Law, represented Larchmont. Myra Salinas, Larchmont's Senior Director of Learning and Support Services attended all hearing days on Larchmont's behalf.

At the parties' request the matter was continued to August 23, 2021, for written closing briefs. The briefs were filed on August 23, 2021; the record was closed and the matter was submitted on that date.

ISSUES

At hearing, the issues as set forth in the prehearing conference were modified pursuant to discussion with the parties. Subsequent to the hearing, on July 30, 2021, Student filed a request that Issues 3 and 5, and their subparts, as numbered in the June 18, 2021, Order Following Prehearing Conference, be dismissed with prejudice. On August 4, 2021, Larchmont filed a notice of non-opposition. By Order dated August 6, 2021, Student's request was granted. The remaining issues for hearing are listed below. They have been renumbered in view of the August 6, 2021 Order, were rephrased to eliminate extraneous verbiage, and typographical and grammatical errors were

corrected. The ALJ has authority to renumber and redefine a party's issues so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 432-433.)

1. Did Larchmont deny Student a FAPE in developing the March 5, 2019 amendment individualized education program, referred to as an amendment IEP, and May 13, 2019 amendment IEP by:
    A. Failing to ensure that Parents were members of the team that made decisions regarding Student's program and predetermining Student's placement outside of the IEP team meetings; and
    B. Failing to provide prior written notice with all legally required content regarding the addition of the educationally related intensive counseling services, referred to as ERICS?
2. Did Larchmont deny Student a FAPE by failing to complete Student's annual IEP by September 11, 2019, within one year of the previous IEP, or at any time thereafter?
3. Did Larchmont deny Student a FAPE by failing to implement consented-to services from the March 2019 and the May 2019 amendment IEPs?
4. Did Larchmont deny Student a FAPE in the March 2019 amendment IEP and May 2019 amendment IEP during the 2018-2019 regular school year, from March 2019, through extended school year 2019, and the 2019-2020 regular school year, by:
    A. Failing to offer appropriate goals to address Student's needs in the areas of social emotional, ERICS, and counseling;
    B. Failing to offer an appropriate behavior support plan based on an assessment of Student's unique needs;

C. Failing to offer an appropriate placement that would have provided appropriate aids and supports to allow Student to make progress toward a general education curriculum; and

D. Failing to offer a program for extended school year 2019?

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.) (Unless otherwise noted, all references to the Code of Federal Regulations are to the 2006 version.) 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 FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living, and
- the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, assessment, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 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 is the petitioning party, and has the burden of proof in this matter. The factual statements in this Decision constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

Student was 14 years old and completing ninth grade at Bridges Academy, a private school, at the time of hearing. Student resided within the boundaries of Los Angeles Unified at all relevant times. He was placed in general education classes at Larchmont, a charter school within the boundaries of Los Angeles Unified, at all relevant times. While at Larchmont, Student was eligible for, and received, special education and related services under the category of other health impairment. Student attended Larchmont until September 2019, when he was in eighth grade. On September 16, 2019, Parents disenrolled Student from Larchmont and enrolled him at Bridges.

LARCHMONT'S MOTION TO DISMISS IS DENIED

LOCAL EDUCATIONAL AGENCIES AND CHARTER SCHOOLS

The IDEA defines a local educational agency as

> a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary schools or secondary schools in a city … or for such combination of school districts or counties

as are recognized in a State as an administrative agency for its public elementary schools and secondary schools. (20 U.S.C. § 1401(19)(A); 34 C.F.R. § 300.28(a).)

Under California law, a local educational agency means a school district as statutorily defined, or a charter school that is deemed a local educational agency pursuant to Education Code section 47641. (Ed. Code, § 47640.) Local educational agency also means a charter school that is responsible for complying with all provisions of the IDEA and implementing regulations as they relate to local educational agencies. (*Ibid.*)

A school district is responsible for providing a FAPE to all eligible students between the ages of six and eighteen whose parent or legal guardian resides within the jurisdictional boundaries of the school district, subject to several specified exceptions. (*Union Sch. Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1525, fn. 1.) Ordinarily, a minor student attends the public school of the parents' residence. (Ed. Code, § 48200.)

Unlike a school district, a charter school's FAPE obligation turns on attendance, not residency. A charter school is one "to which parents choose to send their children." (20 U.S.C. § 7221i(2)(H).) Thus, a public charter school does not admit students by residency; it admits only volunteers. (Ed. Code, § 47605, subd. (d)(2).) By its terms, the law limits a public charter school's obligation to provide a FAPE to children who attend the public charter school. Thus, children who *"attend"* public charter schools and their parents retain all rights under the IDEA and its regulations. (34 C.F.R. § 300.209(a); Ed. Code, § 56145.) A charter school that is a public school of a local educational agency, or is itself a local educational agency, must serve children with disabilities *"attending"* the charter school in the same manner that a local educational agency serves children with disabilities in its other public schools. (34 C.F.R. § 300.209(b)(1)(i) & (c).) When a

student disenrolls from a charter school without graduating, for any reason, the charter school is required by law to notify the student's last known district of residence within 30 days of the student's departure. (Ed. Code, § 47605, subd. (e)(3).)

Consequently, a charter school is not responsible to offer a FAPE to a student who is no longer enrolled and attends there. Rather, the obligation to offer a FAPE in that circumstance reverts to that of the local educational agency of the district of residence of the student. Neither party cited any legal authority that the charter school's obligation to provide a FAPE continues until the charter school gives the notice required by Education Code section 47605, subdivision (e)(3). Rather, based upon the statutes cited above, the charter school's responsibility to offer a FAPE is limited to the time period during which a student attended the charter school.

LARCHMONT'S RELATIONSHIP WITH LOS ANGELES UNIFIED SCHOOL DISTRICT

Larchmont is a charter school authorized by the Los Angeles Unified School District, with several campuses located within Los Angeles Unified. Larchmont serves students from transitional kindergarten through high school. Los Angeles Unified's most recent authorization of Larchmont as a charter school was documented by Larchmont's Charter Petition, which was dated August 19, 2019, for a term from July 1, 2020 to June 30, 2025, and a Memorandum of Understanding, effective July 1, 2020. These were the only two agreements between Los Angeles Unified and Larchmont offered into evidence at hearing. The Charter Petition provides, "As an independent charter school, Charter School, operated as or by its nonprofit public benefit corporation, *is a separate legal entity and shall be solely responsible for the debts and obligations of Charter School.*" (Emphasis added.) The Memorandum of Understanding

between Larchmont and Los Angeles Unified describes and defines the parties' respective obligations to provide special education and related services. The Memorandum confirms that Larchmont would be an Option 3 charter school. As of the beginning of the 2013-2014 school year, Los Angeles Unified has required district-authorized charter schools to elect one of three options available to further define their relationship with the district. Los Angeles Unified's undated description of Option 3 on its website states that such a charter school

> *operates independently for the purposes of special education*. The charter school will not have *complete* [local educational agency status], *but will function in a similar manner*. The charter will assume sole management and fiscal responsibility for all of its students' special education instruction, program and services, related services, placement, due process, and supports." (Emphasis added; https://achieve.lausd.net/Page/2862.)

Similar language with respect to "Charter-operated Program" charter schools appears in the Charter Petition, including, "The Charter-operated Program schools do not have [local educational agency] status for the purposes of special education *but will function in a similar role in that each charter school will be responsible for all special education requirements. …*" (Emphasis added.)

The Option 3 description concludes, "While Option 3 charter schools do operate mostly independently, they continue to be housed within the [Los Angeles Unified special education local plan area] and have access to District-wide special education supports." The Memorandum confirms that Los Angeles Unified is approved to operate as a single district special education local plan area. The Memorandum provides that,

for the purposes of providing special education services, Larchmont is deemed a public school of Los Angeles Unified, and is part of Los Angeles Unified's special education local plan area.

Section 2 of the Memorandum covers due process proceedings. Section 2 provides that, in the event a parent initiates a due process proceeding, both Larchmont and Los Angeles Unified shall be named as respondents. During such proceedings, and any other legal proceedings or actions involving special education, Larchmont will be responsible for its own representation, and will be responsible for the cost of such representation. Because Larchmont will manage, and is fiscally responsible for its students' special education instruction and services, Larchmont will be responsible for any prospective special education and related services, compensatory education, and/or reimbursement awarded in a due process proceeding based on allegations that solely Larchmont failed to fulfill its responsibilities under state and federal special educational laws and regulations. The Memorandum provides, as examples of such responsibilities,

- identifying students with disabilities,
- assessing students,
- conducting IEP team meetings,
- developing appropriate IEPs, and
- implementing IEPs.

If parents' attorneys' fees and costs are to be paid because parents are the prevailing party as a result of a special education due process hearing or settlement agreement based on Larchmont's alleged failure to fulfill its federal and state statutory and regulatory responsibilities, the Memorandum provides that Larchmont will be responsible for payment of those attorneys' fees and costs.

La Shun Washington-Ajayi, the Coordinator for Charter Operated Programs at Los Angeles Unified, testified at hearing regarding the respective obligations of Larchmont and Los Angeles Unified under the Charter Petition and Memorandum. Ms. Washington-Ajayi received

- a master's degree in education,
- a professional clear multiple subject teaching credential,
- a pupil personnel services credential in school psychology, and
- an administrative services credential.

During her career, and prior to holding her current post, she served as a high school math teacher, a school psychologist, and a vice-principal in the Los Angeles County Office of Education Division of Special Education.

Washington-Ajayi testified that, pursuant to Larchmont's Charter Petition and the Memorandum, Los Angeles Unified was the local educational agency ultimately responsible for providing special education and related services, and a FAPE, to special education students at Larchmont. She further stated that Los Angeles Unified, as Student's district of residence when he was disenrolled from Larchmont, would be responsible for assessments and any compensatory education owed to Student prior to and upon his disenrollment from Larchmont. Washington-Ajayi further commented that once a student was disenrolled from Larchmont, but continued to reside within Los Angeles Unified's boundaries, and then filed a request for due process alleging matters that occurred after the student was disenrolled, Larchmont had no responsibility for such matters.

In this case, Larchmont notified Los Angeles Unified by letter dated October 11, 2019, that Student was disenrolled from Larchmont on September 16, 2019. There was no direct evidence that Los Angeles Unified received the letter, but the evidence showed

it was properly addressed and mailed. It is therefore presumed to have been received in the ordinary course. (Evid. Code, § 641; see Evid. Code, § 644 [presumption that official duties were properly performed].) There was no evidence sufficient to rebut these statutory presumptions.

LARCHMONT'S MOTION TO DISMISS

On July 21, 2021, while the hearing was in progress, Larchmont filed a motion to dismiss this action. Larchmont contended that in view of witness Washington-Ajayi's testimony regarding the Charter Petition and the Memorandum, Larchmont was never the local educational agency responsible for offering Student a FAPE. Rather, Larchmont contended that Los Angeles Unified was the local educational agency so responsible. Consequently, Larchmont contended that it was not a proper party to the action, and OAH could not order Larchmont to provide any remedies to Student. Furthermore, since Los Angeles Unified, which was formerly a respondent in this case along with Larchmont, recently arrived at a written settlement agreement with Student that included a waiver of all claims to the date of the agreement, Los Angeles Unified was no longer, and could no longer, be a respondent in this matter. Implicit in Larchmont's motion was the contention that, as due process hearings are intended to be between a local educational agency or similar public agency, and Larchmont was not such, OAH had no jurisdiction to award any relief against Larchmont.

Furthermore, Larchmont contended that the waiver language in the settlement agreement between Student and Los Angeles Unified did not carve out an exception for Student's ongoing dispute with Larchmont. Therefore, it constituted a waiver of all of Student's claims against Larchmont.

Student timely opposed the motion, primarily contending that the motion was untimely, as Larchmont had not raised the issues in the motion in its response to Student's complaint, and that Larchmont was not a party to the settlement agreement between Los Angeles Unified and Student and had asserted no basis for being a beneficiary of that contract. Without permission, on July 23, 2021, Larchmont filed a reply memorandum of points and authorities. Without considering the reply memorandum, on July 26, 2021, OAH issued an Order denying the motion without prejudice, on the ground that OAH has no jurisdiction to grant motions for summary judgment, directed verdicts or nonsuit. After the Order was issued and served, and also without permission, Student filed a sur-reply memorandum of points and authorities, which OAH also disregarded.

At the request of the ALJ, the parties briefed the issues raised by the motion in their closing briefs. The ALJ has reviewed and considered all of the pleadings the parties filed regarding the motion to dismiss.

In its closing brief, Larchmont essentially summarized the briefs it filed in support of its motion, and also contends that the description of Option 3 on the website merely pertains to the division of fiscal responsibilities between Los Angeles Unified and the charter. In his closing brief, Student contends that Larchmont was responsible for providing Student a FAPE while Student was enrolled there. Student also relied on the language in the Memorandum regarding Larchmont's responsibility for any reimbursement or other relief ordered in a due process hearing.

Student's motion to dismiss is denied insofar as it seeks to prevent Student from recovering against Larchmont during the period Student was enrolled at and attending Larchmont. Larchmont has not sufficiently demonstrated that it was not obligated to Student during that time.

First, Larchmont's motion does not present a jurisdictional issue, which may be raised at any time, and is not subject to waiver or estoppel. (2 Witkin, Cal. Procedure (5th ed. 2008 & 2000 supp.) Jurisdiction, § 13, and cases cited therein.) This case involved whether Larchmont offered or provided Student a FAPE. OAH has subject matter jurisdiction to conduct due process hearings regarding such matters. (Ed. Code, § 56501, subd. (a).) Indeed, the Memorandum acknowledges OAH's personal and subject matter jurisdiction by its references to Larchmont becoming a party to such due process actions.

Rather, Larchmont's motion contends that there is a defect or misjoinder of parties, and such a contention can be waived if not timely presented in a response to a complaint. (2 Witkin, Cal. Procedure (5th ed. 2008 & 2000 supp.) Jurisdiction, § 99.) Here, Larchmont waived its contention that it is not a proper party to this action, by virtue of Larchmont's response to Student's complaint, which it filed on March 17, 2021. The response describes Larchmont as the "responsible [local educational agency]" while Student was enrolled there, but states it was no longer the local educational agency responsible to provide a FAPE upon Student's voluntary disenrollment from Larchmont and upon notifying Los Angeles Unified of Student's withdrawal. By virtue of its response to Student's complaint, and its continuing participation in this matter through all of the prehearing and almost all of the hearing process, Larchmont cannot now assert that it was not a proper party to this action such that the action should be dismissed.

Significantly, Larchmont's response to the complaint expressed the legal principle, discussed above in the section describing Local Educational Agencies and Charter Schools, that Larchmont was not responsible for offering or providing Student a FAPE after Student disenrolled from Larchmont. Therefore, Larchmont did not waive its right to rely upon that principle in this hearing. It may maintain its contention that, Los Angeles Unified, Student's district of residence at the time, was responsible to offer and provide Student a FAPE upon Student's disenrollment from Larchmont.

Second, Larchmont relies on the Charter Petition and Memorandum, but they are effective as of July 2020 and June 2020, respectively, after the time period involved in this action. Washington-Ajayi relied on those documents while testifying. Larchmont did not establish that the Charter Petition and Memorandum in effect as of the 2018-2019 school year are the same as the Charter Petition and Memorandum received into evidence at hearing, and therefore there is technically no evidence to support Larchmont's position.

Third, the language of the Charter Petition and Memorandum is not consistent with Larchmont's contention that Los Angeles Unified was ultimately responsible for offering a FAPE while Student attended Larchmont, and that after Student was disenrolled from Larchmont, Los Angeles Unified was responsible for any compensatory education that Larchmont was to pay based upon events that occurred when Student attended Larchmont. Rather, the Charter Petition and Memorandum state that Larchmont would be responsible for any prospective special education and related services, compensatory education, and/or reimbursement awarded in a due process proceeding. Nothing in these documents suggests that Larchmont's obligations to

Student based upon its actions or inactions while Student attended Larchmont, as set forth in the Memorandum and the Charter Petition, simply vanished when Student was disenrolled from Larchmont.

