

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

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CASE NO. 2021040751

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PARENT ON BEHALF OF STUDENT,

v.

SAUGUS UNION SCHOOL DISTRICT.

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DECISION

SEPTEMBER 13, 2021

On April 22, 2021, the Office of Administrative Hearings, called OAH, received a due process hearing request from Student, naming Saugus Union School District. On June 11, 2021 OAH granted a continuance of the hearing to July 20, 2021.

Administrative Law Judge Laurie Gorsline heard this matter by videoconference on July 20 through 22, 27, and 28, 2021 and August 3, 2021.

Attorney Coleman Alguire represented Student and was assisted by Attorney Jennifer Tanios on July 22, 2021. Parent testified on August 3, 2021 but did not otherwise attend the hearing. Student did not attend the hearing. Attorney Sundee

Johnson represented Saugus Union and was assisted by Attorney Rebecca Buchsbaum on July 21 and 22, 2021. Michelle Barries, Saugus Union Assistant Superintendent of Student Support Services attended the hearing on Saugus Union's behalf and Darcie Quinn, Saugus Union Coordinator of Student Support Services attended the hearing on Saugus Union's behalf when Barries did not attend.

At the parties' request the matter was continued to August 24, 2021 for written closing briefs. The record was closed, and the matter was submitted on August 24, 2021.

## ISSUES

1. Did Saugus Union School District deny Student a free appropriate public education, called a FAPE, from the March 2020 school closure until the end of the 2019-2020 regular school year by:
  - a. failing to offer or implement the services in the individualized education programs, called IEPs, in-person, face-to-face;
  - b. failing to implement the accommodations in the IEPs in-person, face-to-face;
  - c. failing to develop adequate and appropriately written goals for Student for a distance learning setting, specifically,
    - i. for the period between the March 2020 school closure and the May 2020 IEP; and
    - ii. in the May 2020 IEP, or any amendments?

2. Did Saugus Union deny Student a FAPE from the start of the 2020-2021 school year to the filing of the due process complaint by:
  - a. failing to offer or implement the services in the IEP, in-person, face-to-face; and
  - b. failing to implement the accommodations in the IEP, in-person, face-to-face?
3. Did Saugus Union deny Student a FAPE developing Student's May 2020 IEP by:
  - a. failing to conduct any formal assessment of Student before the IEP team meeting on May 4, 2020;
  - b. failing to adequately determine Student's presents levels of performance and progress toward his goals;
  - c. failing to adequately evaluate the effect of remote learning on Student's educational program before the May 4, 2020 IEP team meeting;
  - d. failing to offer a one-to-one aide in the May 2020 IEP; and
  - e. failing to offer adequate and appropriately written goals in the May 2020 IEP?
4. Did Saugus Union deny Student a FAPE by failing to address Student's regression resulting from Student being assigned to distance learning from March 2020 until the filing of the due process complaint?
5. Through the filing of the due process complaint, did Saugus Union deny Student a FAPE by failing to implement adequate speech and language and specialized academic instruction required by the May 4, 2020 IEP or any amendments?

## JURISDICTION

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

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

The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, assessment, or educational placement of the child, or the provision of a free appropriate public education, referred to as FAPE, to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, and 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents, and has the burden of proof by a preponderance of the evidence. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 57-58, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) Here, Student has the burden of proof. The factual statements in this Decision constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

Student was eight years old at the time of the hearing and completed second grade during the 2020-2021 school year. Student resided within the Saugus Union geographic boundaries at all relevant times. Student was eligible for special education under the primary category of autism and the secondary category of intellectual disability.

ISSUE 1A: DID SAUGUS UNION DENY STUDENT A FAPE FROM THE MARCH 2020 SCHOOL CLOSURE UNTIL THE END OF THE 2019-2020 REGULAR SCHOOL YEAR BY FAILING TO OFFER OR IMPLEMENT THE SERVICES IN THE IEP, IN-PERSON, FACE-TO-FACE?

At hearing, Student contended that from March 16, 2020 through the end of the 2019-2020 school year, Saugus Union only made available the services in Student's operative IEP in a limited capacity, or not at all. Student contended Saugus Union should have made his IEP services available and implemented them in-person, face-to-face, between March 16, 2020, through the end of the school year. Student also argued Saugus Union should have offered the services in the May 4, 2020 IEP in-person, face-to-face. In his closing brief, Student argues, among other things, that nothing prevented Saugus Union from implementing or offering the services in-person, face-to-face, and that its failure to do so was a denial of FAPE. Student contends Saugus Union knew Student's disability would make him prone to struggling in any environment requiring long stretches of focus and attention at a computer screen without in-person supervision. Student claims the operative IEP was intended to be implemented in-person and the failure to implement it in person denied Student a FAPE.

At hearing, Saugus Union contended it did not make available or implement Student's services in person because the orders issued by Governor Gavin Newsom related to the 2020 Covid 19 pandemic required Saugus Union to shut down the school district. In its closing brief, Saugus Union argues it was not required to offer or implement Student's IEP services "in-person, face-to-face." It claims that because a systemwide closure due to COVID-19 was in place between March 16, 2020, through the end of the 2019-2020 regular school year, Saugus Union was not required to provide any services to special education students regardless of what Student's IEP required, or otherwise implement Student's IEP during that period. It argues that the period after the COVID-19 school closure consisted of "non-instructional days," and Student's IEP expressly stated Saugus Union was not required to provide services on non-instructional days. Saugus Union argues that during the period after March 16, 2020, it merely gave students "enrichment activities to support learning" through packets, and online postings and videos through Google Classroom. Saugus Union contends that some students received related services, but no direct academic instruction was provided. Saugus Union further contends Student did not prove the language of his operative IEP specifically required implementation in the home for direct in-person, face-to-face instruction.

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

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

An IEP must contain a statement of the special education and related services and supplementary aids and services to be provided to the pupil, or on behalf of the pupil, and a statement of the program modifications or supports for school personnel that will be provided to enable the student to advance appropriately toward attaining the annual goals and to be involved in and make progress in the regular education curriculum and participate in nonacademic activities, and to be educated and participate with other individuals with exceptional needs and nondisabled pupils. (20 U.S.C. § 1414(d)(1)(A)(i)(IV); Ed. Code, § 56345, subd. (a)(4).) An IEP must also contain a statement of measurable annual goals designed to meet the needs of the student. (20 U.S.C. § 1414(d)(1)(A)(i)(II); Ed. Code, § 56345, subd. (a)(2).)

No one test exists for measuring the adequacy of educational benefits conferred under an IEP. (*Rowley, supra*, 458 U.S. at pp. 202, 203 fn. 25.) A student may derive educational benefit under *Rowley* if some of his goals and objectives are not fully met, or if he makes no progress toward some of them, as long as he makes progress toward others. A student's failure to perform at grade level is not necessarily indicative of a denial of a FAPE, as long as the student is making progress commensurate with his abilities. (See e.g., *K.D. v. Downingtown Area School District* (3rd Cir. 2018) 904 F.3d 248, 255-256; *Walczak v. Florida Union Free School Dist.* (2nd Cir. 1998) 142 F.3d 119, 130; *E.S. v. Independent School Dist., No. 196* (8th Cir. 1998) 135 F.3d 566, 569; *In re Conklin*

(4th Cir. 1991) 946 F.2d 306, 313; *El Paso Indep. School Dist. v. Robert W.* (W.D. Tex. 1995) 898 F.Supp. 442, 449-450; *M.P. v. Poway Unified School Dist.* (S.D. Cal. July 12, 2010, No. 09 CV 1627) 2010 WL 2735759, at \*11.)

When a school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the child's IEP. (*Van Duyn v. Baker School Dist.* 5J (9th Cir. 2007) 502 F.3d 811, 815 (*Van Duyn*).)

## PRESCHOOL AND KINDERGARDEN AT EMBLEM ACADEMY

Student first became eligible for special education and related services in April 2016, the day before his third birthday. Student attended preschool at Saugus Union's Emblem Academy during the 2017-2018 school year. During the 2018-2019 school year, Student attended kindergarten in a special day class at Saugus Union's regional autism program at Emblem Academy. The regional autism program was designed for students severely impacted by autism.

## THE 2019 TRIENNIAL ASSESSMENTS

In March and April 2019, Saugus Union conducted Student's triennial assessments in preparation for his April 9, 2019, IEP team meeting. According to the April 9, 2019 meeting notes, the assessments included:

- a psychoeducational evaluation including an environmental learning support assessment,
- a speech and language assessment, including an alternative augmentative communication evaluation,



- an occupational therapy assessment, and
- an assessment by the special education teacher designed for students with autism.

Neither party offered the psychoeducational and environmental learning support assessments into evidence and none of the witnesses at hearing testified as to the contents of those assessments.

## THE APRIL 2019 TRIENNIAL IEP AND AMENDMENTS

On April 9, 2019, Saugus Union held Student's triennial IEP team meeting while Student was in kindergarten. The IEP offer of special education and related services, included:

- specialized academic instruction of 360 minutes per day in a separate classroom in the regional autism program,
- speech and language services of 480 minutes per month, with approximately 60 minutes a week in small group and 60 minutes a week of individual services, and
- occupational therapy services of 30 minutes a month in the form of consultation and collaboration with the IEP team. The IEP also offered extended school year services.

The IEP also included 30 minutes a week of group occupational therapy services. The IEP also identified Student as eligible for an alternative augmentative communication device. The IEP offered Student accommodations and goals in the areas of:

- verbal communication,
- augmentative alternative communication,
- social pragmatics,
- math,

- writing,
- sight reading, and
- toileting.

Under the "Other Supports" provision, the IEP offered environment learning support in the form of an aide five times a week for six hours a day at the school site with a fading plan for times when the student could maintain lower adult support, describing it as when the adult could work with Student and a peer at structured times.

Student was nonverbal and needed assistance with communication and access to the curriculum. He needed facilitation and assistance for some of his goals. Student also needed prompting to transition. His fine motor skills were delayed, and he needed assistance with writing and attention. Student was slow in his responses and needed additional processing time. He was easily distracted by things in the classroom and needed visual cues.

Parent consented to an amendment of the April 9, 2019 IEP on June 13, 2019, deleting the group occupational therapy services which had erroneously been included in the April 2019 IEP, and clarifying that Student would only receive consultative occupational therapy services to the IEP team to support Student's participation in his classroom program. The IEP amendment included Parent's consent to the April 9, 2019 IEP, which established that, at least as of June 13, 2019, Parent had consented to the April 9, 2019 IEP.

On July 15, 2019, Parent consented to an amendment of the April 9, 2019 IEP dated June 26, 2019, changing Student's placement for the 2019-2020 school year,

specifically from Emblem to specialized academic instruction for the majority of the school day in a special day class for intensive/moderate needs at Saugus Union's Mountainview Elementary School.

For the 2019-2020 school year, beginning in August 2019, Student began attending Mountainview. On November 18, 2019, Parent agreed to an amendment to the April 2019 IEP dated September 24, 2019, modifying Student's speech services pursuant to Parent's request. The amendment stated that Saugus Union would provide Student's 480 minutes of monthly speech and language services, 60 minutes a week in a group setting, and 60 minutes a week in an individual setting in three 20-minute sessions on non-group speech days.

On November 18, 2019, Parents agreed to another amendment of the April 9, 2019 IEP dated October 2, 2019, to add two additional speech goals, giving Student a total of 10 goals.

#### THE 2019-2020 MOUNTAINVIEW SPECIAL DAY CLASS BEFORE MARCH 16, 2020

Student attended credentialed special education teacher Molly Gallo's special day class at Mountainview during the 2019-2020 school year for first grade. The classroom had about 10 students and six adults. The classroom had different centers or stations for working on different activities, including whole group, circle time, goals and for some sensory, social, and daily living skills throughout the day.

Gallo reported to the September 2019 IEP team that Student was not making progress on his goals, explaining that he had just changed schools and there had been limited time to work on his goals. Student was following directions and classroom

routines. Following the September 2019 IEP team meeting Gallo saw Student make progress on his goals consistent with the level of his disability, although Gallo described his progress as slow and requiring prompting. Student loved to color and play with letters, enjoyed riding a tricycle outside and learning how to use his communication device, which he was demonstrating more strength in using.

Student typically needed redirection and assistance from an adult to help him focus and participate in class. Student was typically not interested in his peers but interacted if the interaction was facilitated. Student needed assistance in gaining the attention of adults. He often used a communication device when he needed help, and, at times, initiated use of the device independently for routine things like requesting a snack. However, for other things, Student often needed adult facilitation or modeling, such as asking for a turn or expressing a need that was not routine. Student was not attentive to safety concerns, such as obstacles which could cause him to trip. Sometime around early February 2020, Gallo saw Student present with seizure-like behaviors in which his hands were shaking, his eyes rolled back into his head, and, at times, he lost his balance if he was standing up. Since August 2019 Saugus Union had an existing Emergency Action Plan for seizures.

## THE COVID-19 SHUTDOWN

California Governor Newsom issued a Proclamation of a State of Emergency dated March 4, 2020 as a result of the threat of COVID-19. On March 13, 2020, the Governor issued Executive Order N-26-20 which was specifically directed to California schools. It stated that if a local educational agency closed its schools to address COVID-19, the local educational agency was not prohibited from offering distance learning or independent study to impacted students, and that the local educational

agency would continue to receive state funding to continue delivering high-quality educational opportunities to students to the extent feasible through, among other options, distance learning and/or independent study.

On March 16, 2020, Saugus Union closed its campuses, including Mountainview, to in-person instruction due to the COVID-19 related "state of emergency." Saugus Union campuses remained closed through the end of the 2019-2020 school year due to the ongoing "state of emergency" and subsequent orders issued by Governor Newsom.

On March 19, 2020, Governor Newsom mandated that all individuals living in the State of California stay home except as needed to maintain continuity of operations of 16 federal critical infrastructure sectors, and that when people left their homes for authorized or necessary activities, to practice social distancing. (Governor's Exec. Order No. N-33-20 (March 19, 2020).)

**BETWEEN MARCH 16 AND MARCH 30, 2020 SAUGUS UNION WAS NOT REQUIRED TO OFFER OR IMPLEMENT STUDENT'S SERVICES IN-PERSON, FACE-TO-FACE**

On March 12, 2020, the United States Department of Education Office of Special Education and Rehabilitative Services, called OSERS, issued informal guidance. The guidance provided that, if a local educational agency closed to all students because of COVID-19, the local educational agency was not required to provide services to students with disabilities during that time. (*OSERS Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak*, Answer A-1 (March 12, 2020).)

OSERS' guidance was consistent with the Ninth Circuit's decision in *N.D. v. Hawaii Dept. of Education* (9th Cir. 2010) 600 F.3d 1104, 1116-1117 (*N.D.*), which upheld a district court's denial of a motion by special education students to enjoin the state's shutdown of all schools on Fridays during a fiscal emergency. In that case, the students argued that ceasing services owed them under their IEPs was a change of placement and therefore violated the IDEA's stay-put rule. However, the court disagreed, explaining that "Congress did not intend for the IDEA to apply to system wide administrative decisions" and that "[a]n across the board reduction of school days such as the one here does not conflict with Congress's intent of protecting disabled children from being singled out." (*Id.* at p. 1116.) *N.D.* acknowledged that an implementation claim might exist, but the Ninth Circuit did not decide that issue. (*Id.* at p. 1117.)

Here, the last consented to IEP in place on March 16, 2020, through the end of the regular 2019-2020 school year, was the April 9, 2020 IEP, as amended in June, September, and October 2019. Although Student's annual IEP team meeting was convened on May 4, 2020, and Saugus Union made an offer of special education and related services at that time, Parent did not consent to the May 2020 IEP until January 2021. Saugus Union was not required to implement the May 2020 IEP during the 2019-2020 school year without parental consent. (Ed. Code, § 56346.)

Student's operative April 2019 IEP, as amended, stated that the program and services would be provided consistent with the school calendar and scheduled services, excluding holidays, vacations and non-instructional days unless otherwise specified. Saugus Union informed Parent the Mountainview campus was closed, and no instruction would be provided as of March 16, 2020 due to the COVID-19-related state of emergency.

The weight of evidence established that for the first two weeks after the campus closure on March 16, 2020, through approximately March 30, 2020, Saugus Union was closed to all students and did not offer instruction or services to any students during that time. Although not specified on the school calendar, those two weeks became “otherwise specified” non-instructional days. Further, based on the guidance provided by OSERS, Saugus Union was not required to provide Student a FAPE during that two-week period in which no instruction or services were provided. (OSERS, *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak*, supra, p. 2, Answer A-1.)

Saugus Union’s claim that non instructional days extended from March 16, 2020, through the end of the school year was not supported by the evidence. Although Saugus Union campuses were closed during that entire period, the evidence established that some form of distance learning began around the end of March 2020, but the instruction was limited and apparently without clear structure. Darcie Quinn, Saugus Union’s Coordinator of Student Support Services testified that the school district implemented distance learning through Google Classroom toward the end of March and beginning of April 2020 for both general education and special education students. Special education teacher Gallo corroborated Quinn's testimony. Gallo estimated distance learning began approximately two weeks after the school closure.

Initially, Saugus Union sent packets home to parents, but around the end of March 2020 Saugus Union began using online platforms, such as Google Classroom, to post activities, videos, and assignments for its students to access instructional materials and, in the case of special education students, access their IEP services. Mountainview provided services to students with IEPs which varied depending on the needs of a

student, the provisions of a student's IEP and the COVID-19-related mandates. Mountainview made iPads available to all special day class students. Information was provided to Parents to access the online platforms.

Gallo posted assignments to Google Classroom for her special day class students, which parents and students could access online. Gallo also posted videos and instructional aides because her special day class students had limited reading and writing abilities. Gallo also posted worksheets or assignments for students that likely required parent assistance and gave instructions to parents on how assist students on the worksheets. These assignments were general to the class, but, at times, Gallo made certain assignments specifically for Student. Typically, the assignments revolved around letters, numbers, colors or something the class was working on or that could be tied to her students' IEP goals in some way. Gallo asked students to submit their work, but she did not require proof students finished the work because, in her opinion, the technology related to distance learning was complicated for many people at that time. As such, Gallo usually measured progress by the work that was turned in by students and by communicating with parents as to how students were doing in distance learning. At some point, Gallo began live check-ins with parents and communicated through emails. At hearing, Gallo could not recall how many assignments she provided. Gallo also had live online "social-emotional" group sessions available to her class beginning in April 2020, which consisted of hand-motion songs, comprehension questions after reading a story, and discussions about students' feelings.

Between March 16, 2020, and the end of the school year, Parent accessed Google Classroom whenever Gallo posted an instructional video for the class and Student watched it. At hearing, Parent could not recall the frequency per week Gallo posted



videos. Parent denied that Gallo provided any other asynchronous work. Parent testified Gallo only held two online live sessions after the campus closure, which Parent opined were not instructional. However, Parent also admitted Gallo may have provided one or two more online live sessions, but Parent did not remember. Also, during the hearing Parent admitted her memory was flawed during the period after the campus closure because she was busy caring for her newborn baby and everything was "crazy with COVID" at that time.

Saugus Union's speech language pathologist, Karina Sangren, and occupational therapist, Inga Runolfsdottir, also posted activities online for Student to access during the period from March 30, 2020, through the end of the school year. The occupational therapist's service log reflects consultative services for Student began on March 30, 2020, informing Parent of her office hours and posting materials and questions for Student as part of the distance learning program. Sangren began posting lessons in April 2020 and providing online live speech and language therapy services to Student beginning on May 5, 2020. Saugus Union instructed Sangren to provide as many IEP service hours as possible, but, according to Sangren, there was not enough structure at that time to provide all hours. Saugus Union did not provide Student with environmental learning support in the form of the aide after March 16, 2020.

Parent did not recall any communications from the occupational therapist during this period after the campus closure and claimed that the only activities Saugus Union provided online, other than the videos Gallo posted, came from the speech therapist. However, Parent's testimony was not reliable. The May 2020 IEP notes reflect that some occupational therapy activities were posted for Student in Google Classroom on letter

formation. Parent also stated at the May 4, 2020 IEP team meeting that she could not help Student with all the assignments because she was occupied with Student's ongoing private behavior and speech sessions and Parent's new baby.

The evidence established Saugus Union was not required to offer or implement Student's IEP services in-person, face-to-face between March 16 and March 30, 2020.

BETWEEN MARCH 30, 2020 AND THE END OF THE 2019-2020 SCHOOL YEAR SAUGUS UNION WAS NOT REQUIRED TO OFFER OR IMPLEMENT STUDENT'S IEP SERVICES IN-PERSON, FACE-TO-FACE

Governor Newsom's Executive Order N-26-20 authorized distance learning if local districts chose to close their schools. Executive Order N-26-20 instructed the state departments of education and health to issue guidance that would ensure students with disabilities received a FAPE consistent with their IEPs during the pandemic. (Governor's Exec. Order No. N-26-20, *supra*, (March 13, 2020).)

The California Department of Education, called CDE, responded with guidance that encouraged school districts to deliver educational opportunities "to the extent feasible" through options such as distance learning and independent study. (CDE, *Special Education Guidance for COVID-19*, Answer to Question 1 (March 20, 2020).)

In its March 12, 2020 guidance discussed above, OSERS also emphasized that every effort should be made to provide, to "the greatest extent possible," special education and related services in accordance with a child's IEP. (OSERS *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak*, *supra*, Answer to A-1.)

Moreover, on March 21, 2020, OSERS issued subsequent guidance assuring school districts that ensuring compliance with the IDEA should not prevent any school from offering educational programs through distance instruction. OSERS emphasized that the provision of a FAPE may include, as appropriate, special education and related services “through distance instruction provided virtually, online, or telephonically.” OSERS counseled,

While some schools might choose to safely, and in accordance with state law, provide certain IEP services to some students in-person, it may be unfeasible or unsafe for some institutions, during current emergency school closures, to provide hands-on physical therapy, occupational therapy, or tactile sign language educational services. Many disability-related modifications and services may be effectively provided online. These may include, for instance, extensions of time for assignments, videos with accurate captioning or embedded sign language interpreting, accessible reading materials, and many speech or language services through video conferencing.

OSERS further stated,

It is important to emphasize that federal disability law allows for flexibility in determining how to meet the individual needs of students with disabilities. The determination of how FAPE is to be provided may need to be different in this time of unprecedented national emergency. (OSERS *Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities* (March 21, 2020).)

As the Ninth Circuit recently noted, in March 2020 the California State Public Health Officer issued a list of designated “essential” workers who were allowed to leave their homes to support specified critical infrastructure sectors. That list expressly included workers teaching at “public and private ... K-12 schools,” but only for “distance learning.” Although many schools had already independently decided to close, the effect of these orders was to impose a new State mandate that schools remain limited to “distance learning.” (*Brach v. Newsom* (9th Cir. 2021) 6 F.4th 904, 911.)

On April 9, 2020, CDE issued guidance that not all IEPs needed to be amended to change to distance learning. Citing to the March 21, 2020 guidance from the United States Department of Education Office of Education Program, or OSEP, CDE’s guidance stated that under the unique circumstances of the COVID-19 pandemic, it was not necessary for a school district to convene an IEP team meeting, or propose an IEP amendment without a team meeting, for the purpose of discussing the need to provide services away from school, because that change must necessarily occur. (CDE, *Special Education Guidance for COVID-19, supra*, April 9, 2020.) CDE stated that it was not necessary for a school district to obtain the parent’s written consent to provide previously agreed-upon services away from school. (*Ibid.*) The IEP that was in effect at the time of the physical school closure remained in effect for students, and CDE directed school districts, to the greatest extent possible, to continue to provide the services called for in the IEPs in alternative ways. (*Ibid.*) Although an IEP amendment was not necessary for every child with an IEP, CDE noted that there might be instances when amending an IEP to reflect the change to distance learning might be necessary and urged school districts to communicate and collaborate with parents to transition students to distance learning, and to identify and address any immediate support needs when feasible. (*Ibid.*)

CDE's April 9, 2020 guidance also addressed whether school districts may provide in-person special education services while schools are closed due to COVID-19. CDE noted that in some exceptional situations, a local education agency may need to provide certain supports and services to individual students in person to maintain the student's mental or physical health and safety for the purposes of supporting distance learning. (*Ibid.*) CDE confirmed any alternative delivery options should comply with federal, state and local health official's guidance relating to physical distancing, with a primary consideration of keeping all participants safe and healthy. (*Ibid.*)

CDE directed if an "individual determination" was made that a student needs services or supports in person to maintain their mental or physical health and safety to support distance learning, the local educational agency "is not necessarily precluded from providing that service" by Governor Newsom's stay at home order. (*Ibid.*) Significantly, CDE's guidelines did not mandate that under these circumstances in-person services were required, but rather provided the local educational agencies the ability to provide them in exceptional circumstances.

CDE's April 9, 2020 guidance was addressed in *E.M.C. v. Ventura Unified School Dist.* (C.D. Cal. October 14, 2020 No. 2:20-cv-09024-SVW-PD) 2020 WL 7094071 (*E.M.C.*). In that case, a student argued she was entitled to a stay-put order, ordering in-person services notwithstanding the COVID-19-related statewide public health restrictions. Based on the reasoning of *N.D.*, the court rejected student's argument that COVID-19 restrictions on in-person learning did not excuse a school district's obligation to provide in-person IEP services. The IDEA does not "give the parents of disabled children veto power over a state's decisions regarding the management of its schools." (*E.M.C., supra* at \*6 [quoting *N.D.*]). Where an entire county's schools were limited to distance learning under the state-wide framework, the student was "unlikely to be

entitled to modify this system-wide decision." (*E.M.C., supra* at \*6.) *E.M.C.* also recognized that CDE's April 9, 2020 guidance did not preclude a school district in some "exceptional situations," specifically, in-person services might be required to maintain a student's mental or physical health and if an individual determination was made of that necessity. (*E.M.C., supra* at \*6- 7.) However, *E.M.C.* found that no such individual determination had been made and therefore the limited exception was inapplicable under the facts of that case. (*Ibid.*)

IMPLEMENTATION OF THE APRIL 2019 IEP, AS AMENDED, DID NOT  
REQUIRE IN-PERSON, FACE TO FACE SERVICES TO BE PROVIDED

Here, the IEP team certainly contemplated that the operative April 2019 IEP, as amended, would be implemented in person at school when it was written. In fact, the IEP was implemented in person at school before March 16, 2020. However, Student points to nothing in the IEP which expressly required the offer of special education and related services to be implemented in-person, face-to-face. On its face, the April 2019 IEP, as amended, does not specifically require in-person, face-to-face services and therefore Saugus Union was not required to implement any of the services in-person, face-to-face. Moreover, although listed on the services grid of the amended April 2019 IEP, the occupational services were not direct services to Student, but merely consultative services to the IEP team. Student's in-person, face-to-face implementation claim is defeated on these grounds alone.

Student's argument that, regardless of the express terms of the IEP, Saugus Union was nonetheless legally required to make available, implement, or offer the services to Student in person was not persuasive. Student's argument ignores the realities of the global COVID-19 pandemic at the time and flies in the face of the Governor's orders and

resulting federal and state guidance which required Student's IEP to be implemented to the extent feasible while at the same time complying with federal, state and local health official's guidance relating to physical distancing. Even if the amended April 2019 IEP did require in-person services, Student's educational program was modified by statewide public health restrictions prohibiting in-person education as discussed in *E.M.C. (E.M.C., supra, 2020 WL 7094071 at \*6.)*

According to the applicable CDE, OSERS and OSEP guidance, in-person services were not legally required to provide students with a FAPE at that time, nor were school districts required to amend students' IEPs to conform to the distance learning platform. The cumulative guidance urged school districts to continue to provide the IEP services in the greatest extent possible in alternative ways, communicating and collaborating with parents to address any immediate support needs, but at the same time complying with federal, state and local health official's guidance relating to safety concerns to keep participants safe. (CDE, *Special Education Guidance for COVID-19, supra, (April 9, 2020.)*) CDE carved out an exception regarding in-person services if "an individualized determination is made that a student needs services or supports in-person to maintain their mental/physical health and safety for the purpose of supporting the student in accessing the alternative options for learning being offered." (*Ibid; E.M.C., supra, 2020 WL 7094071 at \*6.*)

Student did not prove exceptional circumstances existed warranting in-person services in the home, or that the IEP team made an individual determination that Student required his services be provided in person to maintain his mental/physical health and safety for the purpose of supporting his access to distance learning.

The evidence established that Saugus Union communicated and collaborated with Parents about changes in Student's educational program and distance learning during this period. Parent never made known to Saugus Union that any immediate need for in-person services existed. Saugus Union sent out communications through Parent Square, a parent communication system, including newsletters, videos, and direct messages about the distance learning. Saugus Union's Superintendent also sent out information to parents and the school district held parent meetings and offered presentations to the parent population within the school district.

Parent was also communicating with special education teacher Gallo after March 16, 2020. According to Gallo, Student's limited distance learning program seemed to be working based on the assignments Gallo claimed Student submitted and communications with Parent. Parent told Gallo that the distance learning was working well for Student, and he was enjoying it. Parent reported to Gallo that Parent was seeing a lot of language from Student at home. These communications with Parent occurred throughout the March through June 2020 period. Gallo checked up on Parents to see it was working throughout that period. Parent never communicated to Gallo that Student required in-person, face-to-face services in the home.

On May 4, 2020, Saugus Union held Student's annual IEP team meeting virtually with Parents in attendance. Saugus Union gave Parents the opportunity to provide input at the onset of and throughout the meeting. However, Parents never requested or made known to the IEP team members any need for in-person face-to-face services for any reason, much less to maintain Student's mental/physical health and safety for the purpose of supporting his access to distance learning.



Instead, Parents discussed that Student's teacher had done a great job of developing the distance learning program for the children. Saugus Union told Parents that Student's speech services posted online and provided using Zoom would be considered FAPE. Parents reported that Student had been talking a lot more at home, which was motivating Student because he was able to obtain what he verbally requested. Parents reported to the IEP team that they were finding the speech sessions posted in Google Classroom "harder" to do and requested tele-speech therapy. When the occupational therapist reported that she had posted some letter formation activities in Google Classroom, Parent reported that she was unable to do all the assignments due to Student's private services and because she had a new baby.

Notably, both the school psychologist and the school board-certified behavior analyst attended the May 2020 IEP team meeting and were available for questions. Yet, Parents told the IEP team they did not believe there were any unusual or challenging behaviors by Student that needed to be addressed. In fact, as discussed in Issue 3A, there was an outstanding assessment plan for environmental learning support including a one-to-one aide, which Parents had not returned to Saugus Union since prior to March 16, 2020. The IEP team agreed to disregard this assessment plan because it was not necessary because Student was not at the school site. There was no evidence that Parents objected to or otherwise expressed disagreement with this decision.

The only pertinent issues regarding Student's physical or mental health which came up during the IEP team meeting were twofold. Student had been scratched at school prior to the school closure and Parent wanted someone watching out for Student at school. The other issue was that his teacher reported that prior to the school closure Student had a few incidents which lasted two or three seconds, that looked like his eyes rolled back, stiffness in his body and hands/arms shaking. However, this issue had been

reported to Parents by at least early February 2020. At the May 2020 IEP team meeting, the school nurse mentioned that Student was supposed to have a medical test back in April 2020. Parents told the IEP team that it was postponed due to the COVID-19 crisis until late summer. Parents also reported that they had not noticed any episodes with respect to seizures and would keep the school apprised of updated medical information. Student failed to prove that either of these health-related issues was an exceptional circumstance or otherwise demonstrated an immediate need for in-person, face-to-face services in the home.

Parent claimed at hearing that in April or May 2020 she contacted someone at the school district and asked for aide support in the home but was told it was not available. Parent's testimony was not credible. Not only did Parent testify inconsistently on this point, but she could not remember who she spoke to or specifically when she made this request. At one point, Parent admitted she never contacted anyone to request additional assistance for Student to access his distance learning program. At another point, Parent claimed she spoke to Mountainview principal Katie Demsher or someone from the district office. Later, Parent changed her testimony again, claiming that it "could have" been Gallo or someone at Mountainview. She also claimed that things were chaotic at that time, so she could not "be 100 percent certain" of the timing. Parent appeared nervous during this part of her testimony, and the pace of her testimony, her demeanor and overexplaining this point, along with her inability to definitively identify who she spoke to, considering all the other evidence, rendered her testimony unconvincing.