Furthermore, the terms of the Memorandum and Charter Petition are ambiguous as to whether Larchmont could be considered the actual local educational agency. Los Angeles Unified's description of Option 3 on its website, and the Charter Petition, state that Larchmont was to act as though it were a local educational agency, but will not have "complete" local educational agency status. While this language may implicate the financial or legal relationship between Larchmont and Los Angeles Unified, it is ambiguous as to what it means with respect to Larchmont's obligations to Student in this case, and there was no evidence that explained the meaning of Larchmont not having "complete" local educational agency status. Apart from the language cited above that Larchmont was responsible to provide a FAPE and to provide compensatory education, reimbursement, and otherwise comply with an order issued in a due process proceeding regarding its conduct in providing special education and related services to students, the Memorandum states that Larchmont was to be a party to any due process hearing regarding Larchmont's conduct, and to retain and pay for its own attorneys. In other words, by the terms of the Memorandum and the Charter Petition, Larchmont was to hold itself out to third parties, such as Student and OAH, as a responsible local educational agency. Student's IEPs at issue named Los Angeles Unified as the school district. However, Larchmont, not Los Angeles Unified, convened all of Student's IEP team meetings at issue in this case. No Los Angeles Unified personnel attended these IEP team meetings, and there was no evidence that any Los Angeles Unified personnel were invited to attend these IEP team meetings. Larchmont personnel provided, or were to provide, Student's services, and conducted, or were to conduct, his assessments. As a

result, to all the world, Larchmont looked like a duck, walked like a duck, and quacked like a duck, and that is exactly what the Memorandum and Charter Petition required it to do. Indeed, Larchmont's answer to the complaint specifically acknowledged that Larchmont was the local educational agency during the 2018-2019 school year.

Under these circumstances, Larchmont cannot duck behind the qualifying ambiguous language that it "will not have complete local educational agency status" in the Charter Petition so as to avoid legally assuming the label of a responsible local educational agency with respect to third parties such as Student, at least concerning matters that occurred while Student attended Larchmont.

Finally, the argument in Larchmont's motion to dismiss that the language in the first two paragraphs of the settlement agreement between Los Angeles Unified and Student applied to Larchmont also is not meritorious. Larchmont was not a party to the settlement agreement, and, except to the extent that the settlement agreement states the case title, Larchmont is not referred to in the settlement agreement. The settlement agreement specifically states it is between Student and Parents, as Petitioners, and Los Angeles Unified. Some of the agreement's provisions are broadly worded, but read in context they are directed only at the resolution of this case as it concerned Student and Parents and Los Angeles Unified, and Student dismissed with prejudice Los Angeles Unified as a result of the agreement. The actions of both Student and Los Angeles Unified upon entering into the agreement and thereafter did not demonstrate that Larchmont was a third-party beneficiary of the agreement, or that there was any expectation by the parties to the agreement that Student would dismiss his case against Larchmont as part of the agreement. Indeed, Washington-Ajayi, a Los Angeles Unified employee, testified in this matter on behalf of Larchmont. Los Angeles Unified knew

that this matter was continuing against Larchmont, and, if that was not contemplated by the parties to the agreement, Los Angeles Unified could have taken action to stop it.

Larchmont remains a party to this action, and its motion to dismiss is denied, except that Larchmont was only responsible to offer Student a FAPE through September 16, 2019, when Student ceased attending Larchmont.

ISSUE 1A: DID LARCHMONT DENY STUDENT A FAPE IN DEVELOPING THE MARCH 5, 2019 AND MAY 13, 2019 AMENDMENT IEPS BY FAILING TO ENSURE THAT PARENTS WERE MEMBERS OF THE TEAM THAT MADE DECISIONS AND PREDETERMINING STUDENT'S PLACEMENT OUTSIDE OF THE IEP TEAM MEETINGS?

This case involves the development of Student's March 5, 2019, and May 13, 2019, amendments to Student's annual IEP of September 11, 2018. These amendments concerned the addition of ERICS to Student's program. ERICS was added to Student's program as a consequence of an email Mother sent to Larchmont staff regarding Student's deteriorating social emotional state and mental health. Student contends that Larchmont predetermined Student's March 5, 2019 amendment IEP because Larchmont school psychologist Lily Sais and Larchmont behavior specialist Dr. Sara Thompson met before the March 5, 2019 IEP amendment team meeting to discuss ERICS and to draft the additional ERICS/social emotional IEP goal that was added at the IEP team meeting. Student contends there was no evidence that any other options or goals were discussed at this IEP team meeting other than what Sais and Dr. Thompson had determined prior to the meeting. Further, there was no IEP team meeting held with respect to the

May 13, 2019, IEP amendment. Dr. Thompson merely presented an amendment, which purported to correct a clerical error in the level of ERICS, for Parents to sign.

Larchmont contends that Parents meaningfully participated in the IEP process as both parents attended the March 5, 2019 amendment IEP team meeting. At the meeting, Parents had the opportunity to ask questions, and the IEP team discussed Parents' concerns and the proposed changes to Student's IEP. Further, the May 13, 2019 IEP amendment was generated by Dr. Thompson when she discovered the clerical error in the level of ERICS that she had written into the March 5, 2019 amendment IEP. Since this was simply a typographical error, and since Parents had taken a while to consent to the March 5, 2019 IEP amendment, she immediately provided Parents the May 13, 2019 IEP amendment for signature so that the ERICS could start. However, Parents were given the opportunities to decline to sign the amendment or to convene the whole team for an IEP team meeting.

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

In general, a child eligible for special education must be provided access to specialized instruction and related services that 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 (*Rowley*); *Endrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. ____ [137 S.Ct. 988, 1000] (*Endrew F.*).)

States must establish and maintain certain procedural safeguards to ensure that each student with a disability receives the FAPE to which the student is entitled, and that parents are involved in the formulation of the student's educational program. (*W.G. v. Board of Trustees of Target Range Sch. Dist.*(9th Cir. 1992) 960 F.2d 1479, 1483) (*Target Range*).) Citing *Rowley, supra*, the court also recognized the importance of adherence to the procedural requirements of the IDEA, but noted that procedural flaws do not automatically require a finding of a denial of a FAPE. (*Id.* at 1484.) Procedural violations may constitute a denial of a FAPE if they result in the loss of educational opportunity to the student or seriously infringe on the parents' opportunity to participate in the IEP process. (*Ibid.*) These requirements are also found in the IDEA and California Education Code, both of which provide that a procedural violation only constitutes a denial of FAPE if it:

- impeded the child's right to a FAPE;
- significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of a FAPE to the child; or
- caused a deprivation of educational benefits.

(20. U.S.C. § 1415 (f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2).)

The IDEA emphasizes the importance of parental participation in a child's education. "Procedural violations that interfere with parental participation in the IEP formulation process undermine the very essence of the IDEA. An IEP which addresses the unique needs of the child cannot be developed if those people who are most familiar with the child's needs are not involved or fully informed." (*Amanda J., etc., v. Clark County School Dist.* (9th Cir., 2001), 267 F.3d 877, 892)(*Amanda J.*).) In *Timothy O. v. Paso Robles Unified School Dist.* (9th Cir. 2016) 822 F.3d 1105, a school district failed to assess a student for autism, and did not disclose to parents its suspicions that the student had autism. In finding the district liable for failing to assess the student in all areas of suspected disability, the court stated,

> The creation of an IEP is not a unilateral enterprise by the school district, but rather, a collaborative process that necessitates parents' input. … the failure to obtain necessary information about student's disorder prevented an informed discussion with his parents about his specific needs as an autistic child. (822 F.3d at 1125-1126.)

Predetermination of a student's placement is a procedural violation that deprives a student of a FAPE in those instances in which placement is determined without parental involvement in developing the IEP. (*Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 392 F. 2d 840, 857-859.) To fulfill the goal of parental participation in the IEP process, the school district is required to conduct a meaningful IEP meeting. (*Target Range, supra,* 960 F.2d at p. 1485.) A parent has meaningfully participated in the development of an IEP when the parent is informed of the child's problems, attends the IEP meeting, expresses their disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688,

693; *Fuhrmann v. East Hanover Bd. of Educ.* (3rd Cir. 1993) 993 F.2d 1031, 1036 (*Fuhrmann*) [parent who had an opportunity to discuss a proposed IEP and whose concerns were considered by the IEP team has participated in the IEP process in a meaningful way].) "A school district violates IDEA procedures if it independently develops an IEP, without meaningful parental participation, and then simply presents the IEP to the parent for ratification." *(Ms. S. ex rel. G. v. Vashon Island Sch. Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131) (*Vashon Island*).)

However, an IEP need not conform to a parent's wishes to be sufficient or appropriate. (*Shaw v. District of Columbia* (D.D.C. 2002) 238 F. Supp. 2d 127, 139.) For example, in *Gregory K. v. Longview School Dist*. (9th Cir. 1987) 811 F.2d 1307, 1314, (*Gregory K.*), the court stated that if a school district's program was designed to address the student's unique educational needs, was reasonably calculated to provide the student with some educational benefit, and comported with the student's IEP, then the school district provided a FAPE, even if the student's parents preferred another program and even if the parents' preferred program would have resulted in greater educational benefit. Citing *Rowley, supra,* 458 U.S. 176, 197, footnote 21, the court stated, "An 'appropriate' public education does not mean the absolutely best or 'potential-maximizing' education for the individual child." (*Gregory K., supra,* at p. 1313.)

In making changes to a child's IEP after the annual IEP Team meeting for a school year, the parent of a child with a disability and the public agency may agree not to convene an IEP Team meeting for the purposes of making those changes, and instead may develop a written document to amend or modify the child's current IEP. (34 C.F.R. § 300.324(a)(4)(i).) The entire IEP team must be informed of an IEP amendment made in

accordance with this regulation. (34 C.F.R. § 300.324(a)(4)(2).) Unless the IEP is modified by agreement in accordance with paragraph (a)(4), it may be modified only "by the entire IEP Team at an IEP Team meeting." (*Id.* § 300.324(a)(6).)

2018-2019 SCHOOL YEAR

EVENTS PRECEDING MARCH 5, 2019, AMENDMENT IEP TEAM MEETING

SEPTEMBER 11, 2018, IEP TEAM MEETING

Larchmont convened Student's annual IEP team meeting on September 11, 2018, when Student was 12 years old and had just begun seventh grade. As a seventh grader, he transitioned from Larchmont's Selma campus to Larchmont's Lafayette Park middle school campus.

This IEP team meeting set the anticipated academic program for Student's 2018-2019 school year. The IEP's present levels of performance, goals, and services focused on the areas of social emotional; occupational therapy; and an area the team labelled pre-vocational, which was directed on executive functioning in class, such as focusing, timely work completion, and study skills. The present levels of performance also addressed an area the team labelled vocational education, which was directed at classroom behaviors. The team continued Student's placement in a general education class, and offered accommodations, as well as services. Student was to receive 120 minutes per week of push-in resource services and 30 minutes per week of pull-out resource services, to cover multiple academic areas. Push-in services were services that were delivered in Student's general education classroom. The pull-out resource services were delivered outside of Student's classroom, and were delivered in Larchmont's Learning Lab, located in the basement of Student's school. The IEP also offered Student

120 minutes of counseling monthly, on a pull-out basis, and 30 minutes monthly of consultative occupational therapy services. The occupational therapy services did not involve direct services. Rather the occupational therapist would consult with Student's teachers and service providers to ensure that appropriate sensory and other supports, strategies, and accommodations were available to enable and enhance Student's ability to function in the classroom. The counseling was performed on a group basis, but this IEP did not so specify. The IEP did not offer Student extended school year services.

The IEP team discussed and proposed ERICS to help Student with his social emotional issues. Lily Sais, Larchmont's school psychologist, was present at the IEP team meeting. Sais held a bachelor's degree in psychology and a master of arts in educational psychology. She also earned a pupil personnel credential in school psychology, and was first employed as a school psychologist in 2010. She was employed by Larchmont as a school psychologist since 2011. Sais discussed the difference between ERICS and the school-based counseling services already offered in the IEP. Parents were interested but were not ready to commit to ERICS services. They wanted to speak to the service provider to get more information. Therefore, the IEP team did not include ERICS in this IEP. Parents signed their consent to the IEP on September 11, 2018.

On February 25, 2019, Mother emailed Student's resource teacher, and other Larchmont staff, and advised that Student had reached peak anxiety levels. He cried before school, begged to stay home, and called her multiple times a day from school begging to come home. The email stated Parents had been in touch with several of Student's teachers about this, but nobody seemed to know how to manage the situation. Mother reported she was attempting to arrange for Student to see a child psychiatrist. She wrote that his grades were terrible, his class participation was low, and

Student was miserable. Mother's email closed with four questions: how to make school tolerable, how to tackle class work and homework, as Student was perpetually behind and it was becoming a constant source of conflict at home; whether they should try an at-home independent study plan for part of the week; and what suggestions Larchmont had for managing Student's anxiety.

In response to Parents' email, Larchmont convened an IEP team meeting on March 5, 2019.

IEP AMENDMENT TEAM MEETING OF MARCH 5, 2019

The IEP team at this meeting included Parents, Larchmont administrator Tracy Erland Zehnder, resource specialist Fallon Perdue, general education teacher Stephen Day, school psychologist Sais, and occupational therapist Bethany Cook. Prior to the meeting, Sais met with Dr. Sara Thompson, Larchmont's ERICS provider, to discuss ERICS and draft a proposed ERICS goal.

The team noted Student's eligibility category of other health impaired. The parent Procedural Rights and Safeguards document was provided, just as it had been provided at the September 11, 2018 IEP team meeting.

The team discussed Student's present levels of performance in the social emotional area, which it expanded to include the area of ERICS. The present levels of performance in this area included many of the present levels in the social emotional area as set forth in the September 11, 2018 IEP. Student was tech-savvy, and parents contributed that Student benefitted from structure and support in terms of behavior, organization, and homework. Organization, specifically of his binder and backpack, was an area of need. He expressed his dislikes through crying and shutting down. He

seemed to zone out and go inward instead of asking for clarification when confused. He appeared to be disengaged, with his head down on his desk. He displaced his materials for class and took a while looking for them. Student yelled out during class and interrupted others. Sometimes his comments were on topic and sometime not. He benefitted from a lot of redirection. All of these comments were repeated from the social emotional present levels of performance in the September 11, 2018 IEP. The March 5, 2019 IEP team also added some new information. The new information included that Student experienced anxiety that could be debilitating and was an issue since sixth grade. Parents reported that Student called home throughout the day asking to go home, Student often made jokes at school that were inappropriate, and Parents and teachers expressed significant concerns regarding Student's mood and behavior.

With respect to other areas, the March 5, 2019 amendment IEP essentially repeated the present levels of performance contained in the September 11, 2018 IEP. Student's present levels of performance in the area of occupational therapy reflected that he could functionally access all facets of his academic environment and access and participate in his academic curriculum. He continued to have challenges in the areas of motivation, attention, and focus, which his IEP addressed through a variety of supports.

In the area of vocational education, teachers reported Student was very sharp and had interesting things to say when motivated to share. When he was focused, he could produce quality work, and was able to participate when he was in a preferred classroom setting. He worked well with partners and showed a willingness to connect with his peers during shared activities. However, the teachers generally agreed with Parents that Student demonstrated difficulty in the areas of self-regulation and attention. He continued to struggle with maintaining focus in the classroom setting, and was resistant to adult support. He shut down when they offered assistance or

prompting. Student struggled with communication with his peers and would not volunteer answers. He seemed sullen and disconnected in the school setting, which might impact his ability to maintain peer relationships.

In what the team labelled the pre-vocational area, Student's teachers reported him to be a considerate student who had some difficulty adjusting to the academic expectations of the classroom. He was quiet, and usually followed classroom routines and school procedures. He struggled with inattentiveness, and needed a quiet, smaller setting to complete individual work. He did not consistently complete assignments on time, and needed prompting to begin work. He seemed to lack the skills to accept responsibility for his own learning. He was encouraged to participate in group and class discussions, to accept a variety of roles within the classroom, and to come to class prepared with his school materials. He would benefit from a consistent study and homework routine.

In general, the IEP teams at the September 11, 2018 IEP team meeting and the March 5, 2019 amendment IEP team meeting discussed the challenges underlying Student's eligibility of other health impairment that impacted his attention, focus, organizational skills, motivation, and attitude toward adult support. All of these challenges made it difficult for Student to engage fully in class, complete assignments independently, express himself appropriately, seek help or ask for clarification, and form peer relationships. These challenges impacted Student's progress in the general education curriculum.

The team continued Student's goals from his September 11, 2018 IEP, and reported that, as of January 2019, Student had made substantial progress on Goal 1, and partial progress on the other goals. Goal 1, a social emotional goal, required Student to

use “I Statements” to describe, with no adult support, why he felt a certain way, identify what could be changed, and identify ways that he might need help, in a set percentage of weekly trials.

Goal 2 was labelled a pre-vocational goal that required Student to begin a task, including a non-preferred task, within 2 minutes of direction, and remain on task for a minimum of 10 minutes, with no more than 2 prompts, on 8 out of 10 independent tasks.

Goal 3 was labelled as another pre-vocational goal. It required Student to complete a given assignment or task, ask for assistance, if needed, and turn in the assignment with 80 percent accuracy in a set percentage of trials, in the classroom setting.

The March 5, 2019 amendment IEP team discussed the ERICS goal. The goal provided that in counseling sessions, Student would accurately identify situations that could be anxiety-producing, and identify and practice appropriate coping strategies or relaxation techniques when presented with real or imagined situations with 80 percent accuracy on 4 out of 5 trials.

The team continued Student’s placement in a general education class at Larchmont’s Lafayette Park campus, and maintained the same instructional accommodations as were in the September 2018 IEP.

The IEP amendment offered the same amount of resource services as before: 120 minutes per week, including 30 minutes per week of pull-out from general education, to address multiple academic areas.

The IEP continued student's occupational therapy consultative services of 30 minutes per month, to address all three of Student's goals plus the ERICS goal.

The IEP team also continued Student's counseling services of 120 minutes monthly, to address Student's social emotional goal.

The IEP team restated Student's accommodations from the September 11, 2018 IEP, including minimizing distractions, seating Student in close proximity to staff, allowing Student to choose between a variety of activities, and providing Student with designated work periods and with additional time as needed. Student would also have extended time up to 50 percent to complete homework assignments, classwork, projects, tests, and quizzes as needed. He would have weighted lap items as needed, and breaks as needed. Student would have explicit instructions for all tasks, with frequent check-ins for understanding, and he would be asked to turn in his homework from the homework folder. Student could also turn in homework electronically, without penalty for not turning in a hard copy.

The IEP offered ERICS for 150 minutes per week, including 120 minutes per week pull-out from general education, to address the social emotional goal and the ERICS goal. The Larchmont team members intended the remaining 30 minutes per week to be used for consultation between the ERICS provider and Parents, and this was explained to Parents at the IEP team meeting, along with a description of ERICS services. However, the IEP did not specify that the remaining 30 minutes were to be used for Parent consultation.

The services were set forth on the IEP's Summary of Services page. The IEP restated the FAPE offer on the FAPE Summary Grid, which stated, "By clicking this box the IEP team has reviewed the FAPE Summary Page to ensure that it reflects the IEP Team decisions." The box referred to was checked.

The notes section of the amendment IEP included the notes from the September 2018 IEP team meeting, with an update dated "March 15, 2019," which was a typographical error, as the meeting occurred on March 5, 2019. The note stated that the IEP team met to discuss Parents' continuing concerns about Student's escalating anxiety and resistance to performing schoolwork. The note further stated the team offered ERICS services to provide more social emotional support. The note concluded, "Parents agree." The evidence reflected that Parents participated in the IEP team meeting, asked questions, and expressed their concerns

The consent page of the amendment IEP showed Parent's signature, but not the date. The FAPE Summary Grid page of the IEP amendment reflected Larchmont received Parent's signed consent to the IEP on May 8, 2019.

Student did not meet his burden of demonstrating that Larchmont predetermined the March 5, 2019 amendment IEP in violation of the IDEA and the Education Code. The IEP team, including Parents, convened in response to Parents' expressed concerns about Student's emotional difficulties at school. The team incorporated those concerns and other parental comments in the present levels of performance in the IEP. The IEP team developed an IEP that added an ERICS goal, and ERICS to support the goal. Parents agreed at the meeting that Student should receive ERICS, and ultimately signed consent to the IEP. There was no evidence that the goal or the services were predetermined such that they were presented to Parents on a take-it-

or-leave it basis. Some of the IEP team members who attended the meeting and testified at hearing about the meeting, including Father, did not recall very much about the discussions at the meeting. However, the evidence showed that ERICS was discussed and explained, and the ERICS goal was discussed. Parents contributed to the discussion of Student's present level of performance in the area of social emotional/ERICS. There was no evidence that Parents were not permitted to participate in the meeting, or were prohibited or discouraged from raising concerns or asking questions at the meeting.

Student contends that Larchmont engaged in predetermination, based upon Sais's and Dr. Thompson's pre-meeting discussion about ERICS services and that they drafted a proposed ERICS goal before the meeting. Then, Student posits that Larchmont simply presented that information to Parents at the meeting. This contention is not supported by either law or fact. First, school staff are permitted to meet in advance of an IEP team meeting to form opinions, compile reports, discuss a child's special education, and otherwise engage in preparatory activities to develop a proposal or response to a parent proposal that will be discussed at a later IEP team meeting. (See, 34 C.F.R. §§ 300.501(b)(1) and (b)(3); *N.L. v Knox County Schools, supra,* 315 F.3d 688, 694, n. 3, in which the court stated: "Indeed, without some organization and evaluation [by school staff] prior to the IEP Team meeting, it is unclear how an IEP Team could make reasonable and informed decisions.") Second, there was no evidence that the ERICS and goal were presented to Parents at the March 5, 2019 IEP amendment team meeting in a "take it or leave it" manner.

The March 5, 2019, amendment IEP team meeting did not predetermine Student's placement or services. Parents meaningfully participated in the development of the IEP, in that they were informed of Student's problems, attended the meeting, and

had an opportunity to discuss the IEP, all in accordance with the standards set forth in *Fuhrmann, supra,* 993 F.2d 1031 at 1036. Larchmont did not deprive Student of a FAPE on this ground.

IEP AMENDMENT OF MAY 13, 2019

Larchmont assigned Sara Thompson, Psy.D., as Student's ERICS provider. Dr. Thompson received her clinical doctorate and master's degrees from the California School of Professional Psychology. Since 2011, she has been a postdoctoral fellow at the Reiss Davis Child Study Center. She was employed at Larchmont since 2014, first as a child development specialist and then as a behavior interventionist. As Dr. Thompson was preparing to provide Student's ERICS, she determined that the March 5, 2019 amendment IEP document incorrectly offered Student 150 minutes per week of ERICS services, and that the offer was actually 150 minutes per month. There was no documentary evidence that reflected how Dr. Thompson arrived at this conclusion, or that the level of services offered in the May 5, 2019 amendment IEP was incorrect. The only evidence that supported the view that the services were to be delivered monthly instead of weekly was the testimony of Sais, who said that the services were offered monthly and she believed that she shared that information with Parents at the March 5, 2019 amendment IEP team meeting, and the testimony of Erland Zehnder, Larchmont's administrative designee at the March 5, 2019, IEP team meeting, that the team discussed ERICS and offered it at 150 minutes per month.

By email on the evening of May 13, 2019, Dr. Thompson advised Parents that she had met with Student the previous week to start ERICS, but Student did not want to be pulled out of class at that time. Dr. Thompson wrote that she wanted to start services with Student that week, and to arrange a meeting or conversation with Parents to

discuss how Student was doing. In the same email, Dr. Thompson advised Parents that she had erroneously put 150 minutes per week of ERICS services on the IEP instead of 150 minutes per month Dr. Thompson advised the "only way" to correct it would be to create a new amendment and have Parents sign it. Mother responded to Dr. Thompson's email on the same day, advising that she could sign the amendment the next day or after May 20. Mother also advised that Parents could meet with Dr. Thompson after May 20. Dr. Thompson had the latest IEP amendment ready for signature by May 14, and emailed Mother on that date to so advise her.

The IEP amendment Dr. Thompson prepared was dated May 13, 2019, but did not reflect the fact that no meeting was held on that date or at any other time. Rather, the May 13, 2019 IEP amendment represented that a meeting was actually held on that date. The May 13, 2019 IEP amendment was largely identical to the March 5, 2019 amendment IEP. However, among other changes, it listed a meeting date of May 13, 2019, it changed the ERICS service minutes from 150 minutes weekly to 150 minutes monthly, and it changed the amount of time Student would spend outside of general education weekly from 9 percent to 5 percent. The amendment IEP did not mention why the reduction in ERICS services minutes occurred. Additionally, the amendment IEP document had a typed date of May 13, 2019 next to Parents' signature, which was incorrect. The services page of the May 13, 2019 amendment IEP stated that the services would be "Effective on Signature Date," which was listed as May 17, 2019. Based on the emails between Dr. Thompson and Mother on the evening of May 13, 2019, and Dr. Thompson's May 14, 2019 email reflecting that she had the "documents" ready, the date Parents consented to the amendment IEP had to be after May 13, 2019.

Larchmont committed procedural violations of the IDEA and the Education Code in developing the May 13, 2019 amendment IEP. First, the May 13, 2019 IEP amendment

was not developed through a meeting, despite what the IEP amendment itself misleadingly stated. As was discussed above, by its terms, 34 Code of Federal Regulations part 300.324(a)(4), provides an IEP may be modified without a meeting, but only when the parent and the public agency agree as to the modification, agree not to convene an IEP team meeting, and develop a written document to amend or modify the IEP. Here, there was scanty evidence that the first condition was met, and no evidence that the second condition was met. Dr. Thompson, who was not at the March IEP team meeting, advised Mother that she had inserted into the IEP document the incorrect frequency of ERICS minutes, and that they were to be delivered on a monthly basis, not a weekly basis. Dr. Thompson never asked Parents for their recollection as to whether the ERICS minutes agreed to at the IEP team meeting were to be delivered monthly or hourly, or whether they agreed to change the frequency of ERICS from hourly to monthly. Her email simply confidently stated her conclusion that the ERICS hours were to be delivered monthly and not hourly, told Mother the only way to correct this "error" was for Parents to sign an amendment to the IEP, and asked when Parents were available to sign the amendment. Dr. Thompson's failure to solicit Parents' input into their recollection of the offer of services at the meeting, and to engage in a discussion with Parents as to whether they agreed that the IEP team actually intended the ERICS to be delivered on a monthly basis, failed to comply with 34 Code of Federal Regulations, part 300.324(a)(4). Moreover, Dr. Thompson's conduct in simply preparing an amendment IEP and presenting it to Parents for signature exemplified the practice criticized in *Vashon Island, supra,* that a local educational agency violates IDEA procedures if it independently develops an IEP and then simply presents the IEP to parent for ratification.

Second, Larchmont violated 34 Code of Federal Regulations part 300.324(a)(4), because Parents never specifically agreed that an IEP meeting need not be convened to amend the IEP. Rather, Mother agreed to sign the May 13, 2019 amendment IEP without a meeting because Dr. Thompson's email of May 13 incorrectly advised that this was "the only way" to amend the IEP. It may have been the quickest way, and the simplest way, but it was not the only way. As mentioned above, 34 Code of Federal Regulations part 300.324(a)(6) provides that changes to an IEP may be made by the entire IEP team at an IEP team meeting.

Third, amending the March 5, 2019 amendment IEP without an IEP team meeting was particularly egregious here, because there was no documentary evidence presented at hearing to support Larchmont's representation to Parents that the March 5, 2019 amendment IEP incorrectly expressed the amount of ERICS to which the IEP team agreed. Both Sais and Erland Zehnder testified that the services were to be provided monthly. However, the March 5, 2019 IEP specifically stated that the weekly ERICS and other services listed in that IEP were the services agreed to by the IEP team. In short, the March 5, 2019 amendment IEP specifically documented, *in two places*, that the services set forth in that IEP were the services agreed to by the IEP team. Additionally, there was no reference in the May 13, 2019 amendment IEP that it was amending the March 2019 amendment IEP because the latter contained a clerical error as to the amount of ERICS. There was simply no documentary evidence produced at hearing to establish that the services in the March 5, 2019 IEP were incorrectly documented, and no evidence to explain how these alleged errors occurred.

The IDEA does not address when it is appropriate to use the procedures in 34 Code of Federal Regulations part 300.324(a)(4)(i). However, an amendment of this magnitude, which significantly reduced the amount of ERICS to Student based upon the

unrecorded memory of two of the Larchmont IEP team participants that the level of services agreed to at the IEP team meeting and inscribed in the IEP was incorrect, was an amendment which merited discussion at another IEP team meeting. Under the circumstances, a brief email to Parents regarding a purported clerical error in the IEP was not sufficient to convey to Parents the importance of the issue presented by the error, or afford them an adequate opportunity to respond.

Larchmont's conduct in unilaterally determining that the March 5, 2019 amendment IEP included an incorrect amount of ERICS, and in misrepresenting to Parents that the only way to correct this purported error was to ask Parent just to sign an amendment to the March 5, 2019 amendment IEP, constituted predetermination. As a result of this conduct, neither Parents nor the rest of the IEP team were given an opportunity to determine whether the level of services set forth in the March 5, 2019 IEP amendment was actually an error, and, if so, to engage in an informed discussion as to the amount of ERICS Student actually needed. Such an informed discussion with Parents was contemplated by the court in *Amanda J., supra.* Consequently, Larchmont predetermined the May 13, 2019 amendment IEP.

Predetermination is a procedural violation of the IDEA and the Education Code. A procedural violation only constitutes a denial of a FAPE if it impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decisionmaking process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2).) In this case, this procedural violation significantly impeded parental participation in the development of Student's IEP, as Parents did not have the opportunity to discuss with the other IEP team members the appropriate service level that would provide Student with a FAPE. Further, as the evidence discussed below with respect to Issue 1B

shows, Larchmont's unilateral diminution of Student' services deprived him of an educational benefit. Under these circumstances, Larchmont deprived Student of a FAPE by predetermining the May 13, 2019 amendment IEP.

ISSUE 1B: DID LARCHMONT DENY STUDENT A FAPE IN DEVELOPING THE MARCH 5, 2019 AND MAY 13, 2019 AMENDMENT IEPS BY FAILING TO PROVIDE PRIOR WRITTEN NOTICE WITH ALL REQUIRED CONTENT REGARDING THE ADDITION OF ERICS?

Student contends that Larchmont failed to provide prior written notice with respect to the ERICS services included in the March 5, 2019 and May 13, 2019 amendment IEPs. Student contends that the March 5, 2019 amendment IEP constituted prior written notice, especially as it incorporated the September 11, 2018, annual IEP, and that Larchmont was not required to serve another prior written notice with respect to the correction of the ERICS services in the May 13, 2019 amendment IEP. Larchmont further contends that, in any event, failure to send a prior written notice was a procedural error that did not deny Student a FAPE. Larchmont asserts Parents were not denied the opportunity to meaningfully participate in the decision to add the ERICS goal and supports, and Student did not suffer a loss of educational opportunity due to any failure of Larchmont to send an additional prior written notice.

A local educational agency must provide parents with prior written notice which contains specific information whenever the local educational agency proposes or refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of a FAPE to the child. (34 C.F.R. § 300.503.) The contents of the prior written notice are mandated by the IDEA, and must include: a description of the subject

action; an explanation of why the local educational agency proposed or refused to take the action; a description of each evaluation procedure, assessment, record, or report used as a basis for the subject action; a statement referring parents to the procedural safeguards; sources for parents to contact to obtain assistance; a description of other options the IEP team considered and the reasons those options were rejected; and a description of other facts relevant to the local educational agency's proposal or refusal to act. (34 C.F.R. § 300.503(b).) An IEP may serve to provide prior written notice if it contains all of the information required by 34 Code of Federal Regulations part 300.503(b). (Office of Special Education Programs, Letter to Lieberman (August 15, 2008) 52 IDELR 18; 71 Fed. Reg. 46450, 46691 (Aug. 14, 2006).) Furthermore, prior written notice of an amendment to the IEP that Parents agreed to without an IEP team meeting must be given pursuant to 34 Code of Federal Regulations. part 300.503(b). (See Office of Special Education Programs, COVID-19 Questions & Answers: Implementation of IDEA Part B Provision of Services, *supra*, 77 IDELR 138.)