In any event, based on Parent's testimony and the other evidence, the reasons Parent claimed justified her alleged request for in-person support in the home had more to do with Parent's schedule at the time, including her appointments with Student's

private providers and her responsibilities with a new baby, rather than maintaining Student's health and safety for the purpose of supporting his access to distance learning. Student failed to prove that Saugus Union was required to implement or make available Student's IEP services in-person, face-to-face following the school closure on March 16, 2020.

#### SAUGUS UNION WAS NOT REQUIRED TO AMEND THE APRIL 2019 IEP

For the same reasons set forth above and as explained below regarding Issue 1C(i), Saugus was not required to amend Student's April 2019 IEP to implement it during distance learning.

#### STUDENT DID NOT PROVE SAUGUS UNION WAS REQUIRED TO OFFER IN-PERSON, FACE-TO-FACE SERVICES IN THE MAY 4, 2020 IEP

In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the student with some educational benefit in the least restrictive environment. (*Ibid.*) Whether a student was offered or denied a FAPE is determined by looking to what was reasonable at the time the IEP was developed, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.)

The May 4, 2020 IEP offer of special education and related services, included specialized academic instruction of 1,450 minutes weekly and speech and language services of 480 minutes per month, both services to be delivered in a separate classroom in a public integrated facility, and occupational therapy was added to the "Other Supports" section in the form of consultation between the occupational therapist and the teacher and other staff as needed. The IEP team offered the same environment learning support at the school site under the "Other Supports" section in the form of a full-time aide. No specific determination at that time was made that Student required services or supports in person to maintain his mental/physical health and safety for the purpose of supporting his access to distance learning.

Student failed prove that the May 2020 IEP was unreasonable at the time it was offered because it did not state that the IEP services would be provided in-person, face-to-face. At the time of the May 4, 2020 IEP, Saugus Union believed that the campus closures were temporary and it was unknown at that time when students would be returning to campus. Saugus Union fully expected students to return to campus for the 2020-2021 school year. It was not until July 2020 Saugus Union knew the campuses would continue to remain closed into the 2020-2021 school year. Saugus Union wrote the May 2020 IEP offer with the understanding that it would be implemented on campus in fall 2020. Therefore, it was not required to offer in-person services face-to-face for the 2020-2021 school year.

In addition, Saugus Union was not required to offer the May 2020 IEP services in-person, face-to-face, for the end of the 2019-2020 school year for most of the same reasons it was not required to provide in-person, face-to-face, services pursuant to the amended April 2019 IEP as discussed above. Further, Student did not establish by a preponderance of the evidence that Student required in-person, face-to-face services at

home during distance learning for the period from May 4, 2020 to the end of the school year, June 12, 2020, even if Saugus Union could provide them as discussed above and as further explained below.

Parent communicated with both special education teacher Gallo and Saugus Union speech therapist Sangren online and over the telephone after the campus closure. Gallo spoke to Parent throughout this period. Parent contacted Gallo about five times, to tell her that Student was having trouble accessing the online activities. Gallo provided Parent with the instructions to log on, and as far as Gallo knew, Parent could access the assignment or activity after Gallo assisted her. Based on what Gallo saw and her communications with Parent, distance learning seemed to be working well for Student. Parent reported Student was enjoying distance learning and the posted videos were working well for him. Parents never contacted Gallo to request additional adult support be provided in the home setting.

Nor did Parent ever tell speech therapist Sangren that Student needed additional adult support in-person, face-to-face to help Student with speech services. Sangren had a lot of communication with Parent after the campus closure in March 2020. In fact, Sangren recalled she had more communication with Parent after the school closure than she did earlier in the school year. Sometime around late April 2020, Parent contacted Sangren because she was unsure how to do the online lessons Sangren had posted, so Sangren explained them. Sangren did not believe that Student completed the lesson because many were based on using his communication device and Parents wanted to move Student away from using the device because Student was becoming more verbal. At hearing, Parent admitted to completing only one of the several speech videos Sangren posted.

The evidence established that Parent never requested any in-home in-person, face-to-face support or demonstrated a need for such support during the May 2020 IEP team meeting. This is consistent with the evidence at hearing regarding the amount of adult support Student already had in the home. During this period between March and June 2020, Student had several adults in the household. Parent was not employed outside the home. Father was unemployed through sometime in May 2020. According to Parent, Student also had ongoing private behavior services in the home through Parents' private insurance since the beginning of the 2019-2020 school year for five to six days a week, totaling 20-25 hours weekly. In May 2020, when Father went back to work, the behavior service hours increased to 108 hours per month, which according to Student's private behavior analyst, Student continued to receive until March 2021. The behavior interventionists in the home assisted Student with school, including his speech services.

Based on the totality of the evidence, Parent's difficulties accessing the limited distance learning materials Saugus Union provided after the campus closures were transitory. Although at the May 4, 2020 IEP team meeting Parents reported Student seemed to be regressing, that concern appeared to be related to his speech services and was not convincing, as discussed in Issue 4. In fact, Parents reported during a discussion of Student's goals that they were working on many of the same skills at home and Student's level of verbal speech had increased at home. Nonetheless, the IEP team addressed Parents' concern by offering extended school year services and online live speech therapy which began on May 5, 2020. Student did not prove by a preponderance of evidence that for this limited period between May 4, 2020, through the end of the 2019-2020 school year on June 12, 2020, Student needed in-person, face-to-face support in the home for a FAPE.

Saugus Union was not required to amend his April 2019 IEP or offer or provide Student's services in-person face-to-face in the home pursuant to the April 2019 IEP, as amended. Saugus Union was not required to offer services in-person face-to-face in the May 2020 IEP. Student did not prove that Saugus Union denied him a FAPE by failing to offer or implement the services in the IEPs in-person, face-to-face.

ISSUE 1B: DID SAUGUS UNION DENY STUDENT A FAPE FROM THE MARCH 2020 SCHOOL CLOSURE UNTIL THE END OF THE 2019-2020 REGULAR SCHOOL YEAR BY FAILING TO IMPLEMENT THE ACCOMMODATIONS IN THE IEPs, IN-PERSON, FACE-TO-FACE?

ISSUE 2B: DID SAUGUS UNION DENY STUDENT A FAPE FROM THE START OF THE 2020-2021 SCHOOL YEAR TO THE FILING OF THE DUE PROCESS COMPLAINT BY FAILING TO IMPLEMENT THE ACCOMMODATIONS IN THE IEP, IN-PERSON, FACE-TO-FACE?

Student contended Saugus Union denied Student a FAPE by failing to implement the accommodations in his operative IEP in-person, face-to-face. In his closing brief, Student argues that the coloring accommodation which was added to Student's May 2020 IEP unreasonably expected Parent to implement it in the home each day prior to distance learning. Student contends that the failure to implement the IEP accommodations in person limited Student's ability to access the curriculum.

At hearing, Saugus Union contended it implemented the accommodations to the extent practicable in distance learning and that it was not required to implement the accommodations in-person, face-to-face. Saugus Union contended it appropriately

implemented Student's accommodations virtually and could have implemented them, as written, in person during the 2020-2021 school year had Student returned to campus when in-person learning at Saugus Union resumed in November 2020. In its closing brief, Saugus Union also argues that under *N.D., supra*, 600 F.3d 1104, it was not required to implement Student's IEP during the period it was not providing instruction to any of its students.

An IEP must contain a statement of any individual accommodations that are necessary to measure the student's academic achievement and functional performance on state and districtwide assessments consistent with Section 1412(a)(16)(A) of Title 20 of the United States Code. (20 U.S.C. § 1414(d)(1)(A)(i)(VI); Ed. Code, § 56345, subd. (a)(6)(A).)

The April 9, 2019 IEP, as amended, was the operative IEP at the time of the COVID-19 school closure through the end of the 2019-2020 school year, and the amendments did not change the accommodations offered in the April 9, 2019 IEP. The amended April 2019 IEP contained three program accommodations, specifically, extended time, reduction of distractions to the student and visual cues.

The accommodation of extended time was included in the April 2019 IEP because Student was slow in responding and he needed additional processing time. Student was easily distracted by things in the classroom, so he needed the additional support of reduced distractions. He needed visual cues to help him understand content.

During distance learning in the 2019-2020 school year, special education teacher Gallo implemented the April 2019 IEP accommodation of extended time by allowing Student extended time for the work she posted to be completed. In Gallo's opinion, Student's home was a less distracting environment for him, and he had more time to



complete his work which he often needed. Gallo also gave Student visual cues and icons when Gallo provided instruction through the videos posted for Student to watch during this period. According to Gallo, these accommodations were appropriate at the time because in her opinion, these were the only accommodations Student needed to complete his work accurately and make progress on his goals.

Parent claimed that none of the accommodations were implemented during this period, but it was clear from her testimony she did not fully understand the accommodations in Student's IEP. Parent also admitted her recollection was not perfect during this period.

Student's May 4, 2020 IEP included the same accommodations as his amended April 2019 IEP and added one additional accommodation. The new accommodation offered to have Student color or draw for 20 minutes at the beginning of the school day. However, because Parent did not consent to the May 4, 2020 IEP until January 2021, Saugus Union was not required to implement it during the 2019-2020 school year. (Ed. Code, § 56346.)

During the 2020-2021 school year through January 17, 2021, the April 2019 IEP, as amended, remained the operative IEP. As discussed in Issue 2A and 5, at the beginning of the 2020-2021 school year, Saugus Union students remained in a distance learning setting. In November 2020, Mountainview started integrating students back into on-campus learning beginning with the moderate severe special day classes. Parents were given the option of keeping their children in distance learning or returning to campus for some live instruction in combination with asynchronous learning. Parent decided to keep Student in distance learning during the 2020-2021 school year, so Student did not receive any live in-person instruction. Saugus Union delivered Student's

services online, including his specialized academic instruction which was provided in the form of direct instruction from his teacher and online assignments posted by his teacher for him to complete at home.

Special education teacher Baylee Gottfried was Student's second grade teacher during the 2020-2021 school year. Gottfried implemented the accommodations in Student's April 2019 IEP and the same three accommodations in the May 2020 IEP during distance learning during the 2020-2021 school year. At hearing, Gottfried explained what the accommodations could entail. Student did not persuasively rebut Gottfried's testimony that she implemented the three identical accommodations from the April 2019 IEP and May 2020 IEP during the 2020-2021 school year. Among other things, at the beginning of the school year, Gottfried prepared for Parent to pick up some behavioral supports, including visual boards so Student could have a visual schedule at home to anticipate which activities the classroom would be working on, as well as hands on crafts and school materials for him to color or doodle with at home. She was able to create an environment virtually where Student could participate with his peers by minimizing visual and auditory stimuli as well as creating virtual presentations that were engaging and appropriate for his accommodations. Although in the classroom Student's attention could be affected by too much auditory stimuli, Gottfried no longer saw distractions as an issue for Student during virtual learning because Student was receiving his instruction in the home. There was no persuasive evidence that Student was distracted in the home during virtual learning. With help from an adult in the home, Student was able to respond verbally to Gottfried's instruction, and participate by pointing or verbally responding to questions Gottfried asked throughout instruction. Student's ability to attend increased as the school year proceeded, and he

made notable progress in language arts. Based on her interactions with Student, Gottfried did not think Student needed additional accommodations in the distance learning format.

Gottfried made available to Parent materials for the coloring for implementation by whomever was assisting Student at home with his education. Gottfried did not personally implement the coloring accommodation added in the May 2020 IEP during distance learning. The coloring accommodation had been added to the May 2020 IEP because Gallo reported after giving Student time to color in the morning, Student was more awake and ready to participate. Student offered no persuasive evidence at hearing that Student was lethargic or otherwise required the coloring accommodation during the distance learning. In any event, as discussed in Issue 2A, the new coloring accommodation could have been implemented in person as of January 17, 2021, and the other three accommodations as of November 9, 2020, if Parent returned Student to campus for instruction. Parent's reasons for choosing not to return Student to campus where his accommodations could have been implemented in person were not sufficient to establish a basis for requiring Saugus Union to implement the accommodations in-person, face-to-face, at home.

Student presented no persuasive evidence, apart from the coloring accommodation, that proved Saugus Union did not implement Student's program accommodations during distance learning during the 2019-2020 and 2020-2021 school years. Student also failed to prove Saugus Union's failure to implement Student's coloring accommodation in-person, face-to-face was a procedural violation because it could have been implemented, as written, had Parent returned Student to campus during the 2020-2021 school year. In any event, Student did not prove that the failure

to implement the coloring accommodation was a material discrepancy between what the IEP required and what was provided as required by *Van Duyn*. (502 F.3d at p. 815.) Student did not establish that Saugus Union denied him a FAPE by failing to implement his IEP accommodations in-person, face-to-face.

ISSUE 1C(I): DID SAUGUS UNION DENY STUDENT A FAPE FROM THE MARCH 2020 SCHOOL CLOSURE UNTIL THE END OF THE 2019-2020 REGULAR SCHOOL YEAR BY FAILING TO DEVELOP ADEQUATE AND APPROPRIATELY WRITTEN GOALS FOR A DISTANCE LEARNING SETTING FOR THE PERIOD BETWEEN THE MARCH 2020 SCHOOL CLOSURE AND THE MAY 2020 IEP?

Student contends that from March 16, 2020, to May 4, 2020, Saugus Union did not rewrite to adjust or change any of Student's goals to adequately allow Student to reasonably access his education in a distance learning setting. Saugus Union contends that amending the goals during that period was not necessary, and to have rewritten goals for Saugus Union's three thousand students with IEPs was impossible.

Student's April 2019 IEP offered eight goals in the areas of verbal communication (LAS 1), augmentative alternative communication (LAS 2), social pragmatics (LAS 3), four academic goals (2020-1 [reading sight words], 2020-2 [writing], 2020-3 [math] and 2020-5 [reading]), and prevocational (2020-4) [toileting]. Although occupational therapist Clara Moon testified she also proposed a self-help [opening containers] goal as part of the April 2019 IEP, her testimony on this point was not reliable. First, Moon testified that one of Student's 2018 goals was a new proposed goal in the April 2019 IEP, which was not accurate. Moon's inaccurate testimony cast doubt on whether Moon's

memory about the goals proposed more than two years ago was reliable. Moreover, the weight of evidence established that the self-help goal was merely a draft because it was incomplete, and the notes to the April 2019 IEP mentioned each of the new goals proposed but did not mention this self-help [opening containers] goal. Further, the April 2019 IEP notes specifically stated that occupational therapy would attach to the writing goal, and the self-help goal was not included in the May 2020 IEP with the other April 2019 IEP goals where progress was reported. Thus, the self-help [opening containers] goal was not a goal that was adopted in the April 2019 IEP.

On November 24, 2019, Parent agreed to an amendment of the April 2019 IEP dated September 24, 2019. The IEP team amended Student's 2020-5 (reading site words) to remove his use of eye gaze or flapping.

On November 18, 2019, Parents agreed to an amendment of the April 9, 2019 IEP dated October 2, 2019, adding two speech goals. Thus, at the time of the COVID-19 school closure on March 16, 2021, Student had ten annual goals in the operative April 2019 IEP, as amended.

Student failed to prove that Saugus Union was required to amend his IEP between March 16 and May 4, 2020 because Saugus Union had ceased in-person learning and began instruction through distance learning. As discussed in Issue 1A above, on April 9, 2020, CDE issued guidance that not all IEPs needed to be amended to change to distance learning. The IEP that was in effect at the time of physical school closure remained in effect for students. (CDE, *Special Education Guidance for COVID-19*, *supra*, (April 9, 2020).)

Although the CDE guidance acknowledged there might be some instances where an amendment to an IEP might be necessary, the evidence did not establish that

amending Student's IEP was one of those instances for purposes of revising the goals. If Student's April 2019 IEP required modification, that revision could be accomplished at Student's annual May 2020 IEP team meeting.

Student did not prove that Saugus Union denied Student a FAPE by failing to develop adequate and appropriately written goals for a distance learning setting for the period between the March 2020 school closure and the May 2020 IEP.

ISSUE 1C(II): DID SAUGUS UNION DENY STUDENT A FAPE FROM THE MARCH 2020 SCHOOL CLOSURE UNTIL THE END OF THE 2019-2020 REGULAR SCHOOL YEAR BY FAILING TO DEVELOP ADEQUATE AND APPROPRIATELY WRITTEN GOALS FOR STUDENT FOR A DISTANCE LEARNING SETTING IN THE MAY 2020 IEP, OR ANY AMENDMENTS?