The March 5, 2019 IEP amendment, which incorporated the September 18, 2018 annual IEP, provided the information required by prior written notice with respect to the addition of ERICS. It included a description of the action proposed by Larchmont, which was the addition of ERICS. The present levels of performance and notes in the March 5, 2019 amendment IEP describing Student's anxiety and parent's concerns explained why the IEP team was taking such action and constituted the information upon which the IEP team was basing its action. The IEP included a statement that Parents received the procedural safeguards, and listed the Larchmont IEP team members on the IEP, who constituted sources for parents to contact to obtain assistance in understanding the procedural safeguards. The counseling services already in place, the present levels of performance, and the notes from both the September 2018 IEP and the March 5, 2019

IEP, which were contained in the amendment IEP, combined to constitute a description of other options the team considered and the reasons why those options were rejected. The IEP notes reflecting Parents' agreement at the March 5, 2019 amendment IEP team meeting that Student should receive ERICS, when they were not ready to agree to such services at the previous September 11, 2018 IEP team meeting, provided a description of other relevant factors.

However, the May 13, 2019, IEP amendment, which changed the terms of the March 5, 2019 IEP without an IEP team meeting, did not meet the requirement of prior written notice, and Larchmont provided no separate prior written notice. At no time did Larchmont even explain to Parents why Dr. Thompson, who was not at the March 5, 2019 IEP team meeting, believed that the level of ERICS services written in the March 5, 2019 IEP was incorrect. Indeed, the only two elements of prior written notice that Dr. Thompson's May 2019 emails contained was a description of the proposed amendment, which was designed to change Student's level of services from weekly to monthly, and, arguably, sources such as Dr. Thompson to contact to understand the proposed change. The emails did not include any of the following elements of prior written notice: a sufficient explanation as to why the frequency of ERICS set forth in the March 5, 2019 amendment IEP was incorrect and how the error occurred; a description of the records or reports upon which Larchmont based the proposal to amend the IEP; sources for Parents to contact to obtain assistance in understanding the proposed change; a description of other options that the IEP team considered regarding the proposed change and why those options were rejected; and a description of any other factors relevant to the proposed change.

A failure to give prior written notice when required is a procedural violation, which is only a deprivation of FAPE if it impeded the child's right to a FAPE, significantly

impeded the parent's opportunity to participate in the decisionmaking process regarding the provision of a FAPE to the child, or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2).) Here, the failure to give prior written notice pertaining to the change in services that gave rise to the May 13, 2019 amendment IEP not only significantly impeded Parents' opportunity to participate in the IEP process, but it also magnified the unilateral nature of the request that Parents sign an amendment to an IEP without giving them an opportunity to discuss the amendment with the IEP team. Furthermore, it also impeded Student's right to a FAPE, as it resulted in a diminution of the services Student was to receive. Larchmont therefore denied Student a FAPE by failing to give adequate prior written notice of its decision to reduce ERICS.

ISSUE 2: DID LARCHMONT DENY STUDENT A FAPE BY FAILING TO COMPLETE STUDENT'S ANNUAL IEP BY SEPTEMBER 11, 2019?

Student contends that Larchmont was required to hold an annual IEP team meeting by no later than September 11, 2019, and that Larchmont never provided any formal notice of any such IEP. Further, Student contends that Larchmont was not absolved from its failure to hold an annual IEP by September 11, 2019, by reason of Parent's unilateral placement of Student at Bridges on September 16, 2019, citing authority that failure to timely hold an annual IEP justifies an award of relief.

Larchmont contends it was actively trying to schedule Student's annual and triennial IEP team meetings for September 2019 as early as August 2019. Parents, however, refused to respond to Larchmont's repeated attempts to schedule any IEP team meetings. Larchmont further contends that Larchmont's obligation to convene an

annual IEP team meeting ceased once Student voluntarily disenrolled from Larchmont on September 16, 2019. At that point, Los Angeles Unified was the entity responsible for convening an IEP team meeting.

A local educational agency must conduct an IEP team meeting for a special education student at least annually "to review the pupil's progress, the [IEP], including whether the annual goals for the pupil are being achieved, and the appropriateness of placement, and to make any necessary revisions." (Ed. Code, § 56343, subd. (d); 20 U.S.C. § 1414(d)(4)(A)(i).) The public agency must schedule IEP team meetings at a mutually agreed time and place. (34 C.F.R. § 300.322(a)(2).) Additionally, every three years, the IDEA requires that the IEP team complete a triennial assessment unless the parent and the public agency agree that a reevaluation is unnecessary. (20 U.S.C. § 1414(a)(2)(B)(ii); (Ed. Code, § 56381, subd. (a)(2).) The IEP team meeting that is held after such a reassessment is commonly referred to as a triennial IEP team meeting. (20 U.S.C. § 1414(d)(4)(ii)(II); Ed. Code, § 56341.1, subd. (d)(2).)

Local educational agencies must make substantial efforts to secure parent attendance at the IEP team meeting. In *Drobnicki v. Poway Unified Sch. Dist.* (9th Cir. 2009) 358 Fed.Appx. 788, at 789-790, the court held the district committed a procedural violation when it made no attempt to schedule the IEP team meeting at a mutually agreeable time. A scheduled IEP team meeting may proceed without parents only if the local educational agency is unable to convince the parent to participate. (34 C.F.R. § 300.322(d).) Even in that circumstance, the local educational agency must keep a detailed record of its attempt to include the parent. (*Id.*) Put another way, parental involvement in the IEP creation requires the parents be included in an IEP meeting unless they affirmatively refused to attend. (*Doug C. v. State of Hawaii Dept. of Educ.*

(9th Cir. 2012) 720 F.3d 1038, 1044 (*Doug C.*), citing *Shapiro v. Paradise Valley Unified Sch. Dist.* (9th Cir. 2003) 317 F.3d 1072 at 1078, superseded on other grounds by 20 U.S.C. § 1414(d)(1)(B).)

Here, Student's annual IEP was due on September 11, 2019, and his triennial IEP was due on September 26, 2019. On August 29, 2019, Cindy Gonzalez, the special education clerk for Larchmont, emailed Mother. Gonzalez suggested that since Parents had obtained a comprehensive assessment for Student over the summer, perhaps Parents would like to waive the triennial assessment, and just assess Student for health. She closed by asking Mother to let her know if it was acceptable to proceed with just a review for the September 11, 2019 IEP team meeting. Mother emailed Gonzalez the same day, requesting more elaboration as to what the triennial was before Parents decided whether to waive it. Sais, Larchmont's school psychologist, emailed Mother the same day, to attempt to explain what the triennial assessment was, and to advise that, even if Parents waived the triennial assessment, Larchmont would still convene an IEP team meeting to review Student's present levels of performance, progress towards goals, and whether anything needed to be changed. She also advised that, if Parents wished, Larchmont would perform the triennial assessment. Mother immediately sent a responsive email, stating that she had not understood that Larchmont performing a triennial assessment was an option, and that Parents would waive it. Sais and Mother exchanged follow-up emails that day, in one of which Mother asked to be advised of the scheduling options for the IEP team meeting. Mother copied Gonzalez on this email. Mother's email did not refer to the September 11, 2019, date that Gonzalez had proposed, and Gonzalez never heard from Mother regarding the proposed September 11, 2019 IEP date.

Therefore, Gonzalez offered another date for the meeting. By email dated September 1, 2019, Gonzalez sent Mother the assessment plan for the health assessment and advised that a tentative date for Student's IEP meeting was September 13, 2019, at 12:45 p.m. "given that health assessment is completed." Gonzalez credibly testified that this phrase did not mean that the health assessment had been completed, rather, she intended the phrase to mean that the meeting would be held if the health assessment were completed. Her testimony was credible regarding this point for a variety of reasons, including that Larchmont staff continued efforts after this date to obtain Parents' signed consent to the assessment plan for the health assessment. The health assessment could not be completed without signed parental consent.

Parents never confirmed the proposed meeting date of September 13, 2019. On September 9, 2019, Sais sent an email to Parents, saying that the health assessment plan was attached, and that they should sign it and send it back. She noted that a hard copy would be sent home as well.

On or about September 11, 2019, Gonzalez was advised by Student's case manager that Parents had signed the assessment plan. Gonzalez never saw a hard copy of the signed assessment plan. No evidence was offered at hearing that confirmed that Parents ever signed the assessment plan for the health assessment. On September 11, 2019, Gonzalez cancelled the September 13, 2019 meeting date. Notwithstanding her belief that the health assessment plan was signed, she determined that the health assessment could not be completed by the tentative meeting date of September 13, 2019, and, in any event, Parents never confirmed the September 13, 2019 meeting date. Gonzalez intended to reschedule the IEP team meeting.

On September 16, 2019, Mother wrote a letter to Larchmont staff, advising that Student was accepted at Bridges. She expressed gratitude for how diligently and compassionately staff worked with Student and his family as his needs evolved and became known. The letter stated "We know everyone would continue to support [Student] this year and beyond. We also believe [Student] would have continued to struggle with the challenges of trying to succeed. As a result, we have elected to move forward with Bridges." The letter specified that Student would start classes at Bridges on the date of the letter, acknowledged that Student may have difficulty transitioning from the Larchmont community and his friends and teachers, and that Parents did not know the process for withdrawing Student from classes. Myra Salinas, Larchmont's Senior Director of Learning and Support Services, responded by email, saying that Mother's letter was sufficient to exit Student from Larchmont, offered assistance in the transition, and was amenable to letting Student return to campus "to say good-bye to his friends." Until September 16, 2019, when Parents disenrolled Student from Larchmont, Parents did not advise Sais or Larchmont that Student was accepted at Bridges and would attend there.

There was no specific evidence as to why Parents did not confirm any date for Student's annual IEP team meeting by September 11, 2019, the last date to hold the annual IEP team meeting, or confirm the proposed September 13, 2019 date, which could have doubled as a triennial IEP team meeting date. However, as is further discussed below, the evidence demonstrated that, after their meeting with Dr. Thompson on August 27, 2019, Parents were disillusioned with Larchmont, and decided Student should attend another school. On September 11, 2019, Parents signed an enrollment contract with Bridges, without Larchmont's knowledge. Further, the enrollment contract with Bridges provided that the tuition Parents submitted along with

the enrollment contract was non-refundable, thereby confirming the conclusion that Parents had no intention, as of approximately September 11, 2019, of continuing Student's enrollment at Larchmont. Five days later, on September 16, 2019, Parents disenrolled Student from Larchmont. Therefore, after cancelling the proposed September 13, 2019 IEP team meeting, Larchmont did not attempt to reschedule the annual IEP team meeting because, as was discussed in the Local Educational Agencies and Charter Schools section above, when Student disenrolled from Larchmont, Larchmont was no longer obligated to offer Student a FAPE.

The evidence reflected that Larchmont considered scheduling one IEP team meeting to serve as both the annual IEP team meeting and the triennial IEP team meeting, whether the meeting would have been on or before September 11, 2019, the due date of the annual IEP team meeting, or soon thereafter as possible, such as by the proposed date of September 13, 2019. This is supported by Larchmont's attempts to obtain Parents' consent to the health assessment plan in conjunction with its attempts to obtain Parents' agreement to dates for at least one IEP team meeting. Parents' failure to confirm either the September 11, 2019 or September 13, 2019 dates, or to suggest alternative dates, contributed to putting Larchmont in the position of being unable to comply with the procedural requirements of the IDEA. That is, Larchmont could deprive Parents of participation by holding the annual IEP team meeting in a timely fashion, or, at least, in as close to a timely fashion as possible. Doing so would violate the IDEA's requirements of parental participation, as well as the IDEA's requirements that Larchmont document concerted efforts to convince parents to attend an IEP team meeting. (34 C.F.R. § 300.322(d).) Alternatively, Larchmont could continue to attempt to obtain Parents' agreement to the date and time of the meeting, and schedule the meeting for a date on which Parents confirmed they would attend, even if it meant

holding the annual IEP team meeting in an untimely fashion. It bears repeating that, until September 16, 2019, Parents had not given Larchmont notice that they had decided to disenroll Student and send him to Bridges. As is explained below in the Remedies section, Larchmont knew that Parents were applying to Bridges, but they had no information until September 16, 2019, that Student was accepted to Bridges and would be disenrolling from Larchmont at that time.

The school district in *Doug C., supra,* faced a similar dilemma regarding scheduling the annual IEP team meeting so that it was either timely, or so that the Parent could be present. The *Doug C.* court held that, in those circumstances, the public agency must determine which course of action promoted the purposes of the IDEA and was less likely to result in a denial of a FAPE. (*Doug C., supra,* 720 F.3d 1038, at 1046.) The court offered assurance that in reviewing the district's action in such a scenario, it would allow the district reasonable latitude. (*Ibid.*) The *Doug C.* court found that the district had chosen incorrectly by holding the IEP meeting without the Parent's presence, as it still could have provided services to Student after the annual review date of the IEP. (*Ibid.*) Here, Larchmont's decision not to hold the annual IEP team meeting on a timely basis was reasonable for two reasons. First, Larchmont, ignorant of Parents plans to disenroll Student on September 16, believed it could continue to provide services even if the annual IEP was not timely held. As the court in *Doug C.* noted, the IDEA requires an annual review of the Student's IEP. There is no authority, however, that requires the local educational agency to cease providing services to a student whose annual review is overdue. (*Ibid.*) Secondly, Student's triennial IEP team meeting was due on September 26, 2019, a mere 15 days after the due date for the annual IEP team meeting. Therefore, ignorant as Larchmont was that Student was accepted by Bridges, and of Parents' plans to disenroll Student from Larchmont by that time, Larchmont reasonably

could have attempted to reschedule the annual IEP team meeting to the date of the triennial IEP team meeting and hold both meetings at the same time, in the hope of promoting efficiency as well as securing the required mutually agreed upon time and place.

Consequently, based upon the information that Larchmont had at the time it was trying to schedule the annual IEP team meeting, Larchmont made a reasonable choice. It was the choice that was most respectful of the rights of Parents, who did not respond to Larchmont's attempts to schedule an IEP team meeting on either September 11 or September 13, or suggest any dates amenable to their schedule.

The failure to timely hold an annual IEP team meeting is a procedural violation of the IDEA. As was discussed above with respect to Issues 1A and 1B, procedural violations are only actionable if they impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decisionmaking process regarding the provision of a FAPE to the child; or caused a deprivation of educational benefits. Here, Student has not demonstrated that his right to a FAPE was impeded or that he was deprived of educational benefits by reason of Larchmont's procedural failure. Student did not demonstrate that any of his IEP services ceased due to the failure of Larchmont to timely hold the annual IEP. Additionally, Student disenrolled from Larchmont on September 16, 2019, a mere seven days after the annual IEP was due. When he disenrolled, Larchmont's obligation to offer Student a FAPE ceased.

Student's factual contention that Parents were waiting for Larchmont to hold the annual IEP was not supported by any testimony, whether of Parent or others. Indeed, Student's contention was contradicted by a plethora of evidence which showed that Parents were, as of early September, not responding to Larchmont's emails about

scheduling the IEP, or about signing the assessment plan for the health assessment, which they did not do either before or after disenrolling Student from Larchmont. The weight of the evidence demonstrated that Parents were, at that point, interested in disenrolling Student from Larchmont and enrolling Student at Bridges, while not giving Larchmont notice of their intentions.