ISSUE 3E: DID SAUGUS UNION DENY STUDENT A FAPE DEVELOPING STUDENT'S MAY 2020 IEP BY FAILING TO OFFER ADEQUATE AND APPROPRIATELY WRITTEN GOALS IN THE MAY 2020 IEP?

Student contends in Issue 1C(II) that Saugus Union denied Student a FAPE between May 4, 2020, and the end of the 2019-2020 school year by failing to develop goals for a distance learning setting in the May 2020 IEP. Student contends in Issue 3E that Saugus Union failed to offer adequate or appropriate goals in a distance learning setting or in any school setting in the May 2020 IEP. Student also contends the goals were not adequate because they were not based on appropriate baselines or present levels of performance gathered for the development of the goals. Student also

contends none of the goals were appropriate because they were not written in a way that allowed a teacher or service provider to accurately collect and measure progress on the goals.

Saugus Union contends that it took into consideration the school closure and distance learning at the time of the May 2020 IEP in developing the goals, but no requirement existed that Saugus Union develop goals for a distance learning setting. Saugus Union argues that its intent and understanding at the time of the May 2020 IEP was that school would resume in the fall 2020 on campus in an in-person setting. Because there were not that many weeks of school left at the time of the IEP May 2020 IEP, it considered the virtual setting, but ultimately the IEP was written so it could be implemented in-person on campus. Saugus Union contends in Issue 3E, that the goals were appropriate for the in-person setting contemplated at time of the May 2020 IEP. Saugus Union contends that it included updated information to the extent it was available and addressed all Student's areas of unique need at the time of the May 2020 IEP team meeting apart from the speech and language goals. Saugus Union argues that because Parent did not sign the May 2020 IEP until January 2021, no new speech goals could have been implemented until then, so there was no denial of FAPE by failing to develop the goals until December 2020.

An annual IEP must contain a statement of measurable annual goals designed to: (1) meet the individual's needs that result from the individual's disability to enable the pupil to be involved in and make progress in the general curriculum; and (2) meet each of the pupil's other educational needs that result from the individual's disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); 34 C.F.R. § 300.320(a)(2)(i); Ed. Code, § 56345, subd. (a)(2).)

The purpose of goals is to permit the IEP team to determine whether the pupil is making progress in an area of need. (*Ibid.*; see also, 64 Fed. Reg. 12,471 (1999).) In developing the IEP, the IEP team shall consider the strengths of the child, the concerns of the parents for enhancing the education of their child, the results of the initial evaluation or most recent evaluation of the child and the academic, functional, and developmental needs of the child. (20 U.S.C. § 1414(d)(3)(A).) For each area in which a special education student has an identified need, the IEP team must develop measurable annual goals that are based upon the child's present levels of academic achievement and functional performance, and which the child has a reasonable chance of attaining within a year. (Ed. Code, § 56345; *Letter to Butler* (OSERS March 25, 1998) 213 IDELR 118.)

The IEP team need not draft IEP goals in a manner that the parents find optimal, as long as the goals are objectively measurable. (*Bridges ex rel. F.B. v. Spartanburg County School Dist. Two* (D.S.C., Sept. 2, 2011, No. 7:10-cv-01873-JMC) 2011 WL 3882850, at \*6.)

## THE GOALS OFFERED AT THE MAY 2020 IEP

The May 4, 2020 IEP identified Student's areas of need as preacademic, prevocational, self-help, fine motor, and communication. The offer of special education and related services contained six new goals, specifically:

- Language Arts 1 (comprehension),
- Mathematics 1 (counting with cardinality),
- Prevocational 1 (routine),
- Self-Help 1 (hand washing),
- Self-Help 2 (Toileting), and



- Social Emotional 1 (parallel play).

Student's language arts comprehension goal (Language Arts 1) required Student by May 2021 to answer a "Wh-" question verbally or with his device after being read an excerpt of two or three sentence from a short story in three out of five trials across five consecutive school days as measured by data collection and teacher observation. The IEP team revised this goal by the December 2020 IEP amendment, but the revision did not materially change the comprehension goal proposed in the May 2020 IEP.

The purpose of Student's comprehension goal was to address his inability to comprehend what he was reading. The goal was appropriate at the time of the May 2020 IEP because when Student was asked questions about what was read to him, he was unsure of the answers. Gallo claimed she created this goal with distance learning in mind and that it could have been worked on in a virtual setting, but Student did not log onto the social emotional online live sessions with Gallo available to him during the end of the 2019-2020 school year. Gottfried, Student's second grade special day class teacher, corroborated that this goal could be implemented in distance learning because she was able to implement this goal during the 2020-2021 school year.

Parent's testimony that there was no online live instruction after the campus closure was not persuasive in establishing that this comprehension goal could not have been implemented during online social emotional live instruction. Parent admitted to having a flawed recollection of events during this period. Parent also admitted Gallo could have conducted Zoom sessions other than the two Parent recalled Student attending with Gallo. Student's private behavior analyst observed Student twice during live distance learning with Student's special day class teacher. Occupational therapist

Runolfsdottir also corroborated that Gallo had online live sessions. Runolfsdottir joined Gallo's online live classroom a few times during this period, but Student was not always present.

Student's Mathematics 1 goal required him by May 2021 to count out a certain number of objects when asked for some of the objects in a pile of 10 in three out of five trials across five consecutive school days as measured by data collection and teacher observation. Student had not met his prior math goal from April 2019 which required him to calculate sums when presented with five simple addition problems. As of November 8, 2019, Student could only do that calculation in one of five opportunities when given three or four prompts. According to Gallo, whose opinion was not rebutted, the May 2020 proposed Mathematics 1 goal was appropriate because although Student was able to rote count with one-to-one correspondence, he could not count with cardinality and counting with cardinality was the next step after counting with one-to-one correspondence. Although Gallo claimed she wrote this goal for distance learning, her testimony was contradicted by Gottfried. Gottfried admitted that the IEP team revised the Mathematics 1 goal at the December 2020 IEP amendment team meeting so that it could be implemented in virtual setting.

Student's Prevocational 1 routine goal required him by May 2021 to take off his backpack, place it on the floor or table unzip it and remove the contents at the beginning of the day in four out of five opportunities as measured by teacher observation and/or data collection. The baseline stated that Student "currently drops his backpack when he comes into the classroom and required direct verbal prompts to participate in each step of the unpacking routine." Gallo opined that this was an appropriate goal based her conversations with Parent prior to the IEP, that Student

often just let his stuff fall to the floor when he walked in the door and Parent wanted Student to work on this goal at home so he could learn to be responsible for objects. Gallo testified she contemplated this was a goal that Student could work on in a distance learning setting and the skill then generalized to a classroom setting. However, Gallo did not explain how this goal could be implemented, as written, in the home setting. Gottfried's testimony established that the goal could not be implemented in a distance learning setting.

Student's Self-Help 1 hand washing goal required Student by May 2021 to participate in a hand washing routine after toileting with no more than four gestural prompts in four out of five opportunities weekly as measured by classroom teacher observation. Gallo opined that this goal was appropriate because when completing hand washing routine, Student still needed direct verbal instructions and gestures to complete the routine and Gallo wanted Student to build independence in hand washing. According to Gallo, this goal could be transitioned into a distance learning setting, and later the classroom, because Student could work on it at home whenever he toileted, and she provided instructions to Parents in Google Classroom on how that could be carried out. However, Gottfried's testimony established that the goal could not be implemented in a distance learning setting.

Student's Self-Help 2 toileting goal required him by May 2021, to push his pants down independently and pull them up with minimal assistance (e.g., adjusting bunched up clothing, placing Student's hands on his waistband, etc.) for four of five consecutive days. Gallo explained at hearing, and as the baseline reflected, Student was able to push his pants down, but needed moderate to maximum assistance pulling up his pants, and she wanted to encourage his independence. As with the hand washing goal, Gallo

claimed this could transition from a classroom into a distance learning setting, but Gottfried's testimony established that the goal could not be implemented in a distance learning setting.

Student's Social Emotional 1 parallel play goal required him by May 2021, during a structured cooperative plan opportunity, to engage in parallel play with peers for at least five minutes given no more than two verbal prompts in a five-minute period in three out of five opportunities as measured by the classroom teacher. Gallo explained at hearing that this was an appropriate goal in the classroom because she wanted Student to sit and play around others. Student often wandered away from spaces when peers were playing with toys, and he did not want to play with them. Gallo agreed that this was not a goal that could be transitioned to a distance learning setting and Gottfried corroborated this.

## SAUGUS UNION DENIED STUDENT A FAPE

A failure to offer an appropriate goal is a procedural violation of the IDEA. A procedural violation results in a denial of a FAPE only if the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a); Ed. Code, § 56505, subd. (f)(2); *W.G. v. Board of Trustees of Target Range School Dist. No. 23 Missoula, Mont.*, 960 F.2d 1479, 1484, *superseded in part by statute on other grounds* ["...procedural inadequacies that result in the loss of educational opportunity, [citation], or seriously infringe the parents' opportunity to participate in the IEP formulation process, [citations], clearly result in the denial of a FAPE."].) Not every procedural violation is sufficient to support a finding that

a student was denied a FAPE. Mere technical violations will not render an IEP invalid. (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 892.)

#### ACADEMIC/PREVOCATIONAL/SELF-HELP GOALS

The weight of evidence established that at the time of the May 4, 2020 IEP, Saugus Union did not know that its campuses would remain closed until sometime in the fall 2020. Saugus Union wrote the May 2020 IEP goals so they could be implemented on campus in fall 2020. However, Saugus Union also knew at the time of the May 2020 IEP Student would likely continue in distance learning through the end of the 2019-2020 school year and it was also contemplating distance learning through the extended 2019-2020 school year. Of the six goals offered at the May 2020 IEP, only one of them, the comprehension goal, could be implemented in distance learning. Saugus Union should have offered Students' other goals so that they could have been implemented in the distance learning setting for the period between May 4, 2020 through the end of the 2019-2020 school year. The failure to offer goals in those other areas which could be implemented in distance learning for the balance of the 2019-2020 school year was a procedural violation of the IDEA.

Saugus Union's failure to offer goals appropriate for distance learning in the May 2020 IEP for the balance of the 2019-2020 school year impeded Student's right to a FAPE. It was not until December 18, 2020, Saugus Union convened a new IEP and developed any other goals that could be worked on in the distance learning setting. Thus, Student only had one May 2020 IEP goal, in reading comprehension, that was appropriate for distance learning between May 4 and December 2020. The failure to

offer goals in all of Student's other areas of need appropriate for the distance learning setting denied Student the opportunity to work on goals in those areas and chart his progress.

Apart from the toileting goal, Student did not otherwise establish that the goals proposed in the May 2020 IEP were inappropriate. On its face, the toileting goal was not objectively measurable and failed to include appropriate objective criteria and evaluation procedures to measure progress. Student was required to push his pants down independently and pull them up "with minimal assistance (e.g. adjusting bunched up clothing, placing [Student's] hands on waistband, etc.)." As written, the toileting goal did not provide an objective, exhaustive and clear definition of "minimum" sufficient to measure Student's progress. The failure to offer an objectively measurable toileting goal was a procedural violation; however, there was no persuasive evidence that this violation significantly impeded Parent's opportunity to participate in the decision making process, caused a deprivation of educational benefits or impeded Student's right to a FAPE.

Saugus Union denied Student a FAPE in developing Student's May 2020, IEP by failing to offer adequate and appropriate prevocational, preacademic and self-help goals for the distance learning setting. Student did not otherwise prove that any of Student's prevocational, preacademic and self-help goals were inappropriate except the toileting goal, but Student did not prove that the inadequate toileting goal denied him a FAPE. Student's remedies are discussed below.

## SPEECH AND LANGUAGE GOALS

Communication was an area of need identified in Student's May 2020 IEP. Despite this, Saugus Union offered Student no speech goals in the May 2020 IEP for any setting. To defend the failure to offer speech goals to Student, Gallo testified that the new goals proposed at the May 2020 IEP addressed all of Student's areas of unique educational need as related to the classroom setting. Gallo's testimony was unpersuasive. No witness, including Gallo, explained how any of the six goals proposed in the May 2020 IEP addressed Student's significant communication deficits. Moreover, speech pathologist Sangren admitted she developed no speech goals at the May 2020 IEP because she lacked the necessary information to do so. Saugus Union was required to offer goals addressing Student's speech and language deficits. The failure to offer any speech goals in the May 2020 IEP was a procedural violation of the IDEA.

Here, the failure to offer speech goals impeded Student's right to a FAPE and deprived him of education benefits. As discussed in 3B below, it was not until December 2020 that Saugus Union convened a new IEP team meeting and developed four new speech goals in the areas of expressive and receptive language. Student continued working on Student's old goals between May 4 and December 18, 2020, some of which Sangren admitted were inappropriate because Student had become more verbal, and his development was beyond those 2019 goals. Sangren claimed at hearing that she worked with Student on the next logical steps and opined that for the most part, the old goals were appropriate. However, Sangren's testimony was not persuasive in rebutting the weight of evidence establishing that Saugus Union's failure to offer new speech goals impeded Student's right to a FAPE and deprived him of educational benefit. Not only was Sangren's testimony was not specific enough, but the documentary evidence indicated that some of the old speech goals had not been worked on during distance

learning since March 16, 2020. Because Student had significant speech and language deficits at the time of the May 4, 2020 IEP, the failure to offer new speech goals denied Student the opportunity to work on definitive receptive and expressive language skills on which Student's progress could be tracked for at least six months.

Saugus Union denied Student a FAPE in developing Student's May 2020, IEP by failing to offer speech goals for any setting. Student's remedies are discussed below.

### FINE MOTOR GOALS

Fine motor was an identified area of need in Student's May 2020 IEP. Despite this, Saugus Union offered no new goal for any setting addressing the area of fine motor skills, specifically writing. Again, although Gallo testified that new goals proposed at the May 2020 IEP addressed all of Student's areas of unique educational need Gallo did not explain how any of the proposed goals addressed Student's fine motor needs. Moreover, occupational therapist Runolfsdottir admitted at hearing that Student had fine motor needs, but she did not recommend any occupational therapy goals in the May 2020 IEP. Runolfsdottir explained she did not recommend any goals because there were no specific activities that required an occupational therapist to intervene, and the classroom teacher could address Student's needs. Runolfsdottir's testimony demonstrated a profound misunderstanding of the purpose of IEP goals, to permit the IEP team to determine whether the pupil is making progress in an area of need. (Ed. Code, § 56345.) Without a fine motor goal, Student's May 2020 IEP lacked any objective and measurable way to determine if Student was making progress in the areas of fine motor skills. Saugus Union was required to offer a goal addressing Student's fine motor deficits. The failure to offer a fine motor goal was a procedural violation of the IDEA.



Here, the failure to offer a fine motor goal, impeded Student's right to a FAPE and significantly impeded the parent's opportunity to participate in the decisionmaking process. As discussed in Issue 3B below, Student did not meet his writing goal from the April 2019 IEP, as amended. In fact, based on the progress reported by Saugus Union in the May 2020 IEP, Student's progress in writing stymied in November 2019, failing to make any progress on his writing goal after that time. Student's progress in fine motor could not be formally tracked if there were no specific fine motor goals. The failure to offer any goal in the area of fine motor denied Student the opportunity to work on his fine motor skills in a way that they could be objectively measured, which in turn, denied Parent the objective information necessary to effectively participate in the IEP process regarding Student's fine motor skills.

Saugus Union denied Student a FAPE in developing Student's May 2020 IEP by failing to offer any fine motor goals in that IEP for any setting. Student's remedies are discussed below.

## ISSUE 2A: DID SAUGUS UNION DENY STUDENT A FAPE FROM THE START OF THE 2020-2021 SCHOOL YEAR TO THE FILING OF THE DUE PROCESS COMPLAINT BY FAILING TO OFFER OR IMPLEMENT THE SERVICES IN THE IEP, IN-PERSON, FACE-TO-FACE?

Student contends that Saugus Union did not offer, make available or implement the services in Student's operative IEPs in-person face-to-face during the 2020-2021 school year and that the failure to do so was a material failure, which denied Student a FAPE. Student contends that Saugus Union was not precluded from offering in-person services in the 2020-2021 school year. Student also claims his operative IEP, which he

argues was the May 2020 IEP because it was being implemented, was intended to be implemented in person. Student claims that he struggled to access his education during distance learning, and he would have been more productive if he had been provided in-person instruction which could have been provided by a nonpublic agency. Student argues that Parent requested additional support in the home and that Saugus Union failed to provide additional accommodations or supports to make up for the lack of in-person assistance. Student claims that although Saugus Union made in-person instruction available in November 2020 if Student wore a mask, Student was unable wear a mask. Student also contends Saugus Union offered the alternative of having Student sit in a separate classroom with an aide without a mask isolated from his peers, but that proposal was unacceptable. As a result, Student claims Parent was forced to hire an in-person assistant at home.

Saugus Union contends that Student failed to meet his burden of proof. Education Code section 43503 authorized distance learning as the result of an order or guideline from a state or local public official. It claims that based on Education Code section 43500, a student services could be implemented through synchronous and asynchronous instruction provided virtually as long as the student could access and benefit from virtual instruction, and Student did not prove he was unable to benefit from virtual instruction. It claims that nothing in Student's April 2019 IEP, as amended, or the May 2020 IEP required implementation in person in his home and Parent never requested such services. Saugus Union contends it offered Student the option of returning to in-person learning in November 2020 through the end of the 2020-2021 school year, but Parent opted to keep Student at home in distance learning because she had concerns about Student's ability to wear a mask. Saugus Union argues that in-person services at home were not required for Student to receive educational benefit.

Senate Bill No. 98, adding and amending numerous Education Code sections in response to the COVID-19 pandemic, became law on June 29, 2020, and went into effective immediately. It added Education Code 43503 to authorize distance learning for the 2020-2021 school year at the local educational or school-wide level as the result of an order or guideline from a state or local public health official, or to an individual pupil who was medically fragile, who would be put at risk by in-person instruction, or who was self-quarantining because of exposure to COVID-19. (Ed. Code, § 43503, subd. (a)(2).)

Section 43500 defined “distance learning” generally as instruction in which the pupil and instructor were in different locations, to include computer, video, audio, and written instruction. Section 43503 provided that distance learning should include computer access, grade-level content, and academic supports. It should also include daily live interaction with certificated employees and peers for instructional purposes, that might take the form of internet or telephonic communication, or other means permissible under public health orders if feasible. These provisions were generally applicable to all public education beginning June 29, 2020.

Pertaining specifically to special education, Section 43503, subdivision (b), stated that distance learning shall include “special education, related services, and any other services required by a pupil’s individualized education program ... with accommodations necessary to ensure that individualized education program can be executed in a distance learning environment.”

For the reasons discussed below, Student failed to prove Saugus Union denied Student a FAPE by failing to offer or implement Student’s IEP services in-person, face-to-face, during the 2020-2021 school year.

At the beginning of the 2020-2021 school year, Saugus Union campuses remained closed to students. Saugus Union provided district-wide, instruction and services through distance learning with some exceptions made for certain students with particularized needs which were not fully established at hearing. As discussed in Issue 5 below, for students in second grade, Saugus Union provided 230 daily minutes of a combination of online live instruction and asynchronous work. Student also continued to receive online speech and language services during the 2020-2021 school year.

During the 2020-2021 school year, Saugus Union was required to comply with Los Angeles County Department of Public Health recommendations for reopening its campuses. Saugus was required to have written plans for implementing safety procedures when bringing students back to campus during the 2020-2021 school year which had to be approved by the Los Angeles County Department of Public Health. Beginning in September 2020, the Los Angeles County Department of Public Health conducted physical inspections of Saugus Union's provision of individual and/or small group instruction to students. The Los Angeles County Department of Public Health provided recommendations or requirements for Saugus Union's compliance with safety protocols. After each visit, the Los Angeles County Department of Public Health made a physical report with the list of the items that needed improvement to be compliant with existing safety requirements.

Saugus Union began a phased reopening of its schools, bringing back to campus a limited number of students for a limited amount of time in fall 2020 based on the approval of the Los Angeles County Department of Public Health. Saugus Union reopened Mountainview on November 9, 2020. Special day class students in the moderate severe program were permitted to return first, because they were the students with the highest need. Students received a combination of some direct live instruction

and online instruction. The first week students received 1.5 hours of in-person instruction four days a week and the rest of their daily instructional minutes online. The second week students were provided with 2.5 hours of in-person instruction four days a week and the rest of their daily instruction online. In the third week students received four hours of in-person instruction per day for four days a week, which continued through Spring 2021. At that point, all students who returned to campus received 4.5 hours of instruction five days a week. Up until spring 2021, instruction on Wednesdays was only provided online.

Saugus Union also resumed on-campus IEP speech services when students returned to Mountainview in November 2020. At first, Sangren streamed into the special day classes on a large flat panel for group sessions, and students received in-person assistance from an adult in the classroom. In January 2021, Sangren began providing group services in person in the classroom. Initially, the individual sessions remained mostly online for the students who had returned to campus, but Sangren gradually began to provide in-person services within the classroom or in a designated area outside of the classroom as more children returned to school. Sangren was delivering all individual speech sessions in person by the end of the school year for those special day class students who had returned to campus.

**BETWEEN AUGUST AND NOVEMBER 9, 2020, SAUGUS UNION WAS NOT  
REQUIRED TO OFFER OR IMPLEMENT STUDENT'S IEP SERVICES  
IN-PERSON, FACE-TO-FACE.**

Student's contention that the May 2020 IEP was the operative IEP prior to January 2021 is without merit. Parent did not consent to the May 2020 IEP until January 17,

2021. Therefore, Saugus Union was not required to implement it until January 21, 2021. (Ed. Code, § 56346.) The April 2019 IEP as amended, was the operative IEP through January 17, 2021.

As discussed in Issue 1A, Student failed to prove that Saugus Union was required to implement the April 2019 IEP, as amended, in-person face-to-face during the 2019-2020 school year. Likewise, Student points to nothing in the April 2019 IEP, as amended, which required its implementation in-person, face-to-face, during the 2020-2021 school year.

In addition, Student failed to prove that Saugus Union was not permitted to provide Student with distance learning while its campuses remained closed during the 2020-2021 school year. Specifically, Student failed to produce any persuasive evidence or cite to any persuasive authority that Saugus Union was not authorized to provide distance learning to Student during the 2020-2021 school year. Student did not prove that Saugus Union's distance learning program was not the result of an order or guidance from a state public health officer or a local public health officer. In fact, the weight of evidence demonstrated the opposite was true. Michelle Barries was a Saugus Union administrator responsible for compliance with Senate Bill 98 and returning students back to campus based on Los Angeles County Department of Public Health protocols. She testified that Saugus Union was regulated by the Los Angeles County Department of Public Health in terms of what Saugus Union was permitted to do as it pertained to COVID-19 in allowing students back on campus. Barries' testimony was corroborated by Quinn, Saugus Union Coordinator of Student Support Services, Mountainview Principal Demsher, and speech language pathologist Sangren.

The evidence did not establish that Student was struggling to access his education during distance learning between the beginning of the 2020-2021 school year and November 9, 2020. Student's behavior analyst Melissa DeConza admitted at hearing that Student was making progress once the 2020-2021 school year began. At the December 2020 IEP amendment meeting, Parents reported that Student was doing "really well with speaking verbally," and they wanted to remove his communication device from Student's IEP. Second grade special education teacher Gottfried confirmed that Student accessed virtual instruction with the support of his private providers in the home, and that Student could respond verbally to Gottfried's instruction and participate by pointing or verbally responding throughout instruction. Gottfried did not see any difficulties or behaviors by Student which interfered with Student's accessing his instruction during distance learning. By the end of the school year, Student met six of his 11 goals, including three of four speech goals.

Student did not demonstrate that he required Saugus Union to provide in-person services in the home at any point prior to November 9, 2020. As discussed in Issue 1A, there was no persuasive evidence that Parent ever requested in-person services from Saugus Union. Parent's testimony on this point was unconvincing. Although Gottfried testified Parent told her Student was not able to attend online sessions unless he had an adult with him because Parent had a baby at home, Student failed to establish when Parent made this statement or that this was a request to Saugus Union for in-home services. This is consistent with the level of support Student already had in the home. During the 2020-2021 school year, beginning in October 2020 Student was receiving regional center hours at no cost to Parents six to eight hours a day, Mondays through Fridays. Student also continued to receive 108 hours per month of private behavior therapy through Parents' private insurance from the beginning of the 2020-2021 school

year through March 2021, most of which was provided in the home. After March 2021, the private behavior therapy was reduced to 80 or 90 hours a month which was mostly provided in the home. Both the regional center and behavior providers assisted Student with his schoolwork.

Student did not prove that Saugus Union was required to implement or offer Student in-person services earlier than November 9, 2020, for the 2020-2021 school year.

### SAUGUS UNION OFFERED TO IMPLEMENT STUDENT'S IEP SERVICES IN-PERSON BEGINNING ON NOVEMBER 9, 2020.

In October 2020, Saugus Union offered to implement Student's services in the amended April 2019 IEP on campus when it opened the Mountainview campus to special day class students beginning on November 9, 2020.

In accordance with the Los Angeles County Department of Public Health requirements, for the 2020-2021 school year Saugus Union instituted a mask policy which required all students to wear a mask at all times, whether indoors or outdoors while on campus around other students. If a student was unable to wear a mask for whatever reason, students were not required to wear a mask to return to campus. However, in that event, students were required to receive their instruction in a separate space by themselves with an adult who wore personal protective equipment where they had access to their teacher through technology. The Los Angeles County Department of Public Health guidance at that time provided that if a person needed to be closer than six feet to a student appropriate personal protective equipment needed to be worn. Saugus Union set up several of these separate areas around campus, both indoors and outdoors. At Mountainview, desks were set up outside so that students could keep



working without their masks. Saugus Union also had the library set up as a classroom with air conditioning, the lunch tables outside in the shade in the lunch pavilion, and in the multi-purpose room with desks and dividers as separate spaces so students could do their work without a mask. In these separate locations, the teacher provided the instruction with assistance of the aide. In this format, some teachers did in-person instruction at the same time as virtual instruction in the separate spaces and some students had a flat panel so they could see their whole class. The school district's mask wearing policy did not change during the 2020-2021 school year.

Parent chose to have Student remain in distance learning rather than return to campus. The only evidence offered as to the reasons why Parent made this choice to keep Student at home was Parent believed Student would not wear a mask and she did not want Student to feel uncomfortable seeing his peers go into the classroom while he was being told to go somewhere else. Also, Parent could not visit the separate location where Student would receive his separate instruction and Parent was afraid Student would be unable to tell anyone if he was hot or cold. None of these reasons required Saugus Union to offer or implement Student's services in person in the home setting.

Student did not prove he could not wear a mask or a mask alternative. At hearing, Parent claimed Student did not understand why or when a mask was required and how to wear it, and that he just pulled it off. Saugus Union personnel told parents prior to returning to campus in November 2020 that staff would practice wearing masks with students during their online sessions and continue to work with students that struggled wearing masks. Parent did not allow Student to assess this instruction.

Student's second grade special day class teacher Gottfried worked with her students online and after they returned to the classroom by watching videos, reading

books, modeling, and positive reinforcement. Student was present online when Gottfried was working on mask wearing with students, but he did not participate because the adult at home with him at the time would not offer Student a mask. If a student in Gottfried's class struggled after returning to campus, she used visual cues, frequent breaks, and reinforcement to systematically build up the student's ability to wear a mask, with mask breaks when needed. Gottfried implemented mask breaks when students communicated or showed signs of needing a break. Gottfried had no students who were not able to stay in her classroom due to the inability to wear mask in the classroom.

Principal Demsher's testimony was compelling on this point. She testified that training to wear a mask was like anything else. Demsher explained that some children had difficulty wearing their shoes, so staff worked with those students to help them learn to wear shoes because, like masks, shoes were a safety concern. At Mountainview, some special day class children who returned to campus for in-person instruction had difficulty wearing a mask initially and needed time and training in the beginning to understand when to wear a mask. These students were provided with icons and symbols to help them learn when to put the mask on, and they worked with the behaviorist, teachers and paraeducators. Ultimately, some students occasionally needed mask breaks, but there were no students who could not remain in in-person learning because they could not wear a mask.

Several district witnesses spoke to Parent about the mask wearing policy during the 2020-2021 school year to offer assurances or alternatives to Parent. At the beginning of the school year, Parent called Quinn, Coordinator of Student Support Services, because Parent had concerns about Student not being able to wear a mask and being separated from his peers. Quinn explained that Student could come back to

school and what mask wearing would look like for Student, including building up his tolerance to wear a mask so he could be in the classroom with his peers.

On December 18, 2020, Saugus Union held an IEP amendment team meeting to revise and add new goals and discuss Student's return to campus. Parents shared that Student "was doing really well with speaking verbally and they would like to remove the AAC device from [Student's] IEP." The team discussed the possibility of Student returning to in-person instruction after winter break. The IEP notes reflect that Student was unable to wear a traditional mask, so Parents were concerned that he would be isolated outside or in other areas if he was not wearing a mask. Parents were shown some different options rather than a traditional mask. Some members of the IEP team suggested having Student come for just one hour at first instead of the full four hours and various flexible options such as mask breaks, transition to the classroom with preferred items, depending on how he was handling wearing the mask alternative. Parents stated they would reconsider Student coming to class in person.

Demsher explained at hearing that she had offered Parents the option of a shield that could be on a hat or visor with an added drape, instead of a mask. Parents took home a sample in December 2020. Student presented no persuasive evidence at hearing proving this option did not work for Student. Demsher also spoke to Parent about the alternative locations available for students, and that students would be offered "mask breaks," permitting them to go outside, weather permitting. Quinn explained at hearing that she had at some point proposed to Parent a shorter period for Student to be on campus to try wearing a mask and building up his tolerance because Parent was concerned with Student being on campus for three hours.

In May 2021, Parent told Demsher they would bring Student back to campus, but then Parent changed her mind and decided to wait to see if the mask mandate would be lifted after June 15, 2021.

Student's private behavior analyst DeConza testified about Student's ability to wear a mask. Her testimony was unconvincing on this point for many of the same reasons discussed in Issue 4. She claimed Student could only wear a mask for about 15 to 30 seconds and a shield for about 45 seconds, but she admitted that her team did not heavily work on mask wearing tolerance as part of Student's private behavior program. When asked if she personally worked with Student on mask wearing, she said yes, and explained by stating she had to "demonstrate with my staff how we were working on it" with Student. That explanation did not establish that DeConza ever worked with Student on mask wearing. DeConza's demeanor and the immediate manner in which she answered some of the questions made her testimony appear unreliable. She did not adequately establish the basis of her statements as to how long Student could wear a mask or shield. Student offered no persuasive evidence that anyone ever really worked with Student to build up his mask tolerance.

While it is understandable that Parent might want to personally visit the campus locations Student would be seated with an adult while receiving his instruction without a mask, Student offered no convincing evidence why this was necessary or how Parent's inability to see the location required the school district to provide an adult in the home to implement his services. Although Student had communication issues, the evidence established that he would always have an adult with him while at school to ensure his health and safety. Moreover, Student offered no evidence that Student would ever see his peers going into a separate class or that it would bother him. Parent's anxiety about

the possibility Student might be uncomfortable seeing his peers walk into another classroom without him did not require Saugus Union to offer or deliver his IEP services in-person, face-to-face, at home.

Finally, Parent's position was incongruent. On the one hand, Parent did not want Student isolated with an in-person adult away from his peers while on campus, but on the other hand, Parent claims Student was entitled to in-person adult support in the home. In-person adult support in the home would have meant that Student would have been isolated with an in-person adult away from his peers in his home without any of opportunities for social interaction that the physical campus might provide. Student failed to offer any evidence to explain this significant inconsistency. Student did not prove that Saugus Union's separate classroom alternative if Student was unable to wear a mask in the classroom was inappropriate.

Thus, the evidence demonstrated that Saugus Union made available and offered to implement Student's April 2019 IEP, as amended, and his May 2020 IEP in-person on campus. Nothing about Saugus Union's mask policy prevented Student from returning to campus for in-person learning during the 2020-2021 school year. Saugus Union accommodated students who could not wear masks by developing additional locations so students could participate in person with peers in the classroom when they could wear a mask, but also participate in a separate location on campus with adult support if they could not wear a mask. Parent chose to keep Student at home.

Student did not establish by a preponderance of the evidence that Saugus Union denied Student a FAPE by failing to offer or implement the services in Student's IEPs in-person, face-to-face during the 2020-2021 school year through the filing of the complaint.