Parents did not demonstrate that they were deprived of parental participation in the development of Student's IEP in this situation, when Larchmont convened no IEP meeting in their absence, and developed no new IEP in their absence. Indeed, Larchmont did not hold the annual IEP team meeting in a timely fashion so as not to deny Parents their right to participate in the meeting, despite Parents' failure to respond to Larchmont's efforts to confirm dates. Arguably, had Parents complied with title 20 United States Code section 1412(a)(10)(c)(iii) and 34 Code of Federal Regulations part 300.148(d), and given Larchmont a 10-business-day notice that they were going to disenroll Student from Larchmont and place him at Bridges, it is possible that Larchmont would have acted with even more urgency to contact Parents and hold an IEP team meeting prior to Student's disenrollment. The 10-day notice period exists so that a local educational agency has the opportunity to do just that, and attempt to address parent concerns before Parents unilaterally place the student in a private school. (*Forest Grove Sch. Dist. v. T.A.* (2009) 557 U.S. 230, 242 [129 S.Ct. 2484,174 L.Ed.2d 168].)

Under these circumstances, Larchmont did not deprive Student of a FAPE by failing to hold his annual IEP team meeting by on or after September 11, 2019.

ISSUE 3: DID LARCHMONT DENY STUDENT A FAPE BY FAILING TO IMPLEMENT CONSENTED-TO SERVICES FROM THE MARCH 2019 AND MAY 2019 AMENDMENT IEPS?

Student contends Larchmont procedurally deprived Student of a FAPE by failing to implement Student's ERICS contained in the March 5, 2019 and May 13, 2019 amendment IEPs, to which Parents consented. Student's closing brief is unclear as to whether it is relying on the level of services as stated in the March 5, 2019 amendment IEP or the May 13, 2019 amendment IEP, or both. Larchmont contends Student failed to prove that Larchmont did not implement the ERICS services in these IEPs. Rather, Larchmont contends that Larchmont did not receive Parents' written consent to the March 5, 2019 IEP amendment until May 8, 2019. At that time, Dr. Thompson recognized the clerical error in the amount of ERICS contained in the March 5, 2019 amendment IEP, quickly obtained Parent's consent to the May 13, 2019 amendment IEP, and then quickly commenced providing ERICS. Larchmont further contends that Dr. Thompson attempted to schedule a meeting with Parent in May to implement the parent counseling portion of the services, but Parent did not respond.

A local educational agency must implement a student's IEP with all required components. (34 C.F.R. § 300.323 (c).) A failure to materially implement the IEP constitutes a substantive deprivation of a FAPE, and is not a procedural IDEA violation, as Student alleges. (*Van Duyn v. Baker Sch. Dist.* (9th Cir. 2007) 502 F.3d 811, 819.) (*Van Duyn*.) 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.*) The materiality standard does not require that the child suffer demonstrable educational harm in order to prevail. However, the child's educational progress, or lack

of it, may be probative of whether there has been more than a minor shortfall in the services provided. (*Ibid.*) A local educational agency can establish substantial compliance by showing that the student made progress toward achieving his goals, showed improvement in his grades, and received passing scores on state assessments. (*A.P. v. Woodstock Bd. of Ed.* (2nd Cir. 2010) 370 Fed.Appx. 202, 205.)

Larchmont failed to substantially implement Student's IEP with respect to ERICS services. He was supposed to begin receiving those services in May 2019, when Larchmont received Parent's consent to the March 5, 2019 and March 13, 2019 amendment IEPs. According to the May 13, 2019 amendment IEP, he was to receive them at the rate of 150 minutes per month.

Student contends he should have received the services as of March 2019, as Parents agreed to the IEP at the March 5, 2019, IEP team meeting. The IEP notes state: "… IEP team has offered ERICS in order to provide more social emotional support. Parents agree." However, the law requires a parent's consent to an IEP to be in writing. (34 C.F.R. § 300.9(a), (b).) Student produced no evidence that Parents consented in writing to the March 5, 2019 IEP amendment any earlier than May 8, 2019, the date Larchmont received the signed IEP amendment. The notation in the IEP that "Parents agree" does not, contrary to Student's contention, unambiguously signify consent to the amendment IEP. Rather, on its face, it signified agreement only to the truth of the statements that preceded the notation "Parents agree." That is to say, Parents agreed that the IEP team met with Parents to discuss their concerns about Student, the IEP team offered ERICS in order to provide more social emotional support, and the note implies, and other evidence reflects, that Parents were willing to accept ERICS support. The notes did not say that Parents agreed to the specific level of ERICS offered in the IEP, or with other aspects of the IEP, such as the social emotional present levels of performance,

or with the goals, such as the new ERICS goal. At hearing, Father recalled very little of the March 5, 2019 amendment IEP team meeting, such as the topics discussed or whether ERICS was discussed. He only was able to testify regarding the level of ERICS offered when counsel showed him the services page on the March 5, 2019 amendment IEP and walked him through the lines that referred to ERICS services. Father was not even able to recall or confirm whether either Parent signed consent to the March 5, 2019 amendment IEP. Under these circumstances, Student's contention that the IEP notes of this unsigned IEP signified consent to the IEP such that it could be implemented is unmeritorious.

Student also contends that Parents likely signed consent to the amendment IEP and returned the consent page to Larchmont on or shortly after March 5, 2019, as Parents promptly signed the September 11, 2018 IEP and the May 13, 2019 amendment IEP. Therefore, Student darkly posits, without any evidence, that Larchmont is hiding the true signature page from Student and the ALJ. This contention is also unmeritorious.

Under these circumstances, Larchmont was not obligated to implement ERICS until it received Parents' signed consent to the IEP on May 8, 2019. The ERICS service logs showed that Student began to receive ERICS services less than a week thereafter, on May 14, 2019. At that time, Larchmont considered itself obligated to deliver ERICS to Student at the level of 120 minutes per month, or 30 minutes per week, and to Parents at the level of 30 minutes per month, pursuant to the May 13, 2019 amendment IEP.

However, as discussed above with respect to Issues 1A and 1B, the May 13 2019 amendment IEP was procedurally defective to the extent that it deprived Student of a FAPE. Larchmont predetermined its development, and failed to provide Parents prior written notice regarding the amendment. For purposes of determining whether

Larchmont materially implemented a consented-to IEP, the IEP to be referenced should be the last, appropriately consented-to IEP, and not an IEP to which Parents did not, and could not, properly consent. In this case, the last appropriately consented-to IEP was the March 5, 2019, amendment IEP, and the level of ERICS in that IEP should be the basis for determining whether Larchmont materially implemented ERICS. The March 5, 2019 amendment IEP offered ERICS in the total amount of 150 minutes per week. The IEP specified that 120 minutes of the services were to be on a pull-out basis, but did not specify what the remaining 30 minutes of services would consist of or how they would be delivered. The evidence showed that the IEP team intended those 30 minutes to consist of Parent counseling with the ERICS provider. Since this intention was not written into the March 5, 2019 amendment IEP, or, indeed, into the May 13, 2019 amendment IEP, the calculation determining the amount of ERICS Larchmont provided will be based on the written offer of 150 minutes per week, to include 120 minutes of pull-out services. (*Van Duyn, supra,* 502 F.3d 811, 820.)

Determining the amount of ERICS Larchmont implemented also requires noting that Larchmont's last day of instruction during the 2018-2019 school year was June 14, 2019. None of Student's IEPs during the 2018-2019 school year offered Student extended school year services, and therefore, by the terms of the March 5, 2019 amendment IEP, Student was not entitled to services during summer 2019. The first day of instruction during the 2019-2020 school year was August 21, 2019, which left little more than a week of instruction in August. As Student disenrolled from Larchmont on September 16, 2019, and Larchmont was not obligated to continue his IEP services after he disenrolled, Larchmont was only obligated to provide services to Student for approximately two weeks during September. Therefore, the period during which Student was entitled to ERICS was from May 8, 2019, which would encompass

approximately three weeks of services, approximately two weeks in June 2019, approximately one week in August 2019, and approximately two weeks in September 2019.

The ERICS provider's log showed Student received 135 minutes of services in May 2019 and 60 minutes in June 2019. Parents received 60 minutes of ERICS in August 2019. Therefore, Larchmont provided a total of 255 minutes of ERICS. Student received no services in September 2019. Student voluntarily declined a 45 minute session on June 5, but that circumstance does not require Larchmont to receive a credit for that missed session. Dr. Thompson re-scheduled the session for June 11, at which time Student received the 60 minutes of ERICS mentioned above. and there was no evidence Dr. Thompson would have provided any additional services to Student during June. Indeed, given Larchmont's and Dr. Thompson's belief that Student was only entitled to 30 minutes per week of ERICS, the 60 minute session Dr. Thompson provided would have been consistent with a belief that she fulfilled Larchmont's obligation.to provide ERICS in June.

Additionally, Larchmont notes that Parents failed to respond to Dr. Thompson's attempts to schedule an ERICS counseling session with them in May. Therefore, Larchmont contends it was not responsible to provide counseling minutes to Parents in May. However, as discussed above, no amount of time for Parent counseling was written into the March 5, 2019 amendment IEP. Consequently, Larchmont's obligation to provide ERICS was not controlled by Parents' availability for counseling when, as here, no precise date was scheduled for the counseling. Larchmont is not entitled to a "credit" for Parents' unavailability in May. Rather, the calculation of minutes owed is based on the written IEP offer of ERICS in the March 5, 2019 amendment IEP, at a total frequency of 150 minutes per week, including 120 minutes per week of pull-out services.

Based upon the level of ERICS set forth in the March 5, 2019 amendment IEP, Student was entitled to 450 minutes in May. Assuming that Student was only entitled to 300 minutes of ERICS in June, Student was entitled to a total of 750 minutes, or 12.5 hours of ERICS from May 2019 through June 14, 2019. Assuming that Student was entitled to 150 minutes of ERICS in August, and 300 minutes of ERICS in September, Student was entitled to 450 minutes, or 7.5 hours of ERICS from August 21, 2019, through September 16, 2019. He therefore should have received a total of 1200 minutes, or 20 hours of ERICS during the time period at issue. However, he received only 255 minutes of ERICS, or a little more than 4 hours of ERICS during that time. Accordingly, Student did not receive 945 minutes of ERICS, for a shortfall of approximately 16 hours, rounding up.

The evidence showed that as of June 11, 2019, Student made some progress on the first incremental objective of his ERICS goal. There was no evidence that Student's anxiety appreciably diminished during this time period, or that he was less resistant to being at school or performing schoolwork. Considering that Student was to receive 20 hours of ERICS services, and only received a little more than 4 hours of services during the relevant time periods, Student has demonstrated that the shortfall is material, and that Larchmont materially failed to implement Student's ERICS services, as written and consented to in the March 5, 2019 amendment IEP.

Student's closing brief does not allege that Larchmont failed to implement any other services in Student's March and May amendment IEPs. Student did not demonstrate that Larchmont failed to implement any other specific services as required by those IEPs. Rather, the weight of the evidence reflected that all of Student's other IEP services were implemented.

Student had the burden of proof as to whether Larchmont implemented his IEP since March 5, 2019. (*Van Duyn, supra,* 502 F. 3d 811 at pp. 819-820.) Student met his burden of showing that Larchmont deprived Student of a FAPE by failing to substantially implement his IEP regarding ERICS since May 2019, when Parents consented to the March 5, 2019 amendment IEP. Student did not meet his burden of showing that Larchmont deprived him of a FAPE by failing to implement his ERICS as of March 2019, because the weight of the evidence demonstrated that Parents did not provide written consent to the March 5, 2019 IEP amendment until May 8, 2019.

ISSUE 4: DID LARCHMONT DENY STUDENT A FAPE IN THE MARCH 2019 AND MAY 2019 AMENDMENT IEPS DURING THE 2018-2020 REGULAR SCHOOL YEAR, FROM MARCH 2019, THROUGH EXTENDED SCHOOL YEAR 2019, AND THE 2019-2020 REGULAR SCHOOL YEAR, BY FAILING TO OFFER APPROPRIATE GOALS TO ADDRESS STUDENT'S NEEDS IN THE AREAS OF SOCIAL EMOTIONAL, ERICS, AND COUNSELING; FAILING TO OFFER A BEHAVIOR SUPPORT PLAN BASED ON AN ASSESSMENT; FAILING TO OFFER AN APPROPRIATE PLACEMENT WITH APPROPRIATE AIDS AND SUPPORTS, AND FAILING TO OFFER A PROGRAM FOR EXTENDED SCHOOL YEAR 2019?

CONTENT AND SUFFICIENCY OF IEPS

An IEP is evaluated in light of information available to the IEP team at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149) (*Adams*).) "An IEP is a snapshot, not a retrospective." (*Id.* at

p. 1149, citing *Fuhrmann v. East Hanover Bd. of Ed., supra*, 993 F.2d 1031, 1041.) The IEP must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid*.) Additionally, to determine whether a school district offered a student a FAPE, the focus must be on the adequacy of the district's proposed program. (*Gregory K. v. Longview Sch. Dist., supra,* 811 F.2d 1307, 1314.) If the school district's program was designed to address the student's unique educational needs, was reasonably calculated to provide the student with some educational benefit, and comported with the student's IEP, then the school district provided a FAPE, even if the student's parents preferred another program and even if the parents' preferred program would have resulted in greater educational benefit. (*Ibid*.)

The IEP must include an assortment of information, including a statement of the child's present levels of academic achievement and functional performance. The IEP shall also include a statement of measurable annual goals designed to meet the child's needs that result from his disability to enable the child to be involved, and make progress, in the general education curriculum based upon the child's present levels of academic achievement and functional performance; a description of how the child's progress toward meeting the annual goals will be measured; and when periodic reports of the child's progress will be issued to the parent. (20 USC § 1414(d)(1)(A)(i); 34 C.F.R. § 300.320.)

The educational benefit provided to a child requiring special education is not limited to addressing the child's academic needs, but also social and emotional needs that affect academic progress, school behavior, and socialization. (*County of San Diego v. California Special Educ. Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467.)

When a child's behaviors impede his learning or that of others, the IDEA requires that the IEP team consider the use of positive behavioral interventions and supports and other strategies to address that behavior. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i).)

PLACEMENT AND SERVICES

Both federal and state law require Larchmont to provide special education in the least restrictive environment appropriate to meet a student's needs. (20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.114(a)(2)(i); Ed. Code, § 56040.1.) This means that Larchmont must educate a special needs pupil with his nondisabled peers "to the maximum extent appropriate," and the pupil may be removed from the general education environment only when the nature or severity of the student's disabilities is such that education in general classes with the use of supplementary aids and services "cannot be achieved satisfactorily." (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(ii)); Ed. Code, § 56040.1.)

As a corollary to the requirement that a local educational agency determine the least restrictive environment, the local educational agency must make available a continuum of placement options. (34 C.F.R. 300.115.) In California, this includes regular education programs, resource specialist programs, related services, special classes, and nonpublic, nonsectarian school services, as well as others not at issue here. (Ed. Code, § 56361.) The continuum of placement options is to ensure that a child with a disability is served in a setting where the child can be educated successfully in the least restrictive environment appropriate for them. (71 Fed.Reg. 46,586-46,587 (Aug. 14, 2006).) The

continuum of placement options does not encompass only physical settings; it encompasses the services and aids provided in the physical setting. (34 C.F.R §300.115(b).)

EXTENDED SCHOOL YEAR

A local educational agency must provide extended school year services when a child's IEP team determines that the services are necessary for the provision of FAPE to the child. (34 C.F.R. § 300.106(a)(2).) Extended school year services are special education and related services that are provided to a child with a disability beyond the normal school year of the public agency, in accordance with the child's IEP, at no cost to the parent of the child, and meet the standards of the state educational agency. (34 C.F.R. § 300.106(b).)

The California Code of Regulations provides extended school year services shall be provided, in accordance with 34 Code of Federal Regulations part 300.106, for each individual with exceptional needs who has disabilities which are likely to continue indefinitely or for a prolonged period, and interruption of the child's educational programming may cause regression, when coupled with limited recoupment capacity, rendering it impossible or unlikely that the child will attain the level of self-sufficiency and independence that would otherwise be expected in view of his or her disabling condition. (Cal. Code Regs, tit. 5, § 3043.) The lack of clear evidence of such factors may not be used to deny an individual an extended school year program if the IEP team determines the need for such a program and includes extended school year in the IEP. (*Ibid.*)

Many of the facts relevant to the issues as to whether the goals and services offered in the March 5, 2019 and May 13, 2019 amendment IEPs constituted a FAPE were determined in the discussion of Issue 1, above. These facts included the contents of the IEPs during the 2018-2019 school year, the circumstances surrounding the 2019 Mental Health Incident Reports in October 2019, and Mother's correspondence with Larchmont regarding Student's behaviors and emotional state. The following facts are also relevant to the determination of these issues.