ISSUE 3A: DID SAUGUS UNION DENY STUDENT A FAPE DEVELOPING STUDENT'S MAY 2020 IEP BY FAILING TO CONDUCT ANY FORMAL ASSESSMENT OF STUDENT BEFORE THE IEP TEAM MEETING ON MAY 4, 2020?

Student contends as a condition of switching Student to distance learning in March 2020, Saugus Union was required to conduct formal assessments prior to the May 4, 2020 IEP team meeting to ensure the IEP developed on May 4, 2020 offered Student a FAPE. Specifically, Student contends a new set of formal assessments was required in the areas of speech and language and occupational therapy, behavior and academics before the May 4, 2020 IEP team meeting. Student also claimed a distance learning assessment should have been conducted.

Saugus Union contends that nothing about the school closure required it to conduct formal assessments of Student, and that Student's triennial assessments were not due until April 2022. Saugus Union also contends there was no evidence demonstrating new assessments were necessary as it had enough information to develop an appropriate IEP. It argues that there were no formal assessments that specifically assessed a student's ability access and benefit from distance learning, even if the school district had wanted to conduct such an assessment. Saugus Union claims that it would have been impossible for Saugus Union to have reevaluated all the special education students at the onset of the pandemic, and that California instituted a waiver for conducting in-person assessments.

To determine the contents of an IEP, a student eligible for special education under the IDEA must be assessed in all areas related to the student's suspected

disability. (20 U.S.C. § 1414 (a)(2) & (3); Ed. Code, § 56320.) School district evaluations of students eligible for special education under the IDEA help IEP teams identify the special education and related services the student requires. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. § 300.324(a)(1); Ed. Code, § 56341.1.) The term “assessment” used in the California Education Code has the same meaning as the term evaluation in the IDEA. (Ed. Code, § 56302.5.)

The IDEA provides for reevaluations, referred to as reassessments in California law, to be conducted not more frequently than once a year unless the parent and school district agree otherwise, but at least once every three years unless the parent and school district agree that a reevaluation is not necessary. (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).) A reassessment must be conducted if the school district determines that the educational or related services needs, including improved academic achievement and functional performance, of the student warrant a reassessment, or if the pupil’s parents or teacher requests a reassessment. (20 U.S.C. § 1414(a)(2)(A); 34 C.F.R. § 300.303(a); Ed. Code, § 56381, subd. (a)(1).)

Reassessment generally requires parental consent. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (f)(1).) To start the process of obtaining parental consent for a reassessment, the school district must provide proper notice to the student and his or her parents. (20 U.S.C. §§ 1414(b)(1), 1415(b)(3) & (c)(1); Ed. Code, § 56321, subd. (a).) When a student is referred for assessment, the school district must provide the student’s parent with a written proposed assessment plan within 15 days of the referral (with limited exceptions not applicable in this case), not counting days between the pupil’s regular school sessions or terms or days of school vacation in excess of five school days from the date of the receipt of the referral. (Ed. Code, §§ 56043, subd. (a), 56321, subd. (a).) The notice consists of the proposed assessment plan and a copy of parental rights

and procedural safeguards under the IDEA and companion state law. (Ed. Code, § 56321, subd. (a).) The school district must give the parent 15 days to review, sign, and return the proposed assessment plan. (Ed. Code, §§ 56043, subd. (b), 56321, subd. (c)(4).) The school district has 60 days from the date it receives the parent's written consent for assessment, excluding vacation and days when school is not in session, to complete the assessments and develop an IEP, unless the parent agrees in writing to an extension. (20 U.S.C. § 1414(a)(1)(C); Ed. Code, §§ 56043, subds. (c) & (f), 56302.1, subd. (a).)

Here, Student failed to prove that Saugus Union was required to conduct any formal assessments of Student between the school closure on March 16, 2020 and the May 4, 2020 IEP team meeting.

Based on the notes to the April 9, 2019 IEP and other evidence at hearing, Saugus Union conducted Student's triennial assessments before the April 9, 2019 IEP team meeting. At that time, Saugus Union conducted and reviewed at the April 2019 IEP team meeting assessments in the areas of psychoeducation, including environment learning support, speech and language, occupational therapy, as well the evaluation conducted by the special education teacher designed for children on the autism spectrum to assess developmental disabilities and measure maladaptive behaviors. The Saugus Union nurse also shared information with the IEP team from Student's Health Care Plan for seizures.

Having conducted triennial assessments for the April 2019 IEP, Saugus Union was not required to reassess Student for another three years, until April 2022, except if Saugus Union determined reevaluation was warranted, or Parent's requested



reassessment. Other than the environmental learning support assessment, Student offered no evidence establishing Saugus Union determined Student required reassessment prior to the May 4, 2020 IEP.

Student had environmental learning support in the form of a one-to-one aide since at least February 2019. Saugus Union performed environmental learning support evaluations on an annual basis for students with environmental learning support in their IEPs. An environmental learning support assessment more thoroughly examined whether a student needed additional support during the school day, which could range from additional adult support to additional accommodations.

An assessment plan for an environmental learning support evaluation was provided to Parents before March 16, 2020 so that an assessment could be conducted and reviewed at Student's annual IEP. Parent did not sign and return the assessment plan prior to the March 16, 2020 school closure, or the before the May 4, 2020 annual IEP team meeting. Student presented no evidence at hearing establishing that Parent signed the assessment plan and returned it to the school district. Parent's response to the question at hearing whether she had requested any assessments after March 2020 was consistent with the preponderance of evidence which established Parent never returned the assessment plan to Saugus Union. That other evidence included the May 4, 2020 IEP team meeting notes, which documented Parent had not returned the assessment plan, and the corroborating testimony of special education teacher Gallo and school psychologist Dana Guterman. Thus, Saugus Union was not required to conduct the environmental learning support assessment prior to the May 2020 IEP team meeting.

Student offered no evidence establishing that Parents requested reassessment prior to the May 2020 IEP team meeting. At hearing, Parent admitted that other than the contemplated environmental learning support assessment proposed by Saugus Union, Parent could not recall asking for any assessments between March 2020 and the filing of the due process complaint. In fact, the only evidence that Parent requested an assessment prior to the May 4, 2020 IEP was contained in the September 2019 IEP amendment notes. The IEP notes document a conversation with Parent regarding assessments. Parents requested at that meeting an occupational therapy assessment, but the IEP team agreed Saugus Union would not reassess Student because he had just been assessed in April 2019. Parent agreed to the contents of the amendment IEP, which included the notes, without noting any exception, on November 18, 2019. Accordingly, Saugus Union was not required to conduct an occupational therapy assessment prior to May 4, 2020 because Parent had no pending request for an occupational therapy assessment at that time.

Even if Saugus Union had determined that an assessment was necessary or Parents had requested an assessment at the beginning of the school closure on March 16, 2020, Saugus Union would not have been required to conduct formal evaluations of Student before the May 4, 2020 IEP team meeting. The legal timelines would not have compelled Saugus Union to complete the assessments and hold the IEP team meeting to review the assessments until, at the earliest, 60 days from the date it received Parent's written consent for assessments, excluding vacation and days when school was not in session. (*Ibid.*) Here, that 60-day deadline would have been well after May 4, 2020.

In addition, Senate Bill 117, enacted into law on March 17, 2020 and repealed effective July 1, 2020 by Senate Bill 820, allowed for the suspension of the 15-day time

limit for providing an assessment plan after requested or determined to be necessary. Chapter 3, section 8, subdivision (a) of Senate Bill 117 declared that if a school was closed due to COVID-19, for purposes of determining compliance with the timelines required by subdivision (a) of Section 56403 and subdivision (a) of Section 56321 of the Education Code, the State Department of Education shall consider the days a school was closed to COVID-19 as days between a pupil's regular school session, up until the time the school reopens and regular school session convenes.

Here, Saugus Union did not reopen for a regular school session during the 2019-2020 school year. Thus, under California law, even assuming that Saugus Union had determined an assessment was warranted or Parents had requested an assessment at the outset of the school closure on March 16, 2020, it was relieved of the obligation to provide an assessment plan to Parent before the May 4, 2020 IEP team meeting given the suspension of the 15-day deadline.

Further, although Student claimed that Student should have been formally assessed to determine Student's ability to access distance learning, Student failed to present any persuasive evidence establishing that any formal assessment existed which specifically determined a student's access to distance learning, or that Saugus Union required an additional formal assessment to develop an appropriate IEP at the May 2020 IEP team meeting to access distance learning.

Student failed to present evidence through testimony or otherwise establishing that the information obtained by Saugus Union through the 2019 formal evaluations in combination with the information his teacher or service providers obtained from working with Student during the 2019-2020 school year was insufficient or how further assessment would have made any difference in development of the May 2020 IEP.

Student claims that a formal behavior assessment should have been conducted based on his enrollment at Achieve Behavioral Associates where Student obtained his private behavior services. However, Student was receiving private behavior services through Parents' insurance from Achieve Behavioral Associates for about four years. Student presented no evidence that Saugus Union's 2019 assessments did not include behavior or that his behavior changed to a degree warranting assessment. Similarly, Student claims an academic assessment should have been conducted, but Student offered no evidence that an academic assessment was not part of Student's 2019 triennial assessments. or that his academic functioning warranted reassessment. Student failed to support any of the other reasons Student raised for requiring Saugus Union to conduct formal assessments with persuasive evidence or authority.

Student failed to prove by a preponderance of the evidence that Saugus Union denied him a FAPE in developing Student's May 2020 IEP by failing to conduct any formal assessment of Student before the IEP team meeting on May 4, 2020.

### ISSUE 3B: DID SAUGUS UNION DENY STUDENT A FAPE DEVELOPING STUDENT'S MAY 2020 IEP BY FAILING TO ADEQUATELY DETERMINE STUDENT'S PRESENTS LEVELS OF PERFORMANCE AND PROGRESS TOWARD HIS GOALS?

Student contends Saugus Union did not adequately determine Student's present levels of performance or progress towards goals in his May 4, 2020 IEP, and therefore it failed to develop appropriate goals in the May 4, 2020 IEP. Student claims Saugus Union did not collect any current progress on goals from March 2020 to May 4, 2020 in

developing the May 2020 IEP. Student argues that Saugus Union could have collected data during this period and asked for the data his private behavior therapists collected.

Saugus Union contends it had appropriate information sufficient to determine Student's baselines and develop new goals and objectives in the May 2020 IEP, apart from Student's speech and language goals. Saugus Union contends that with the agreement of parents, the IEP team waited to develop new speech goals in the following school year at the December 18, 2020 IEP. Saugus Union claims that there was no evidence that the present levels of performance or progress reported during the May 2020 IEP team meeting was inaccurate. Saugus Union contends that the goals proposed were appropriate.

An IEP is a written document for each child with a disability that includes: a statement of the child's present levels of academic achievement and functional performance. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.320 (a)(1); Ed. Code, § 56345 subd. (a)(1).) For each area in which a special education student has an identified need, the IEP team must develop annual goals that are based upon the child's present levels of academic achievement and functional performance. (Ed. Code, § 56345, subd. (a)(2); *Letter to Butler, supra*, (OSERS March 25, 1998) 213 IDELR 118.)

The IDEA does not generally require districts to report on a student's progress toward meeting benchmarks or short-term objectives, apart from children who take alternate assessments aligned to alternate achievement standards. (34 C.F.R. § 300.320 (a)(2)(ii); *Letter to Kelly* (OSEP August 24, 2007) 49 IDELR 165.) Reporting on benchmarks or short-term objectives is within the discretion of the IEP team. (*Letter to Lenz* (OSEP February 7, 2014) 64 IDELR 283.)

## PRESENT LEVELS OF PERFORMANCE

Gallo updated Student's May 2020 IEP including the present levels of performance in the following areas to the extent it was available:

- Precademic/Academic/Functional Skills,
- Communication Development,
- Social Emotional/Behavioral,
- Vocational, and
- Adaptive/Daily Living Skills.

Gallo prepared the present levels after working with Student during the 2019-2020 school year, and she was familiar with him. Gallo had no recollection of Parents having questions or concerns about the present levels of performance that were reviewed at the May 2020 IEP team meeting. Student pointed to nothing in the reported present levels of performance that was inaccurate.

However, the present levels of performance in the area of Communication Development did not include any updated information from the speech pathologist who had been providing Student's speech services since August 2019. The May IEP also lacked updated information in the areas of Gross/Fine Motor Development and Health. The only information provided on the present levels of performance pages for Gross/Fine Motor Development and Health was from April 2019. Saugus Union's failure to include updated present levels of performance in the areas of Gross/Fine Motor Development and Health, as well as updated information from the speech pathologist in Communication Development was a procedural violation.

## PROGRESS ON GOALS

### PROGRESS ON ACADEMIC/PREVOCAATIONAL/SELF-HELP GOALS

Gallo conducted no formal assessments leading up the May 4, 2020 IEP and did not formally collect and report progress on Student's annual goals between March 16, 2020 and the May 4, 2020 IEP. Progress on Student's prior goals from the April 2019 IEP, as amended, was documented in the May 2020 IEP to the extent it was available. Gallo was responsible for reporting progress on at least five of Student's ten goals in the May 2020 IEP.

Student's academic site word goal (2020-1) required him by April 2020 when presented with a field of three cards with sight words written on them for 12 months of the year, four community signs and 10 common foods, and requested to give me/touch a particular sight word, to indicate the correct card for four out of five opportunities. Student did not meet the goal by April 2020, but he made progress. Student's May 4, 2020 IEP reported as his baseline that he could read the days of the week respectively. Saugus Union reported on Student's short-term objectives in June and November 2019. In June 2019, he could read several familiar words. In November 2019, he could identify five months of the year and two community signs. As Gallo explained at hearing, and as reflected on Student's May 2020 IEP, as of the last time Gallo charted progress Student could identify nine months of the year and two community signs at the time of the May 2020 IEP, which he had previously not been able to do.

Student's academic writing goal (2020-2) required him by April 2020 when presented with a simple picture and what is it/what do you see, to write a simple sentence of three or four words to label 10 pictures. Student's May 4, 2020 IEP reported

as his baseline that he could write letters and words within a one-inch space with prompting and redirection. Saugus Union reported progress on Student's short-term objectives in June and November 2019, and on May 4, 2020 at Student's annual review. By June 2019, he required a model of the sentence but could copy it. By November 2019 he had learned to pick the correct noun and was able to build simple sentence using a sentence starter in two out of five opportunities. He could also copy the sentence after building the model for two pictures.

As reflected on Student's May 2019 IEP, as of when Gallo last charted his progress prior to the COVID-19 shutdown, Student maintained some of the same level of progress as of November 2019 on building a simple sentence to label the picture using a sentence starter and choosing the correct noun in two out of five opportunities, but he did not meet this goal. The IEP also noted that as of May 2020, Student could currently trace within a half inch of the sample provided and could copy a sentence on the line with all letters the same size. As Gallo explained at hearing, instead of writing a simple sentence, Student could build a simple sentence using a sentence starter inserting the correct missing noun when staff showed him a picture, which was not something Student could do at the beginning of the school year.

Student's academic math goal (2020-3) required him by April 2020 when presented with five simple addition problems, to calculate the sum with the use of manipulatives/visual supports (e.g., Touch Math) for four out of five opportunities. The May 2020 IEP reported as Student's baseline that he could count out a given number of blocks with assistance. The May 2020 IEP reported that in June 2019 Student could place the visual supports on numbers one through nine with minimal assistance, but he required assistance to calculate. The May 2020 IEP reported that as of November 2019 when presented with a simple addition problem, Student could calculate the sum with



the use of manipulatives/visual supports in one out of five opportunities when given three to five prompts. At the time of the May 2020 IEP, as of the last time Gallo charted progress Student required three to four prompts to accomplish this same task. As reflected on the May 2020 IEP, Student did not meet the goal.

Student's prevocational goal (2020-4) required him when using the restroom, to push his pants down/pull them up independently for four out of five consecutive days. The May 4, 2020 IEP reported as his baseline that he struggled with dressing and required assistance. The May 4, 2020 IEP reported that in June 2019, Student required assistance pulling his pants up and down. By November 2019 for two of five consecutive days, Student could push his pants down independently, but required assistance pulling them up. As reflected on Student's May 2019 IEP, as of when Gallo last charted his progress prior to the COVID-19 shutdown, Student had not met his goal but had made progress. In four of five consecutive days, he was still able to push his pants down independently, but required assistance pulling them up. The IEP recorded that Student did not meet this goal.