DR. COLEGROVE'S ASSESSMENTS

Student received two psychoeducational assessments in 2016, when he was in fourth grade. One was conducted by Larchmont, to determine Student's eligibility for special education. The other was conducted in February and March 2016 by Robert W. Colegrove, Ed.D., a California licensed psychologist retained by Parents. Dr. Colegrove received his bachelor's and master's degrees from California Polytechnic State University, San Luis Obispo. He received his doctorate in educational psychology in 1987 from Northern Arizona University. Since 1988, he has been a Clinical Assistant Professor of Pediatrics at the University of Southern California Keck School of Medicine. He has been in private practice since 1988, conducting assessments of and treating children and adolescents.

In early 2016, Parents consulted Dr. Colegrove for an assessment because they were concerned with Student's social emotional well-being, as he was not happy at school, and Student said he was bored at school. Student did not have a circle of friends, was the subject of teasing at school, struggled with attention and focus when

completing schoolwork, disengaged from social settings, and pursued solitary activities. He had difficulty with transitions and struggled with changes in his routine. Student's fourth grade teacher reported he became upset in the classroom when she tried to redirect him to task.

Based upon the assessment results, Dr. Colegrove determined Student's high average full-scale IQ score on the Wechsler Intelligence Scale for Children, Fifth Edition, was an invalid underestimate of his ability, due to significant discrepancies in his cognitive index scores. Dr. Colegrove found Student met the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, criteria for attention deficit hyperactivity disorder, generalized anxiety disorder, and mild, high-functioning autism spectrum disorder. Dr. Colegrove's report included numerous recommendations directed at the home and school settings. In particular, he recommended the school develop an incentive behavior program to address specific behaviors teachers wanted Student to improve. Dr. Colegrove also recommended the school focus on

- teaching, explaining, and monitoring Student's social skills development,
- increase structure and consistency,
- support Student in implementing executive functioning techniques, and
- help Student understand directions.

Larchmont was provided Dr. Colegrove's 2016 assessment report after it was completed. Subsequent to Dr. Colegrove's assessment, and Larchmont's assessment, Larchmont convened an IEP team meeting in September 2016, and the IEP team initially found Student eligible for special education.

In May 2019 Parents retained Dr. Colegrove to perform another assessment of Student. Parents sought Dr. Colegrove because they were concerned about Student's progress, his attitude toward school and schoolwork, and his social emotional status. Student was unhappy, he appeared to have declined during the school year academically and emotionally, and he had increasingly disliked going to and being in school. As Father said at hearing, Parents "were trying to get Student through the school year." Dr. Colegrove performed the assessment in July 2019, when Student was 12 years old and recently completed seventh grade. Parents were concerned that Student was struggling to keep up with academic demands in school, was shutting-down emotionally, and was socially isolated at school. In general, Parents were concerned that Student's ability to function in his current school setting had deteriorated. Parents advised that Student had significant difficulty completing assignments at school, which negatively affected his grades. They reported Student had significant problems with self-regulation, and struggled to organize and manage his time. Parents stated Student did not want to accept the resource services offered in his IEP. They advised Student was very anxious at school and would call Mother during the day to come and pick him up. They noted Student exhibited significant separation anxiety and social anxiety. Based on Parents' report, Dr. Colegrove believed all of Student's previous challenges had become worse. Student had more social anxiety, he was not connecting with people, he was resisting work, and he disliked school more than before.

Dr. Colegrove wrote an assessment report in August, 2019. Dr. Colegrove concluded Student's full-scale IQ score on the Wechsler was in the average range, but, as before, he considered it inaccurate due to significant differences in Student's

cognitive index scores. Dr. Colegrove found that Student's math skills were deficient, and he scored below grade level in math calculation skills, math problem solving skills and math fluency. Stephen Day, Student's math teacher at Larchmont during the 2018-2019 school year, reported to Dr. Colegrove that Student was at grade level in math, but Dr. Colegrove determined the combination of student's dislike of, and lack of motivation for math, his attention problems, and his slowness in visual-perceptual speed negatively affected his math performance. Therefore, Dr. Colegrove arrived at an additional, new diagnosis, and found that Student met the Diagnostic and Statistical Manual criteria for a learning disorder with impairment in mathematics. Dr. Colegrove also concluded Student still met the Diagnostic and Statistical Manual criteria for attention deficit hyperactivity disorder, high-functioning autism spectrum disorder, and generalized anxiety disorder.

As he had in his 2016 assessment report, Dr. Colegrove included a variety of recommendations in his August 2019 assessment report to be implemented in the home and school settings. Significantly, in this report, unlike in his previous report, Dr. Colegrove recommended that Student's school placement be reconsidered. Dr. Colegrove believed that Student would benefit from a school with a smaller class size and more individualized teacher attention. He suggested that the placement include technology integrated into aspects of schoolwork, as Student liked technology; social skills training integrated into the school day, and behavioral structures as needed. He considered it important for a school counselor to be available for Student to problem solve social situations as they arise. Dr. Colegrove reiterated his previous recommendations that the school support Student's development of social skills,

executive functioning skills, provide help in understanding directions, provide increased structure and consistency, and develop a reward system directed at specific behaviors. There was no evidence that Parents provided Dr. Colegrove's August 2019 report to Larchmont at any time until just prior to hearing. After Dr. Colgrove completed his report, he met with Parents in approximately mid-August 2019 to discuss the report, and he believed they also discussed Parents' interest in Bridges during that meeting.

At hearing, Dr. Colegrove commented that Student's emotional status had deteriorated since his 2016 assessment. Dr. Colegrove observed that Student demonstrated more anger and frustration, and was hating school more, as reflected by his increased resistance to schoolwork and to his resource specialist services, his lack of attention and focus in class, and his frequent calls to Mother to take him home. Dr. Colegrove noted that Student did not seem to be talking with peers at school much, and did not seek them out. Student did not name any close friends. Dr. Colegrove also concluded that Student's anxiety was worse than in 2016, and he still had significant problems with attention. Student's math skills "festered" and deteriorated since 2016. He believed Student was functioning less and less well at school over time. Dr. Colegrove was particularly concerned that Student's anxiety was increasing, and was perhaps combined with depression, all while Student was entering adolescence. Dr. Colegrove considered a different type of educational placement with a smaller class size and more individualized attention could benefit Student. He also recommended that the social skills training be in a placement with a curriculum that took into account children on the autism spectrum, who needed more help with social skills.

Dr. Colegrove was a credible witness. He was trained, experienced, and knowledgeable about his field. Larchmont contends that Dr. Colegrove was not particularly credible because he had not observed Student at Larchmont, he had not reviewed many of Student's educational documents, such as his report cards, and he was unable to define specialized academic instruction or the professional requirements a special education teacher must meet. For the purposes of this hearing, however, Dr. Colegrove's value largely resided in the fact that he had assessed Student in 2016 and in 2019, and he offered many of the same recommendations in both assessment reports, with some variances, such as his recommendation in the 2019 report that Student's placement be reconsidered. Further, Dr. Colegrove was personally familiar with Bridges, and able to credibly testify about its program. Larchmont did not have the benefit of Dr. Colegrove's August 2019 assessment report at the time of the IEP amendments at issue in this case, and the "snapshot rule" requires that those IEP amendments only be evaluated based upon the information the IEP team knew, or reasonably should have known, at the time of the March 5, 2019 and May 13, 2019 amendment IEPs. (*Adams, supra,* 195 F.3d. 1141, 1149.) However, at all relevant times Larchmont had the benefit of the recommendations in Dr. Colegrove's 2016 assessment report. Furthermore, Dr. Colegrove offered his expert opinions at hearing as to some of the services and supports Student needed to address his challenges.

Prior to the completion of Dr. Colegrove's August 2019 assessment, Parents considered placing Student at Bridges. By email dated July 24, 2019, Mother requested Larchmont release Student's records to Bridges. In the email, Mother noted that Parents still intended Student to return to Larchmont in the fall. Mother also advised Student

was undergoing an independent assessment. Amy Held, Larchmont's executive director, immediately sent Mother a responsive email, advising that she had forwarded the records request to the appropriate staff, and requesting that Mother send all private assessment reports to Larchmont to guide Larchmont's support for Student during the upcoming school year. Mother immediately responded that Parents would share all assessment reports, and she expected they would be finalized by the first or second week of school to keep in line with the IEP dates. She also requested Held to "assure everyone that we are returning…" In or about August 2019, during the Bridges admissions process, at Parent's request, Sais wrote a letter of recommendation for Student to Bridges. Sais believed that, if Parents wanted to send Student there, she wanted to support Parents' wishes. She did not believe Parents were unhappy with Larchmont; they just wanted Student to attend a different school.

Additionally, on August 27, 2019, Parents met with Dr. Thompson as part of the ERICS offered in Student's IEP. Parents shared their concerns about Student's struggles at and dislike of school, and his anxiety and depression at school. Dr. Thompson offered recommendations regarding how Parents could respond to Student's daily calls home to pick him up from school and his discomfort at being at school. Father did not recall the specifics of what Thompson said during the meeting, but Parents left the meeting feeling as though Dr. Thompson considered them bad parents who were at fault for Student's problems at school. After this meeting, Parents were disgusted and angry. They questioned whether Larchmont wanted to support Student and whether they should continue to entrust Larchmont with Student's education. Father was receptive to Dr. Colegrove's recommendation of a change in placement, as Father felt it would be beneficial for Student's well-being and the well-being of the family.

On September 11, 2019, Parents signed an enrollment contract with Bridges, without Larchmont's knowledge. Further, the enrollment contract with Bridges provided that the tuition Parents submitted along with the enrollment contract was non-refundable. On September 16, 2019, Parents disenrolled Student from Larchmont.

STUDENT'S PROGRESS AT LARCHMONT DURING THE 2018-2019 SCHOOL YEAR

Evidence of Student's progress in class at Larchmont was limited. The goal progress reports showed some progress on Student's IEP goals. The latest progress reports on his goals were dated June 2019, and they reflected that he made substantial progress on Goal 1, the social emotional goal; some progress on Goal 2, a pre-vocational goal; no progress on Goal 3, the task completion pre-vocational goal, and partial progress on his ERICS goal. Sais testified that Student made expected progress on his non-ERICS goals, without providing any details as to what that meant, such as describing the progress Student had made. Dr. Thompson credibly testified that Student had only made partial progress on his ERICS goal, which was reasonable progress given that his ERICS services had only just started in May. Sais and Perdue, Student's resource specialist teacher, both testified that they provided services to Student, but they did not identify any improvement Student demonstrated with respect to any specific skill or activity as a result of their services. None of Student's report cards from Larchmont were offered into evidence. The only other evidence of Student's academic progress during the 2018-2019 school year at Larchmont were the comments from Student's seventh grade science and math teachers which Dr. Colegrove included in his 2019 assessment report. Both teachers advised Dr. Colegrove that Student was working at grade level in their classes.

GOALS IN THE AREAS OF SOCIAL EMOTIONAL NEEDS, ERICS, AND COUNSELING

Student contends that the subject IEP amendments did not include additional goals in the areas of social emotional, ERICS, and counseling that specifically addressed Student's anxiety and related behaviors regarding his resistance to staying in class, and his social skills. Student further contends that there were no academic goals in the subject IEP amendments to address Student's math and reading deficits, pursuant to Dr. Colegrove's report. Larchmont contends it offered appropriate goals in all areas of need, and Parents never expressed any concerns at the March 5, 2019 amendment IEP team meeting, or offered evidence at hearing, regarding the adequacy of the goals.

Larchmont deprived Student of a FAPE in the March 5, 2019 and May 13, 2019 amendment IEPs by failing to develop goals that specifically addressed Student's social emotional needs and behavioral difficulties. Student's goals in the March 5, 2019 and May 13, 2019 IEPs addressed the areas of social emotional, prevocational, and ERICS services. The social emotional goal required Student to identify his feelings, identify what could be changed, and identify ways that he might need help coping with those feelings. The evidence at hearing reflected that this goal was directed at Student's behaviors of crying and shutting down. The goals labelled "prevocational" addressed Student's abilities to begin a task, stay on task, ask for assistance, and complete assignments. The ERICS goal addressed Student's anxiety, and required Student to identify anxiety-producing situations and practice appropriate coping strategies or relaxation techniques. Dr. Thompson testified, without contradiction, that this goal was directed at Student's anxiety that related to Student's resistance to performing schoolwork and attending school.

These goals did not cover all of Student's areas of need. At hearing, Larchmont witnesses testified that social skills were not an area of need, but the evidence contradicts their testimony. The evidence reflected that Larchmont knew since 2016 that Student was challenged by social situations. Indeed, Dr. Colegrove's 2016 assessment, which was provided to Larchmont, identified that Student had needs in the social skills area and recommended Student participate in a social skills program. The present levels of performance in Student's September 2018 IEP, March 5, 2019 amendment IEP, and the May 13, 2019 amendment IEP which largely copied the March 5, 2019 amendment IEP, reflected that Student's behaviors were not conducive to developing peer relationships. Further, there was little evidence that Student had any friends at school during the 2019-2020 school year. Mother's September 16, 2019 letter withdrawing Student from school referenced "friends," as did Salina's responsive email, but there was no evidence that Student had any close friends or a circle of friends. At hearing, Sais testified that she had no recollection whether Student had any friends at school during the time period at issue here.

Sais, the school psychologist who provided Student's group counseling during the 2018-2019 school year, testified that one purpose of the group counseling was to provide Student with social skills training, but she did not recall or provide any details regarding how she approached it, except to say she used books and resources. Dr. Thompson's ERICS service logs stated that Student reflected on his social challenges during their first session, and that he participated in role plays during one of his sessions with respect to social conflicts at school. However, Student's March 5, 2019 and May 13, 2019 amendment IEPs contained no social skills goals, and social skills were not included as part of any of his other goals. The accommodations in Student's IEP did not address social skills, either.

The IEP team was also aware, or should have been aware, of other social emotional and behavioral issues that were not addressed by any goals. In October 2019, Student had two behavioral incidents that generated Mental Health Incident Reports and required him to be removed from class for a period of time so that Sais could evaluate him and provide counseling. The present level of performance in his March 5, 2019 IEP in the area of social emotional/ERICS mentions a variety of inappropriate behaviors, such as Parent' report that Student called home throughout the day asking to go home, that he expressed his unhappiness by crying and "shutting down" in class, and that he put his head down on the desk and appeared to be disengaged. These behaviors affected his learning, if not that of his classmates.

At the very least, the incidents that generated the Mental Health Reports, while not repeated during the school year, were a signal that Student had social emotional difficulties that were manifesting in class and of which the IEP team should have been aware. Then, the March 5, 2019 and May 13, 2019 IEPs did not address any of the behaviors mentioned in the present levels of performance in those IEPs. For example, Student's ERICS goal was designed to address his anxiety, his social emotional goal was designed to help Student identify his feelings and ways that he might need help, and his prevocational goals addressed his ability to stay on task and complete his assignments. However, there was no goal to specifically address Student's resistance to coming to school, performing schoolwork, and staying at school, or to address his routine of calling Mother during the school day to pick him up and take him home.

There was no evidence that Student made some progress in the social emotional area during the 2018-2019 school year. Rather, the evidence demonstrated that Student's social emotional issues remained at least the same as they were since Dr. Colegrove's assessment in 2016. Student's service providers during the 2018-2019

school year, Sais, his counselor, and Perdue, his resource teacher both testified at hearing, but neither of them identified any specific skills on which Student progressed during the 2018-2019 school year. Further, Student's new behaviors in constantly calling home to be picked up from school, noted by Mother in her February 2019 email to Larchmont staff, demonstrated that his emotional and mental status were becoming worse, and he had a more intensely negative attitude toward school than before.