Student's academic site word goal (2020-5) required Student by April 2020, for 40 words when given a field of three cards with high frequency words written on them and requested to give/point to/touch a certain word, to indicate the correct word by pointing to the word or giving the card with the word on it in four out of five consecutive days. Student's baseline indicated that he was able to read 24 sight words from a field of two cards with accuracy. In a field of three, he had significantly more difficulty and he had been indicating them with an eye gaze or hand/finger flapping. The May 4, 2020 IEP reported that as of June 2019 he could read 15 words from a field of three cards and by November 2019, he could read 20 words. As reflected on Student's May 2019 IEP, as of when Gallo last charted his progress prior to the

COVID-19 shutdown, Student did not meet this goal, but he could now read 33 words from a field of three cards for four of five consecutive days, including specific days of the week, specific months of the year and other specific sight words.

Although at hearing Gallo stated that Student did not make progress on this goal, her testimony did not establish that Saugus Union did not properly report Student's progress on this goal. Gallo's response was inconsistent with the contemporaneous records and reflected that she may have been confused or looking at the wrong goal while testifying. Gallo said she did not believe Student was ready to write with the given criteria that was posted within this goal. However, this academic goal (2020-5) was not a writing goal. Neither party elicited testimony from Gallo to clarify this inconsistency.

The last time Gallo saw Student in person was before the school closure on March 16, 2020. She proposed six new goals based upon the progress she observed Student make through March 16, 2020, and from the information she obtained from Parent during distance learning. Gallo was communicating with Parent before the May 4, 2020 IEP team meeting. Parent told Gallo that Student was enjoying distance learning. Further, Parent was seeing an increase in the amount of language Student was using in the home, and the posted videos were working well for Student at that time. Gallo asked Parents how Student was doing in the distance learning setting and overall, in the home setting. Based on Student's rate of progress before the closure, in Gallo's opinion, Student would not have made a significant amount of progress between mid-March 2020 and May 4, 2020, even if he had continued to receive in-person services on campus. Consistent with the rate of Student's progress during the school year, Gallo did not believe that there would have been significant changes in his progress in that seven-week period. Student presented no persuasive evidence to contradict Gallo's testimony

on this point. Student did not prove Saugus Union failed to adequately report Student's progress on his goals because Gallo did not formally collect data on Student's prevocational, academic, and self-help goals between March 16 and May 4, 2020.

In short, Student did not prove that the Saugus Union failed to adequately determine Student's present levels of performance and progress toward his preacademic, prevocational and self-help goals in the development of the May 2020 IEP. Although Gallo did not formally collect and report progress on Student's annual goals between March 16 and May 4, 2020, Student did not prove that Saugus Union's updated reporting on Student's present levels of performance, baselines on his new goals and his progress on old goals in the May 2020 IEP, was insufficient upon which to propose new goals, apart from speech and fine motor which are discussed below. Student did not establish that any failure by Saugus Union to formally collect and report progress between March 16, and May 4, 2020, impeded Student's right to a FAPE, significantly impeded Parents' opportunity to participate in the decisionmaking process or caused a deprivation of educational benefits.

#### PROGRESS ON SPEECH AND LANGUAGE GOALS

Student had five speech goals in the April 2019 IEP, as amended. Speech pathologist Sangren was responsible for reporting progress on each of these goals at the May 2020 IEP. Progress on each of the speech goals was documented only through November 2019. Sangren attended the May 2020 IEP. She reported that Student was now using his communication device spontaneously which he previously had not been doing, and that he was asking for the activities on his device. Sangren made a general

statement that Student was making progress on his goals, but was unable to benchmark them, which she would do when Student returned to campus. Sangren informed Parents that new speech goals would be developed at that time.

At hearing, Sangren admitted that she did not have enough information about Student's functioning to propose new goals in the May 2020 IEP. Sangren did not provide any speech services to Student between March 16 and April 13, 2020. Based on Saugus Union's speech services log, at the time of the May 2020 IEP team meeting, Sangren had not resumed direct instruction of Student, but had only posted speech lessons on Google Classroom on April 13, 20 and 27, 2020. The failure to report Student's present levels of performance in the form of progress on his speech goals was a procedural violation of the IDEA.

#### PROGRESS ON FINE MOTOR GOAL

Student had one goal in the area of fine motor, his academic writing goal (2020-2), for which both Gallo and occupational therapist Runolfsdottir were responsible. The writing goal required Student to write a simple sentence when shown a simple picture for 10 pictures. By November 2019, he could write a sentence when given a sentence starter and could pick the correct noun in two of five opportunities. The only progress reported after November 2019 was on the May 4, 2020 IEP. The May 2020 IEP stated that Student could write a sentence when given a sentence starter and pick the correct noun in two of five opportunities. The May 2020 IEP also stated that Student could now also trace a picture within a one-half inch sample and could also copy a sentence on the line with all letters the same size. Although reported level of

progress on this goal was identical between November 2019 and May 2020, Student failed to prove that the progress reported on the May 2020 IEP was not current as of March 16, 2020, or May 4, 2020.

As with all his other goals apart from his speech goals, Student failed to prove by a preponderance of evidence that Student committed a procedural violation in reporting progress on his writing goal or that the failure to formally collect progress during this seven-week period prevented Saugus Union from developing an appropriate fine motor goal.

### SAUGUS UNION DENIED STUDENT A FAPE

Saugus Union committed a procedural violation of the IDEA by failing to report Student's present levels of performance in the areas of communication development, gross/fine motor development and health, including progress on his speech goals. However, a procedural error does not automatically require a finding that a FAPE was denied. (20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a); Ed. Code, § 56505, subd. (f)(2); *W.G. v. Board of Trustees of Target Range School Dist. No. 23 Missoula, Mont.*, *supra*, 960 F.2d at p. 1484; *Amanda J. v. Clark County School Dist.*, *supra*, 267 F.3d at p. 892.)

Here, the deficiencies in thoroughly reporting Student present levels of performance and progress on his speech goals, significantly interfered with the opportunity of Parents to participate in the IEP process and impeded Student's right to a FAPE. By her own admission, speech therapist Sangren did not have adequate information to develop new goals. In turn, without the required input from the speech pathologist, Parents did not have the required information to consider or meaningfully participate in the May 2020 IEP team meeting. At hearing, Parent explained she felt that

it was a “null and void meeting” because the school members of the IEP team could not tell Parents where Student was on his current goals, and she did not have an understanding on what he had done that school year up until the March 2020 closure.

Similarly, the failure to report on Student present levels of performance in the area of gross/fine motor, significantly interfered with the opportunity of Parents to participate in the IEP process and impeded Student’s right to a FAPE. Occupational therapist Runolfsdottir testified that she reviewed the April 2019 Gross/Fine Motor Development present levels contained in the May 2020 IEP and thought they were still accurate. This testimony was unconvincing. The dismissive way Runolfsdottir answered the question when confronted with the missing current present levels for gross and fine motor functioning in the May 2020 IEP demonstrated she did not believe her testimony to be true and a lack of candor. That 2019 present levels information was over a year old and Runolfsdottir failed state how she knew that each detail of the April 2019 present levels included in the May 2020 IEP was still accurate. The April 2019 present levels information had clearly been included in the May 2020 IEP for comparison between it and Student’s current functioning in gross/fine motor which was not reported by Saugus Union. Furthermore, by her own admission, Runolfsdottir’s interactions with Student were minimal during the 2019-2020 school year. Although Runolfsdottir attended the May 2020 IEP and provided some information to Parents on Student’s motor development, it did not fully address, nor was it a substitute for providing updated and current present levels in the areas both gross and fine motor development. The weight of evidence established that without complete picture of Student’s functioning in this area, Parents did not have the information necessary to participate in the May 2020 IEP in an informed way.

Saugus Union impeded Student's right to a FAPE by the failure to properly report in the May 2020 IEP on his achievement and functioning in communication development, including progress on his speech goals. It was not until December 18, 2020, a full six months later, that Saugus Union convened a new IEP to report on Student's progress on his old speech goals from his April 2019 IEP, as amended, and developed new goals. According to speech pathologist Sangren, Student continued working on Student's old goals between May 4 and December 18, 2020.

At hearing, Sangren admitted Student was beyond some of those old goals because he had become more verbal. She claimed that when he was beyond those skills in some of those goals, they worked on the next logical steps, and that she felt that for the most part the old goals, were appropriate. However, her testimony was not convincing. Her testimony was not specific enough and based on the December 2020 IEP goal progress reporting on Student's old 2019 goals, some of those old goals had not been worked on during distance learning since March 16, 2020. For Student, this was a critical lapse because of his significant speech and language deficits at the time of the May 4, 2020 IEP. For example, according to Sangren, Student was mostly nonverbal at the beginning of first grade during the 2019-2020 school year. Although Student's communication increased over time, Sangren confirmed at hearing Student still had difficulty communicating his basic needs and wants.

Student did not prove that the failure to report Student's present levels of performance in the area of health deprived Student of educational benefit. Nor did Student prove that this failure significantly interfered with the opportunity of Parents to participate in the IEP process or impeded Student's right to a FAPE.

Saugus Union denied Student a FAPE in developing Student's May 4, 2020 IEP by failing to adequately determine Student's presents levels of performance in the areas of Communication Development and Gross/Fine Motor Development and by failing to adequately determine Student's progress toward his speech and language goals. Student's remedies are discussed below.

### ISSUE 3C: DID SAUGUS UNION DENY STUDENT A FAPE DEVELOPING STUDENT'S MAY 2020 IEP BY FAILING TO ADEQUATELY EVALUATE THE EFFECT OF REMOTE LEARNING ON STUDENT'S EDUCATIONAL PROGRAM BEFORE THE MAY 4, 2020 IEP TEAM MEETING?

Student contends Saugus Union denied him in the May 4, 2020 IEP by failing to adequately evaluate the effect of remote learning on Student's educational program, including his ability to access his education in a remote learning setting.

Saugus Union contends it did informally evaluate Student's ability to access his education through remote learning in developing the May 4, 2020 IEP and took that into account. Saugus Union contends that no formal evaluation tool existed assessing the effect of remote learning on a student.

Similar to Issue 3A above, Student failed to prove that Saugus Union was required to conduct an evaluation of the effect of remote learning on Student's educational program before the May 4, 2020 IEP team meeting.

Parent never requested an assessment of the effect of remote learning on Student's education program. Saugus Union never determined an assessment was necessary to determine effect of remote learning on Student's educational program.



Student also failed to prove that such an assessment existed or was required. Student cited to no authority which supported his argument that Saugus Union was required to assess the effect of remote learning on Student's educational program prior to the May 4, 2020 IEP team meeting. Student did not present any persuasive evidence, through testimony or otherwise that Saugus Union's duty to assess was triggered prior to May 4, 2020. In any event, special education teacher Gallo did consider the effects of remote learning on Student in developing the videos she posted after the school closure and in developing the goals in the May 2020 IEP. Further, Gallo communicated with Parent as to how Student was doing with distance learning prior to the May 2020 IEP team meeting.

As discussed in Issue 3A, even if Saugus Union had determined the necessity of such assessment or Parents had requested that type of evaluation, Saugus Union was not required to conduct such an assessment prior to the May 4, 2020 IEP team meeting. Even assuming Parent had signed an assessment plan on the earliest date possible, March 16, 2020, Saugus Union had 60 days, excluding vacation and days when school is not in session, to conduct such assessment. Here, that 60-day deadline would have been well after May 4, 2020. In addition, Senate Bill 117 suspended the 15-day deadline requiring Saugus Union to provide parents with assessment plans until school reopened and regular school session convened.

Student failed to prove by a preponderance of the evidence that Saugus Union denied him a FAPE in developing Student's May 2020 IEP by failing to adequately evaluate the effect of remote learning on Student's educational program before the May 4, 2020, IEP team meeting.

ISSUE 3D: DID SAUGUS UNION DENY STUDENT A FAPE DEVELOPING STUDENT'S MAY 2020 IEP BY FAILING TO OFFER A ONE-TO-ONE AIDE IN THE MAY 2020 IEP?

At hearing, Student contended that Saugus Union should have offered a one-to-one aide in the May 4, 2020 IEP, either virtually or in person in Student's home, and that Parent had to hire someone in the home to assist Student with his schoolwork. Student argued that the environmental learning support aide in his May 2020 IEP was inadequate because it was not a one to-one aide, but rather a fading aide to ensure his safety. Student contended that a one-to-one aide should have been offered in the home to help Student access his education, rather than just supporting his safety. In Student's closing brief, Student argues that Saugus Union did not offer him a one-to-one aide in the home on a temporary basis during distance learning and that Saugus Union knew Student required that support based on his inability to attend and need for redirection, which denied Student a FAPE.

Saugus Union argues in its closing brief, that at the May 2020 IEP, Student was offered environmental learning support with a fading plan on campus five days a week for six hours a day and no other questions or concerns were raised by Parents regarding Student's behavior or need for an aide at that time. At hearing, Saugus Union argued that the purpose of the environment learning support aide was to protect him and keep him safe from other students, so it was not necessary to offer the support virtually or in the home since safety from other children was not a concern in the home setting. Saugus Union contends Student did not require additional support in the home because with the support he had in the home, he could access and benefit from his distance

learning program, and that Parent never requested in-home support. Saugus Union contends Student failed to prove that the environmental learning support that was offered was not adequate.

In the case of a child whose behavior impedes his or her learning or that of others, the IEP team must consider, when appropriate, “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); Ed. Code, § 56341.1, subd. (b)(1).) An IEP that does not appropriately address behavior that impedes a child’s learning denies a student a FAPE. (*Neosho R-V School Dist. v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028-1030.)

## ENVIRONMENTAL LEARNING SUPPORT

During the February 2019 IEP amendment meeting, when Student was in kindergarten, Saugus Union developed an assessment plan which was signed by Parent to determine Student’s need for an environmental learning support aide. Saugus Union’s coordinator of student services explained to Parents the role of the aide as addressing a student’s independence, behavior, and engagement. A paraeducator within the classroom was dedicated to Student pending the environmental learning support assessment. On February 26, 2019, Father consented to the amendment of April 2018 IEP to add environmental learning support through April 10, 2019, for six hours a day, five days a week at the school site.

Marisol Burns was Student’s kindergarten special day class teacher and case manager at Emblem. At hearing, Burns described Student’s environmental learning support aide as an additional person designated to work in the classroom with a focus

on Student to provide him the additional support he needed. She recalled Student needed this support because he had been hurt twice by a peer and he was not able to protect himself.

Guterman, was Saugus Union's school psychologist since 1996. Guterman was responsible for conducting annual environmental learning support assessments for students who already environmental learning support in their IEPs. Guterman further explained this type of assessment and support at hearing. A one-to-one aide was one type of a broader range of possible environmental learning supports. An environmental learning support assessment looked more thoroughly at the student's need for support in the environment, ranging from a one-to-one aide to other types of supports. To determine if a student was qualified for one-to-one aide, the assessment looked at whatever the student needed in the school environment to support learning. It included considerations such as what a student needed to stay safe or keep others safe, physical supports, medical health issues that could not be addressed by staff already in the classroom, and if a student needed to leave the classroom. The assessment included observations, data collection, analysis of the student's daily schedule, and the kind of supports the student already had during the school day. The recommendations after assessment could have included a range of supports, from additional accommodations to a one-to-one aide.

Jennifer Minkus was a board-certified behavior analyst employed at Saugus Union as a behavior intervention specialist. She was one of a team of behavior intervention specialists who conducted the initial environment learning support assessments, which included assessment for a one-to-one aide. From her perspective, such assessments looked at anything impacting a student's access to education in terms of behavior, from their schedules to how much support and assistance they needed at

certain times, and if the classroom could provide that support or assistance. Minkus described environmental learning support as any type of support including adult support that could be added to classroom that could help the student in their learning. In Minkus' opinion, a student was qualified for a one-to-one aide if there was anything that interfered with their ability to access their education, especially behavioral concerns, which could not be addressed in the classroom, after considering the level of support the student already had in the classroom.

### THE MAY 2020 IEP INCLUDED ENVIRONMENTAL LEARNING SUPPORT

Student's April 9, 2019 IEP offered as "Other Supports" environmental learning support with a fading plan in place for times when the student could maintain a lower adult support. The lower support was described as "when the ELS adult could work with [Student] and one other student at structured times." It also referred the reader to "the ELS part of the school psychological report for times." Neither party offered the psychological report into evidence and neither party elicited testimony as to its contents. The April 2019 IEP identified the frequency and duration for environmental learning support as six hours a day, five days a week at the school site. The IEP notes documented that Student did not have safety awareness. The IEP team discussed Student's needs for individual support throughout the day, and that a schedule would be provided to demonstrate the recommendations for when Student needed support and did not need support throughout the school day. Neither party offered evidence as to whether this schedule was ever prepared or its contents. Thus, there was no evidence that the environmental learning support aide in the April 2019 IEP was limited to any specific time periods throughout the day.