Student also contends that the IEP team should have developed goals to address the math deficiencies Dr. Colegrove noted in his 2016 and August 2019 assessment report, and the reading comprehension deficits Dr. Colegrove noted in his August 2019 assessment report. There was no evidence that Larchmont was provided a copy of Dr. Colegrove's report before hearing, and no evidence that any of Student's teachers at Larchmont knew that Student had these deficiencies such that he required goals in these areas. Therefore, under the "snapshot rule" of *Adams, supra,* 195 F.3d 1141 at 1149, Larchmont is not liable for failing to develop goals in these areas. Furthermore, this contention raises issues that are outside of the scope of the issues in this hearing. At the outset of the hearing, the ALJ specifically inquired of Student's counsel which goals were at issue in this case, and counsel stated the only goals at issue in this case were goals in the areas of social emotional needs, ERICS services, and counseling. (See *A.W. v. Tehachapi Unified School Dist.* (C.D. Cal., March 8, 2019, No. 1:17-cv-00854-DAD-JLT) 2019 WL 1092574, *6, aff'd. (9th Cir. 2020) 810 Fed.Appx. 588.)

The failure of Student's March 5, 2019 and May 13, 2019 amendment IEPs to specifically include goals to address Student's social skills challenges, and behaviors such as his resistance to performing schoolwork and attending school, resulted in an IEP that was not reasonably calculated to permit Student to make progress appropriate in light of his circumstances. These goals should have been included as ERICS and social

emotional goals, to be addressed as part of his counseling services and ERICS. Consequently, Larchmont deprived Student of a FAPE on these grounds, from March 5, 2019, through approximately June 14, 2019, the last instructional day of the 2019-2020 regular school year, and from August 21, 2019, which was the first instructional day of the 2019-2020 school year, through September 16, 2019. These time periods apply to each deprivation of a FAPE discussed in Issue 4. For reasons stated above, with respect to the discussion on the Motion to Dismiss, and below, with respect to the discussion of extended school year, Larchmont was not required to offer Student extended school year services, or to offer Student a FAPE after September 16, 2019, when he disenrolled from Larchmont.

BEHAVIOR SUPPORT PLAN AND ASSESSMENT

Student contends that Student's behaviors related to his anxiety warranted an assessment and a behavior support plan. Larchmont contends that Student produced no evidence that he required a behavior support plan, and that Larchmont's evidence demonstrated the services, supports, and accommodations in Student's amendment IEPs were appropriate to meet Student's needs. Further, Student made expected progress. No IEP team member, including Parents, raised any questions or concerns regarding whether Student required a behavior support plan.

The present levels of performance in both the March 5, 2019 and May 13, 2019 amendment IEPs reflected that Student had difficulties with self-regulation, in that he yelled out in class, interrupted others, and made inappropriate jokes. He expressed his unhappiness through crying and shutting down. As described above with respect to goals, Student resisted performing schoolwork, resisted coming to school, and left class often to call his Parents to request that he be picked up from school.

These behaviors interfered with Student's learning, if not that of others. Some of them were known to the IEP team as of the September 11, 2018 IEP and persisted throughout the 2018-2019 school year; others were new as of February 2019. Yet, there was no evidence that the IEP team considered the use of positive behavioral interventions, supports, or strategies specially designed to address these inappropriate behaviors in the March 5, 2019 amendment IEP or the March 13, 2019 amendment IEP, as required by the IDEA. (See, 34 C.F.R. § 324.(a)(2)(i).)

In his 2016 report, Dr. Colegrove recommended a structured behavioral program at school. Student's ERICS services, which were directed at helping Student address his anxiety, and his counseling services, which were designed to help Student address his emotional state, did not constitute a consistent, targeted behavior program. The weight of the evidence demonstrated that Student's behaviors as manifested at the time of the March 5, 2019, amendment IEP warranted a behavior support plan, to help Student access his curriculum and make progress. The failure of the March 5, 2019 and May 13, 2019 amendment IEPs to offer a behavior support plan resulted in IEP amendments that were not reasonably calculated to enable Student to make progress appropriate in light of his circumstances. Consequently, Larchmont deprived Student of a FAPE on this ground, during the time periods from March 5, 2019 through June 14, 2019 and from August 21, 2019 through September 16, 2019, as discussed above with respect to the section entitled Goals in the Areas of Social Emotional Needs, ERICS, and Counseling.

There is no California legal authority that specifies when a behavior assessment should be performed. The IDEA only requires a functional behavior assessment in the context of a school disciplinary proceeding. (See 20 U.S.C. § 1415(k)(1)(F)(i).) There was no evidence that a behavior assessment was required. The IEP team could have

developed a behavior support plan without such an assessment. Therefore, Larchmont did not deprive Student of a FAPE during any relevant time period by failing to perform a behavior assessment.

PLACEMENT AND SERVICES

With respect to placement, Student contends Larchmont failed to offer a placement that included appropriate aids and supports to allow Student to make progress in the general education curriculum in the 2019 amendment IEPs. The information available to the team at the time of these amendment IEPs demonstrated that Student was struggling at Larchmont. Larchmont contends that it offered a placement in the least restrictive environment with appropriate supports, aids, and accommodations to allow Student to make progress toward a general education curriculum, and that Student made the expected amount of progress on his goals.

Placement includes more than just the physical location of a student; it also includes all of the services, accommodations, and programs that his classroom and IEP provides while the student is in that physical location. (34 C.F.R. § 115(b).) Based upon the evidence at hearing, this issue, which Student framed at least partially in terms of "placement," can also be interpreted as not necessarily focusing on the appropriateness of Student's physical placement, but rather as encompassing the claim that Larchmont denied Student a FAPE by failing to provide sufficient aids and services in Student's general educational classroom. At all relevant times, the IEP team placed Student in a general education class, with accommodations, counseling, resource services, and occupational therapy consultation services to support Student's teachers and service providers regarding Student's needs in that area. Larchmont contends that his general education class with the supports in the IEP was an appropriate placement for him. This

contention overlooks that even with the addition of ERICS services, the March 5, 2019 amendment IEP, followed by the May 13, 2019 amendment IEP, did not address many of Student's social emotional and behavior issues of which Larchmont and the IEP teams were aware, or should have been aware. Yet, Larchmont had the ability to provide these services and supports. Erland Zehnder testified at hearing that she did not agree Student required placement in a different school, and objected that placement at a different school would necessitate skipping over the entire continuum of placement options. Rather, she testified that, if needed, the IEP team could have offered more supports, including additional accommodations, behavior intervention services, a modified class schedule, adjustments to how many classes Student took, and one-to-one instruction in the Learning Lab. She did not believe that Student needed these additional services, accommodations, and strategies to receive a FAPE during spring 2019. Rather, she believed that, since the ERICS had just been offered in March 2019, Larchmont needed time to determine whether those services would be effective.

Neither Erland Zehnder's testimony, nor that of any other Larchmont witness, nor the evidence, justified Erland Zehnder's belief that Larchmont should have waited to see whether ERICS were effective before offering the additional services and accommodations that Erland Zehnder described. Indeed, Erland Zehnder's testimony outlined the myriad services and programs that were available to Larchmont, and which the team could have offered Student simultaneously with offering ERICS services. The IEP team did not have the benefit of Dr. Colegrove's opinions based upon his 2019 assessment, but they knew, or should have known, that Student was not doing well or making little more than de minimus progress regarding his social emotional status and behaviors at the time of the March 5, 2019 IEP amendment team meeting and thereafter. Student was anxious, emotional, disliked school, was resistant to help, was

not performing work, and had no close friends at school. Dr. Thompson credibly explained that she had not been providing ERICS a sufficient amount of time so that Student could make appreciable progress. However, Sais and Perdue, Student's counseling and resource services provider, respectively, could not describe what Student did or how he performed when they were providing services. Sais affirmed that Student made "expected progress," on his goals, but she did not define what that meant. Neither Sais nor Perdue identified any skill that Student acquired, or performed better, or mastered as a result of their efforts. Under these circumstances, the addition of a few hours a month-- or even a week, as set forth in the March 5, 2019 IEP amendment--of ERICS, especially with no social skills goals or behavioral supports, as described above, was insufficient, considering the many other services and programs Erland Zehnder affirmed the IEP team could have offered Student.

Larchmont was not necessarily required to skip over the continuum of alternative placements and place Student in a non-public school, but Larchmont could have, and should have, offered Student more services and supports in the general education classroom, in addition to offering ERICS. Had it done so, it would have offered a placement for Student in a general education environment, with more individual attention and support. Such an offer would have resulted in a more reasonable probability that the offer would enable Student to obtain some educational benefit, and make appropriate progress in light of his circumstances, in the least restrictive environment.

The failure of the March 5, 2019 amendment IEP team to offer Student such additional services and supports resulted in IEP amendments which were not reasonably calculated to enable Student to make progress appropriate in light of his circumstances, contrary to the standards of *Rowley, supra,* and *Endrew F., supra.* As a result,

Larchmont's March 5, 2019, and May 13, 2019, amended IEPs failed to offer Student a FAPE during the periods from March 5, 2019 through June 14, 2019, and from August 21, 2019, through September 16, 2019, as was discussed above in the section entitled Goals in the Areas of Social Emotional Needs, ERICS, and Counseling.

EXTENDED SCHOOL YEAR

Finally, Student contends that, at the March 5, 2019, amendment IEP team meeting, there was no discussion regarding whether Student required ERICS as support during extended school year, or required any extended school year services regarding his areas of need. Larchmont contends that Student failed to provide evidence that Student required extended school year services. Further, the March 5, 2019 amendment IEP team meeting did not revisit the September 11, 2019 IEP team's determination that Student did not require extended school year services, as the meeting was only focused on ERICS supports for specific behaviors relating to Student's anxiety, such as Student's alleged issues regarding completing schoolwork and school resistance. During summer break, Student's anxiety regarding those school-centered issues would likely improve, rather than regress, if Student were not at school and did not have extended school year services.

Student did not demonstrate that Larchmont deprived Student of a FAPE because it failed to offer Student extended school year services in the March 5, 2019 and May13, 2019 amendment IEPs. The criteria for extended school year services are whether the IEP team determines that the child will likely regress over the summer and have difficulty recouping his losses due to the regression. The IEP team at the March 5, 2019 amendment IEP team meeting, which was convened for the purpose of addressing Mother's concerns over Student's anxiety regarding school and schoolwork, did not so

determine, and Student presented no evidence that it should have. There was no evidence that the IEP team at the March 5, 2019 amendment IEP team meeting had any information Student would have any particular difficulties with regression or recoupment with respect to ERICS, or as to any other skills. Similarly, there was no evidence that Larchmont had any information that Student required extended school year services at the time of the March 13, 2019 IEP amendment, which was developed only to change the level of ERICS services Student was to receive. Furthermore, as Erland Zehnder asserted at hearing, Student's emotional and behavioral challenges resulted in significant resistance to school and schoolwork, a situation for which offering an extended school session of ERICS services over the summer might not have been an appropriate remedy.

In his closing brief, Student conflates two issues: the substantive issue of whether Student was deprived of a FAPE by the failure of the amendment IEPs to offer extended school year services, with the procedural issue of whether parents were deprived of meaningful participation in the IEP process and Student lost an educational benefit because of the failure of the March 5, 2019 amendment IEP team to *discuss* extended school year services. This procedural issue was not raised in Student's due process complaint or as an issue the parties agreed would be addressed at hearing. Consequently, it will not be addressed in this Decision. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).)

It should be noted that Student's alteration of this issue presents a different situation than Student's error in characterizing Issue 3, above, which concerned the implementation of ERICS, as a procedural rather than a substantive issue. The facts and substance of Issue 3 were the same regardless of whether the issue was labelled procedural or substantive, as the issue involved the same claim: whether the ERICS

services in Student's IEP were implemented. The alteration of Student's extended school year services issue from the substantive one that Larchmont did not offer extended school year services issue, to the procedural one that extended school year services were not discussed at the IEP amendment meetings, impermissibly converts this issue into a different claim than was alleged in the complaint or presented at the prehearing conference.

Larchmont did not deprive Student of a FAPE by not offering extended school year services during the extended school year 2019.

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 1A: Larchmont did not deny Student a FAPE with respect to the March 5, 2019 amendment IEP by failing to ensure that Parents were members of the team that made decisions regarding Student's program and predetermining Student's placement outside of the IEP team meeting. Larchmont prevailed on this part of Issue 1A. Larchmont procedurally denied Student a FAPE with respect to the May 13, 2019, amendment IEP by failing to ensure that Parents were members of the team that made decisions regarding Student's program and predetermining Student's placement outside of the May 13, 2019 amendment IEP team meeting. Student prevailed on this part of Issue 1A.

Issue 1B: Larchmont did not deny Student a FAPE by failing to provide prior written notice with all legally required content regarding the addition of ERICS with

respect to the March 5, 2019 amendment IEP. Larchmont prevailed on this portion of Issue 1B. Larchmont denied Student a FAPE by failing to provide prior written notice with all legally required content regarding the change in the level of the educationally related ERICS services with respect to the May 13, 2019 amendment IEP. Student prevailed on this portion of Issue 1B.

Issue 2. Larchmont did not deny Student a FAPE by failing to complete Student's annual IEP by September 11, 2019, or any time thereafter. Larchmont prevailed on Issue 2.

Issue 3: Larchmont denied Student a FAPE by failing to implement consented-to ERICS Student was to receive pursuant to the March 2019 amendment IEP. Student prevailed on Issue 3.

Issue 4A: Larchmont denied Student a FAPE in the March 2019 amendment IEP and May 2019 amendment IEP during the 2018-2019 regular school year, from March 5, 2019 through the end of the 2018-2019 regular school year, and from the beginning of the 2019-2020 school year through September 16, 2019, by failing to offer appropriate goals in the areas of social emotional, ERICS, and counseling. Student prevailed on this part of Issue 4A. Larchmont prevailed on Issue 4A to the extent that it did not deprive Student of a FAPE during the 2018-2019 extended school year, or, more specifically, between June 14, 2019 and August 21, 2019, or after September 16, 2019.

Issue 4B: Larchmont denied Student a FAPE from March 5, 2019, through the end of the regular 2018-2019 school year, and from the beginning of the 2019-2020 school year through September 16, 2019, by failing to offer an appropriate behavior support plan in the March 2019 and May 2019 amendment IEPs. Student prevailed on this portion of Issue 4B. Larchmont prevailed on Issue 4B to the extent that it did not

deprive Student of a FAPE by not performing a behavior assessment during any time period at issue. Larchmont also prevailed on Issue 4B to the extent that it did not deny Student a FAPE during the 2018-2019 extended school year, or, more specifically, between June 14, 2019 and August 21, 2019, or after September 16, 2019.

Issue 4C: Larchmont denied Student a FAPE from March 5, 2019 through the end of the 2018-2019 regular school year, and from the beginning of the 2019-2020 school year through September 16, 2019, by failing to offer appropriate aids and supports in the March 2019 and May 2019 amendment IEPs. Student prevailed on this portion of Issue 4C. Larchmont prevailed on Issue 4C to the extent that Larchmont did not deny Student a FAPE during the 2018-2019 extended school year, or, more specifically, between June 14, 2019, and August 21, 2019, or after September 16, 2019.

Issue 4D: Larchmont did not deny Student a FAPE by failing to offer a program for extended school year 2019 in the March 2019 and May 2019 amendment IEPs. Larchmont prevailed on Issue 4D.

REMEDIES

Student proved by a preponderance of the evidence that he was deprived of a FAPE by reason of Larchmont's predetermination of ERICS in the May 13, 2019 amendment IEP, its failure to provide prior written notice regarding the May 13, 2019 amendment IEP, its failure to implement ERICS regarding the March 5, 2019 IEP, and its failure to offer sufficient goals, services, and supports in the March 5, 2019 and May 13, 2019 amendment IEPs, all as described in the discussion of Issues 1A, 1B, 3, 4A, 4B, and 4C. Student seeks remedies, to include reimbursement for tuition at Bridges for the 2019-2020 school year in the amount of $47,085; reimbursement in the amount of

$25.99 per day, representing mileage at the Internal Revenue Service rate for two round trips between Bridges and Student's residence for every day of in-person instruction; reimbursement in the sum of $4,000 for the cost of Dr. Colegrove's assessment; and compensatory ERICS services.

Courts have broad equitable powers to remedy the failure of a local educational agency to provide a FAPE to a child with a disability. (20 U.S.C. § 1415(if)(1)(C)(iii); Ed. Code, § 56505, subd. (g); see *School Committee of the Town of Burlington, Massachusetts v. Dept. of Education* (1985) 471 U.S. 359, 369 [105 S.Ct.1996] (*Burlington*); *Parents of Student W. v. Puyallup School Dist.*, No. 3 (9th Cir. 1994) 31 F.3d 1489, 1496.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.) This broad equitable authority extends to an ALJ who hears and decides a special education administrative due process matter. (*Forest Grove School Dist., v. T.A. , supra,* 557 U.S. 230, 240 [129 S.Ct. 2484].)

An award to compensate for past violations must rely on an individualized analysis, just as an IEP focuses on the individual student's needs. (*Reid v. District of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be fact-specific and be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Ibid.*)

Parents are entitled to private school tuition reimbursement when the district failed to offer the child a FAPE and parents' unilateral private placement is appropriate. (34 C.F.R. § 300.148(c); Ed. Code, § 56175; *Burlington, supra,* 471 U.S. 359, 370; *Florence County Sch. Dist. Four v. Carter* (1993) 510 U.S. 7, 12 [114 S.Ct. 361, 364-365] (*Florence*

County).) Parents who unilaterally change their child's placement without the consent of the state or local school officials do so at their own financial risk. (*Burlington,* at pp. 373-374.) A unilateral private placement need only be appropriate; it need not offer a FAPE. (*Florence County, supra*, at pp. 13-14.) Parents may receive reimbursement for their unilateral placement if the placement met the child's needs and provided the child with educational benefit, even if not all necessary educational benefits are provided. (*C.B. v. Garden Grove Unified Sch. Dist.* (9th Cir. 2011) 635 F.3d 1155, 1159.)

However, the IDEA provides that reimbursement may be reduced or denied if, among other things that are not here applicable, the parents acted unreasonably, or did not give appropriate notice to the local educational agency. (34 C.F.R. § 300.148(d).) With respect to notice, the IDEA provides that reimbursement may be reduced or denied if, at the most recent IEP team meeting that the parents attended prior to the removing their child from public school, the parents did not inform the IEP team that they were rejecting the district's proposed placement, stating their concerns and their intent to enroll their child in a private school at public expense. Alternatively, at least 10 business days prior to the removal of their child from the public school, the parents must notify the school, in writing, that they were rejecting the local educational agency's proposed placement. The notice must state their concerns, and their intention to enroll their child in a private school at public expense. (34 C.F.R. § 300.148(d)(1)(i) &(ii).) Parents need not give such notice, and must be reimbursed for the expenses of the private school placement, if the school prevented the parents from providing the notice; the parents had not received notice of the notice requirement because they did not receive the statutorily required procedural safeguards notice, or compliance with the notice requirement would likely result in physical or emotional harm to the child. Reimbursement may not be reduced or denied for failure to provide the notice if,

among other circumstances that are not applicable here, compliance with the notice requirement would likely result in serious emotional harm to the child. (20 U.S.C. § 1412 (a)(10)(C)(iii); 34 C.F.R. § 300.148(e).)

BRIDGES

Bridges is a private school located in the Los Angeles area, which is not certified by the State of California as a nonpublic school. It is known for accepting twice-exceptional students, that is, students who have high cognitive ability and who also have disabilities, such as those that may qualify them for special education in a public school. The evidence reflected that it was one of the few private schools in the area that accepted children, such as Student, who were high-functioning on the autism spectrum. Its teachers do not necessarily have California teaching credentials. The high school classes meet University of California requirements for A-G classes. A-G classes are courses in the areas of

- English,
- science,
- math,
- foreign language,
- history/social science,
- arts, and
- electives,

which must meet certain requirements, and must be approved by the University of California Regents, who verify that the courses meet the requirements. A student's satisfactory completion of a specified number of these courses in a specified subject

area confers eligibility for admission into a college in the University of California and California State University systems. There was no other evidence as to whether Bridges followed California curriculum standards.

Bridges had small classes, and provided individual attention to students. Student received a separate report card for each class he took during the semester. The report cards were detailed, and for every academic class they evaluated

- Student's cognitive skills,
- skills related to the course subject matter;
- learning to learn skills,
- productivity, and
- socio-emotional development.

They also included a course summary, and the teacher's written statement of Student's progress, some of which were lengthy and descriptive.

Bridges did not provide special education, as one would find in public schools, and there was no evidence that any of its teachers were credentialed special education teachers. Its faculty and staff, however, were willing and available to problem-solve regarding a student's social emotional status. The teachers integrated the problem-solving into the curriculum, set behavioral goals for a student, targeted those behaviors on the report card, and gave feedback on them. Student's school schedule included an Advisory Class that promoted skills such as executive functioning, goal setting, and goal fulfillment.

The evidence demonstrated that, when Student first entered Bridges, he was withdrawn, and covered his head with a hoodie as though he were hiding. By the spring semester, before remote learning began due to the COVID-19 pandemic, he became

more positive and outgoing. He was not disruptive in class, but his report cards reflected he had some difficulty focusing. He needed redirection and prompting at first, and then again when remote learning began.

From Father's perspective, Student was progressing at Bridges more than he had at Larchmont. He was able to do the work and be successful in class. While at Larchmont, Student required far more help from Mother to complete his schoolwork. Father believed Bridges offered more support to Student in class. When Student struggled at Bridges, Bridges was tolerant of Student's needs, and provided an environment conducive to Student's learning.

Student's report cards from Bridges throughout the 2019-2020 school year showed that he performed well in his academic classes. He needed multiple prompts in first semester science to transition into class, to transition between assignments, and to refocus throughout a given assignment. Student's report cards also reflected that he met academic expectations in science, showed a solid understanding of the material covered in algebra, and met expectations in humanities.

Student needed extra time and one-to-one support to complete some assignments and classwork during remote learning in several classes during the second semester. He used a fidget during humanities during the semester, and he showed an improved ability to answer questions in humanities class. His attendance at Advisory Class was inconsistent during remote learning, and he sometimes needed an email reminder to log in. His focus was also intermittent during the afternoon remote Advisory session. His report cards showed that he performed at or above expectations in most of his classes in various skills areas designated on the report card, such as cognitive skills and the technical skills required by the particular course, such as

analyzing data, performing research, and solving problems. He performed below expectations in a few classes on some productivity skills, such as time management and organizational skills, and on some socio-emotional development skills, such as self-regulation. However, he also performed those skills well in some classes. His report cards also reflected he engaged and worked well with his peers throughout the 2019-2020 school year, and there was no evidence that he had problems with peer relationships at any time. There was also no evidence that he was calling home during the day asking to be picked up.

Parents paid a total of $47,085 for tuition and fees for Bridges during the 2019-2020 school year.

Bridges was an appropriate placement for Student. It did not provide special education, but it provided small classes, individual attention, and his teachers had an awareness of and were responsive to his social emotional needs. There was no evidence that he accessed it, but counseling was available at all times. Student's report cards demonstrated that he was able to access the curriculum. He struggled with focusing and work completion during remote learning, and his attendance at Advisory class suffered somewhat during remote learning, but there was no evidence that Student's anxiety level was high, or that he consistently resisted going to school, performing classwork, or receiving assistance from teachers. His Advisory class report card mentioned that he asked for help from teachers as needed.

Since Larchmont deprived Student of a FAPE, and since Bridges was an appropriate placement, ordinarily Student would be entitled to full reimbursement for Bridges tuition. However, although Student could have done so, Student did not provide Larchmont with an appropriate statutory notice, given 10 business days in

advance, stating that Student would be withdrawing from Larchmont and attending Bridges, that Student disagreed with Larchmont's offers of a FAPE, and that Student would be seeking reimbursement for the costs of attending Bridges. (20 U.S.C. § 1412 (a)(10)(C); 34 C.F.R. § 300.148(e).) The only notice Student provided was an email from Mother, sent on September 16, 2019, the same day that Student began attending Bridges, which did not express rejection of Larchmont's program or state that Student would seek reimbursement for the cost of Bridges. There was no persuasive evidence that Parents were excused, by the terms of the statute and regulations, from complying with the 10-day notice requirement. The IEP of September 11, 2018, and the March 5, 2019 amendment IEP, both stated that Parents were provided the parental Procedural Rights and Safeguards document. This document included information regarding the need to provide the 10-day notice. Father did not recall receiving this document, but there was no evidence that Parents contested that statement in the IEPs when they signed consent to those IEPs.

In this case, Student's failure to comply with the 10-day notice requirement was not merely a technicality. Had Student sent such a notice, Larchmont would have been aware of Parents' dissatisfaction, and Larchmont could have realized the urgent necessity of scheduling an IEP, whether termed annual or triennial, to address Parents' concerns. The evidence showed Larchmont had a variety of services and programs that it could have offered; perhaps the 10-day notice would have inspired Larchmont to offer them. Instead, even though Larchmont staff knew that Student was applying to Bridges, Larchmont staff relied on Mother's July 24, 2019, email that Student would be staying at Larchmont, and that Parents had not expressed dissatisfaction with Larchmont.

Reimbursement for tuition of a private placement may also be reduced or denied if there is a judicial finding that Parent acted unreasonably. (20 U.S.C. § 1412(a)(10)(C)(iii)(III).) Here, Parents' failure to send the required 10-day notice was magnified by the failure of Parents to share Dr. Colegrove's report with Larchmont, as Larchmont requested, and as Parents had agreed to do. Had Parents done so, Larchmont might have learned that Parents were unhappy with Larchmont, and also may have constructively responded to Dr. Colegrove's findings that Student's social emotional, behavioral, academic, and mental status had declined. Instead, Parents kept Dr. Colegrove's findings to themselves, kept their dissatisfaction with Larchmont to themselves, and, until the last minute, kept Student's acceptance at Bridges to themselves.

Additionally, Parents did not respond to Larchmont's requests to consent to the health assessment, and they did not respond to Gonzalez's attempts to schedule mutually agreeable dates for any IEP team meeting. Both of these failures unnecessarily complicated Larchmont's plans to hold either or both an annual IEP team meeting and a triennial IEP team meeting. Larchmont's attempts to make these plans and send emails about these matters to Parents were in vain. Parents had decided by late August or early September to send Student to Bridges, and had also, inexplicably, decided not to advise Larchmont of their choice in a timely manner.

However, as determined in this Decision, just as Parents did not comply with the statute, or always act reasonably, Larchmont did not comply with the law in a variety of respects, and deprived Student of a FAPE. Under these circumstances, Parents are not

equitably entitled to all of the relief they seek in the form of Bridges tuition, but Larchmont cannot equitably be relieved of paying any tuition reimbursement. Consequently, Larchmont shall reimburse Parents for one-half of the cost of Student's tuition, in the sum of $23,542.50.

Similarly, Larchmont shall only pay one-half of the cost of the total mileage per day, based on the calculation as set forth in Student's closing brief, in the sum of $13.00 per day for every day of in-person instruction at Bridges.

Additionally, Student requested reimbursement for the cost of Dr. Colegrove's report. That request is denied. Reimbursement for the report may have been relevant to the issues as to whether Larchmont failed to complete assessments, including a triennial psychoeducational assessment, but, at Student's request, those issues were dismissed with prejudice by Order of August 6, 2021. Student cited no facts or legal authority to support any reimbursement for the report. The report was obtained voluntarily by Student, and it was not provided to Larchmont for Larchmont's consideration. Parents may have intended to produce it so that it could be discussed in conjunction with an IEP meeting in September 2019, but, as described above, Parents did not cooperate in scheduling such a meeting. Consequently, by their own conduct, Parents were unable to follow through on that intention. Under these circumstances, Student did not demonstrate that they were entitled to reimbursement for Dr. Colegrove's assessment.

Finally, Student seeks compensatory education for ERICS , on a one-to-one basis, starting on March 5, 2019. For the reasons discussed above with respect to Issue 3, Student is not entitled to compensatory education for ERICS until May 8, 2019, the date that Larchmont received Parents' consent to the March 5, 2019 IEP. Further, as Larchmont contends, and as was also discussed with respect to Issue 4, Student is not entitled to compensatory education based on the extended school year 2019 between June 14, 2019 and August 21, 2019, or based on the period after Student ceased attending Larchmont. As Larchmont also contends, Student provided no, or scant evidence, of the type, amount, duration, and need for compensatory education in the form of ERICS.

Larchmont's report cards reflected that Student was still having difficulty with focusing, with attending school remotely, with work completion, and with self-regulation. Furthermore, he used fidgets. These facts reflect that Student was still being impacted by at least his attention deficit hyperactivity disorder and anxiety during the 2019-2020 school year, and compensatory ERICS services may be helpful now, to assist him in obtaining educational benefits he may have been unable to access at that time because of those impacts. As was determined above in the section discussing Issue 3, the amount of ERICS that Larchmont did not provide should be calculated on the basis of 150 minutes per week, as stated in the March 5, 2019, IEP. Based upon the findings set forth above, then Student would have been entitled to a total of 750 minutes, or 12.5 hours of ERICS from May 2019 through June 14, 2019, and 450 minutes, or 7.5 hours, from August 21, 2019, through September 16, 2019, for a total of 20 hours, Student received 255 minutes of ERICS in May, June, and August. This amounts to a total shortfall of 945 minutes, or a shortfall of approximately 16 hours, rounding up.

A compensatory education remedy need not be calculated on a minute-per-minute basis. However, in this case, when the evidence reflected that Student's social emotional and mental health status improved since attending Bridges, but he still had some challenges during the 2019-2020 school year, 16 hours of compensatory education in the form of ERICS would likely be beneficial to Student.

Student did not request any relief in the form of training for Larchmont staff. However, the facts of this case reveal that Larchmont's staff did not fully appreciate its obligations regarding the procedures surrounding the development of an amendment IEP. Staff training can be an appropriate compensatory remedy, and is appropriate in this case. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025,1034 [student, who was denied a FAPE due to failure to properly implement his IEP, could most benefit by having his teacher appropriately trained to do so].) Accordingly, Larchmont will be ordered to provide staff training on that topic.

ORDER

1. Within 60 calendar days from the date of this Decision, Larchmont shall reimburse Parents in the amount of $23,542.50, representing one-half the tuition and fees Parents paid to Bridges for Student's attendance there during the 2019-2020 school year. Parents provided sufficient proof of payment at hearing.
2. Within 15 calendar days from the date of this Decision, Student shall provide Larchmont with documentation of each day that Student physically attended Bridges. Within 60 calendar days from the date Larchmont receives such documentation, Larchmont shall reimburse Parents for travel between Student's residence during the 2019-2020

school year and Bridges, at the rate of $13.00 per day, for each day of Student's physical attendance at Bridges.

3. Within 45 calendar days from the date of this Decision, Larchmont shall contract with a California certified non-public agency selected by Parents to provide a block of 16 hours of ERICS, to be funded by Larchmont. These services may be used, at the discretion of Parents, for direct services to Student, or for a combination of direct services to Student and for Parent counseling. Larchmont shall also, and additionally, fund the cost for any assessments, materials, or other fees associated with these services. The services shall occur at Student's residence or at another location to be agreed upon by Parents and the nonpublic agency. If the services are held at a location other than Student's home, Larchmont shall reimburse Parents for transportation for one round-trip for travel to the location, not to exceed 50 miles round-trip. The block of hours is to be used by no later than 18 months from the date Larchmont contracts with the non-public agency selected by Parents for these services. Any hours not used by that date shall be forfeited. This remedy is compensatory only and does not constitute part of a stay put placement.

4. Within 45 calendar days from the date of this Decision, Larchmont shall contract with a non-public agency or law firm to provide 4 hours of training to Larchmont's administrators and special education staff concerning requirements and best practices for appropriately amending IEPs. This training shall be completed by April 1, 2022.

5. All other relief sought by Student is denied.

RIGHT TO APPEAL THIS DECISION

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

/s/

Elsa Jones

Administrative Law Judge

Office of Administrative Hearings