As discussed in Issue 3A, prior to the March 16, 2020 school closure, Saugus Union sought to conduct an updated environmental learning support assessment, but Parents never returned the assessment plan. Nonetheless, the May 4, 2020 IEP renewed the identical offer of environmental learning support that was in Student's April 2019 IEP and made the same reference to the "ELS part" of the school psychological report for times. The weight of evidence established that the environmental learning support offered at the May 2020 IEP was an adult one-to-one aide.

### THE ONE-TO-ONE AIDE OFFERED IN THE MAY 2020 IEP WAS APPROPRIATE

Student failed to prove that Saugus Union's offer of the one to-one aide in the May 2020 IEP was not appropriate at the time the IEP was developed. For the 2020-2021 school year, Saugus Union believed at the time the May 4, 2020 IEP was developed that the campus closures were temporary, and it fully expected students to return to campus for the 2020-2021 school year. Saugus Union only learned in July 2020 that the campuses would continue to remain closed into the 2020-2021 school year. Saugus Union wrote the May 2020 IEP containing the offer of the one-to-one aide at the school site with the understanding that the IEP would be implemented on campus in fall 2020. There was no persuasive evidence presented that at the time of the May 2020 IEP team meeting Saugus Union knew that Student needed a one-to-one aide in the home setting during the 2020-2021 school year. Therefore, Saugus Union was not required to offer an aide in the home either virtually or in person in the May 2020 IEP for the 2020-2021 school year.

Student did not otherwise prove that the aide offered in the May 2020 IEP was not appropriate for the 2020-2021 school year at the time it was offered. Student

argued that Saugus Union's offer of a full-time aide was inadequate because it included a fading plan and limited the aide's role to ensuring Student's safety. However, Student presented no evidence that the "fading plan" was inappropriate. Nor did Student prove that an aide limited to ensuring Student's safety was inappropriate.

Student failed to prove that Student required a one-to-one aide for the 2020-2021 school year for purposes other than his safety. There was no persuasive evidence that Student's needs beyond safety could not be addressed by staff already in the classroom at the time of the May 4, 2020 IEP. In addition, none of the goals proposed at the May 2020 IEP listed anyone other than the classroom teacher as being responsible for helping with goal implementation. Further, Student was initially offered an aide because of concerns related to his safety. Parent's testimony corroborated Burns' testimony that safety concerns were the primary reason Student was initially provided with an environmental learning support aide. At hearing, Parent explained that when Student was at Emblem he could elope or get hurt by other students. Parent explained that when Student began attending Mountainview, she wanted to make certain Student had someone by his side to make certain he was safe. As such, the one-to-one aide offered in the May 2020 IEP was appropriate at the time it was offered for the 2020-2021 school year.

For the period between May 4, 2020 and the end of 2019-2020 school year, Student also failed to prove that Saugus Union denied him a FAPE by failing to offer a one-to-one aide in the home either virtually or in person. For the same reasons discussed in Issue 1A, Saugus Union did not deny Student a FAPE because it did not offer a one-to-one aide in the home in the May 2020 IEP for the 2019-2020 school year. Further, Student failed to establish that the primary purpose the aide was offered, for safety issues, was a concern during distance learning. In addition, Student presented no

evidence proving that a virtual one-to-one aide would have been appropriate or necessary to provide him a FAPE after the May 2020 IEP team meeting through the end of the regular 2019-2020 school year. Notably, special education teacher Gallo opined that a virtual adult would not have helped Student participate in the online live social emotional sessions Gallo conducted during the 2019-2020 school closure, and her testimony was not rebutted.

Student failed to establish by a preponderance of the evidence that Saugus Union denied him a FAPE in the development of the May 4, 2020 IEP by the failure to offer him a one-to-one aide.

#### ISSUE 4: DID SAUGUS UNION DENY STUDENT A FAPE BY FAILING TO ADDRESS STUDENT'S REGRESSION RESULTING FROM STUDENT BEING ASSIGNED TO DISTANCE LEARNING FROM MARCH 2020 UNTIL THE FILING OF THE DUE PROCESS COMPLAINT?

Student contends that he regressed from March 2020 through the 2020-2021 school year, and that Saugus Union never addressed the regression. Student claims that he only regained the skills he lost through private services.

Saugus Union contends Student did not prove regression, and that he made progress as evidenced by his June 2021 IEP. Saugus also contends, among other things, that Student could have returned to in-person instruction as early as November 9, 2020, with accommodations and supports to address any difficulty he may have had tolerating a mask, but Parents made the decision to keep Student at home for the remainder of the 2020-2021 school year.



Student failed to prove by a preponderance of evidence that Saugus Union failed to address Student's regression which resulted from distance learning. Father reported at the May 2020 IEP team meeting that he felt Student had regressed in distance learning and that Parents had seen some regression. The IEP notes are not specific, and Father did not testify at hearing, but the notes suggest Father may have been referring to Student's speech skills. At that time, Parents reported they were finding it harder to do the speech assignments posted in Google Classroom, and believed tele-speech therapy would be better. Special education teacher Gallo, one of the only witnesses who attended the May 2020 IEP team meeting and remembered regression being discussed, recalled that from the overall discussion with Parents at the meeting Student did not seem to have any signs of regression. Mountainview Principal Demsher, who also attended the May 2020 IEP team meeting, explained at hearing that determining regression because of distance learning in any student at that time was challenging because the students and teachers were "not together in person." The IEP team agreed to revisit the issue of regression in the fall 2020 when Student returned to campus. However, Student never returned to campus in fall 2020.

Nonetheless, Saugus Union addressed the regression concerns raised by Parent at the May 2020 IEP team meeting. As part of Saugus Union's offer of special education and related services, it offered Student extended year school services which included both speech services and specialized academic instruction. Saugus Union's practice was to offer extended school year to attempt to prevent regression. The May 2020 IEP documented that the IEP team offered Student 2019-2020 extended school year services because the teacher and Parents reported that Student had previously demonstrated a tendency to forget information he had learned unless skills were consistently practiced. A Saugus Union speech pathology log documented that Student began receiving online

live speech services with Sangren on May 5, 2020 and that Student received the speech services offered for the extended school year by live online instruction with a speech pathologist. Student offered no persuasive evidence that the services Saugus Union offered in the May 2020 IEP were inadequate to address any alleged regression as a result of being assigned to distance learning.

There was no persuasive evidence that Parents ever expressed concerns or complained about regression after the May 4, 2020 IEP team meeting. In fact, at the December 2020 IEP amendment meeting, Parents shared that Student was “doing really well with speaking verbally” and they wanted to remove his communication device. Private behavior analyst DeConza’s testimony also corroborated that Student had no regression after the 2020-2021 school year began.

Specifically, DeConza was a board-certified behavior analyst, and clinical director for Achieve Behavioral Associates. Achieve Behavioral Associates had been providing applied behavior analyst services to Student in the home during the 2019-2020 school year. At hearing, DeConza claimed that in March 2020 Student was starting to show the beginning signs of regression after distance learning began. She testified it was not significant, but Student’s skills started to slowly “go backwards.” The only specific example she gave was Student’s listener behavior, that Student had stopped responding to “come here.” DeConza admitted Student started making progress again in August or September 2020, but claimed he was not at the level he was before March 16, 2020. DeConza attributed Student’s progress in the distance learning environment to an increased amount of private therapy hours.

DeConza’s testimony that Student had regressed was unconvincing. She did not sufficiently support the basis of her conclusory opinions. She presented no concrete

evidence or data showing in what areas or ways Student experienced regression. Her observations of Student were sporadic. DeConza admitted she never observed Student prior to the school closure during the 2019-2020 school year, and prior to that only once in preschool and once in 2018. She claimed to have observed Student only twice between March 16, 2020 and the end of the regular school year, but the date and length of those visits was not established. There was no specific evidence that DeConza had ever spoken to other members of Achieve Behavioral Associates who worked in Student's home or when and what information they may have provided her or charted, much less any other basis adequately establishing her familiarity with Student's development during the 2019-2020 school year sufficient to render an opinion on his regression. DeConza was not specific enough in her testimony as to the skills Student allegedly lost, mentioning only his listener behavior. She did not clearly explain how she knew this, given the last time she observed Student prior to the school closure was in 2018 and there was no convincing evidence that this behavior had been tracked by her or otherwise charted. Further demonstrating the unreliability of DeConza's opinions about alleged regression, DeConza admitted she did not collect present levels on Student's school goals. She also admitted she never told Saugus Union about the regression she claimed at hearing to have identified. Notably, DeConza was at the May 2020 and December 2020 IEP team meetings and never mentioned Student's alleged regression at these meetings.

Student claims in his closing argument that Parent obtained an increase in applied behavior analyst services in the home through her insurance in May 2020 because Student had started to regress. However, this was inconsistent with Parent's testimony. Parent testified that they needed the extra help in the home because she

had a six-month old baby and Father, who had been at home for three months, had returned to work in May 2020. Student's claim that Parent obtained more support in the home because of Student's alleged regression was unconvincing.

Parent's testimony was unpersuasive that Saugus Union failed to address claimed regression as a result of being assigned to distance learning. Parent responded to a leading question by Student's counsel claiming she noticed regression in Student between March 2020 through the end of the 2020-2021 school year. Parent testified that all the effort made trying to get Student to pay attention in circle time or with instruction was completely lost and that she could see this through Student's private behavior therapy. However, Parent did not adequately substantiate her testimony. Parent's testimony also conflicted with DeConza's who claimed Student began making progress again when he returned to school in fall 2020. Parent's testimony in attempting to explain the regression she claimed to have observed demonstrated that she was confused between the distinct concepts of regression and progress. Parent also admitted problems with recalling the events during the end of the 2019-2020 school year as discussed earlier. She also admitted that during the 2020-2021 school year she did not often observe Student in synchronous learning because she was busy with her baby. Parent explained that "maybe" she was there the first day of school and would "kind of pop in and kind of see" Student when her baby was sleeping.

In any event, Gottfried observed that Student's ability to attend increased during distance learning and Student progressed in area of language arts. Student's June 2021 IEP reflects that Student met six of his 11 goals, including three of his speech goals. The other goals were not charted because Student had not returned to in-person instruction when it was made available in November 2020 and his progress could not be tracked.

Although the June 2021 IEP notes indicate Student was eligible for extended school year services because of regression, Student failed to prove that any regression was the result of being assigned to distance learning and that Saugus Union failed to address it.

Student failed to establish that Saugus Union denied Student a FAPE by failing to address Student's regression resulting from Student being assigned to distance learning from March 2020 until the filing of the due process complaint.

**ISSUE 5: THROUGH THE FILING OF THE DUE PROCESS COMPLAINT, DID SAUGUS UNION DENY STUDENT A FAPE BY FAILING TO IMPLEMENT ADEQUATE SPEECH AND LANGUAGE AND SPECIALIZED ACADEMIC INSTRUCTION REQUIRED BY THE MAY 4, 2020 IEP OR ANY AMENDMENTS?**

Student contends Saugus Union did not implement the required specialized academic instruction and speech and language service minutes required between March 2020 and the end of the 2020-2021 school year under his April 2019 and May 2020 IEPs.

Saugus Union contends that Student's May 2020 IEP could not be implemented until Parent signed it on January 17, 2021. It also contends that Student could have returned to in-person instruction on campus during the 2020-2021 school year and by April 2021, could have been receiving 4.5 hours of in-person instruction per day for five days per week. Saugus Union argues that Student may have received less specialized academic instruction than what was stated in his IEP, but he received the required 230 minutes per day considering synchronous and asynchronous required at that time for a school day during the 2020-2021 school year. Saugus Union contends that Student received all of the speech therapy he entitled to, and any missing time was made up, or not accessed by Student.

Where a student alleges the denial of a FAPE based on the failure to implement an IEP, the student must prove that any failure to implement the IEP was “material,” which means that minor implementation failures are not automatically actionable. (*Van Duyn, supra*, 502 F.3d at pp. 819-822.) No statutory requirement of perfect adherence to the IEP exists, nor is there any reason rooted in the statutory text to view minor implementation failures as denials of a FAPE. (*Id.* at p. 821.) “A material failure to implement an IEP 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.” (*Id.* at p. 826.) Implementation failures are substantive violations, not procedural errors. (*Id.* at p. 819.)

Student’s closing argument ignores the scope of the issue, which is limited to the implementation of the May 2020 IEP. During the hearing, Student agreed that Issue 5, as written in the Order Clarifying Issues at Hearing dated July 26, 2021, correctly stated Student’s issue. The April 2019 IEP, as amended, is irrelevant to Issue 5. For purposes of Issue 5, the relevant period is from January 17, 2021, the day Parent signed the May 2020 IEP, to April 22, 2021, the day the complaint was filed.

Student failed to prove Parent consented to the May 2020 IEP prior to January 17, 2021. Student’s assertion that the May 2020 IEP “may be considered the operative IEP through implied consent from the beginning of the 2020 school year until January 17, 2021” ignores the law. A school district may only implement those portions of an IEP to which the parent consents. (Ed. Code, § 56346.) Accordingly, Saugus Union was not required to implement the May 2020 IEP or the December 2020 IEP amendment, prior to January 17, 2021, the day Parent consented to the IEP, as amended.

For the 2020-2021 school year, the minimum school day for a local educational agency was 230 instructional minutes for children in first through third grades. (Ed. Code, § 43501, subd. (b).)

At the beginning of the 2020-2021 school year, Saugus Union students remained in a mostly asynchronous learning format because schools remained closed. As discussed in Issue 2A, Mountainview started integrating students back into on-campus learning on November 9, 2020, beginning with the moderate severe special day classes. Mountainview had a phrased reopening of the campus based upon what the Los Angeles County Department of Public Health would approve. Parents were given the option of keeping their children in distance learning or returning to campus for some live instruction in combination with asynchronous learning. Parent decided to keep Student in distance learning during the 2020-2021 school year, so he did not receive any live in-person instruction.

## SPECIALIZED ACADEMIC INSTRUCTION

### STUDENT RECEIVED 230 MINUTES OF DAILY SPECIALIZED ACADEMIC INSTRUCTION

Title 34 Code of Federal Regulations section 300.39(b)(3) defines specially designed instruction, used interchangeably with the term specialized academic instruction, as adapting, as appropriate to the needs of a child eligible for special education, the content, methodology, or delivery of instruction to address the unique needs of the child, and ensure access to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children. Specialized academic instruction is an instructional service, individualized

based on a student's needs, and provided by a credentialed special education teacher. (CDE, *Special Education Guidance for COVID-19* (September 30, 2020); Cal. Code Regs., tit. 5, § 3053, subd. (c); see also Ed. Code, § 56001, subds. (n) and (o).)

The May 4, 2020 IEP offer of special education and related services, included specialized academic instruction for 1,450 minutes weekly. The weight of evidence established that Saugus Union made specialized academic instruction available to Student 230 minutes per day in a combination of online synchronous and asynchronous instruction between January 17, 2021, and the filing of the complaint, excluding holidays, vacations and non-instructional days or days Student was absent. Parent tried to make certain Student did not miss school. Parent could only recall one time during the 2020-2021 school year when Student was absent. Student's attendance record for the 2020-2021 school year recorded that Student had one excused absence and three unexcused absences.

Student attended special education teacher Gottfried's special day class for the 2020-2021 school year. Saugus Union provided Student a combination of live online whole group instruction for one hour a day four days a week, except Wednesdays, along with asynchronous work, which were assignments to be completed on his own time. On Wednesdays, Saugus Union also provided Student with 30 minutes per day of online live specialized academic instruction focused on social emotional learning. Parent's testimony that these sessions were 20 minutes was not credible because she did not often observe Student in synchronous instruction. That schedule continued until approximately November 2020. At that time, Student's one-hour online live whole group sessions on Tuesdays and Thursdays shifted to 30 minutes of online live small group instruction at another time during those two days because Parent requested a



change in the schedule. Specifically, Student's private services scheduled by Parent conflicted with the time Gottfried provided the one-hour whole group lessons to her special day class.

Student accessed virtual instruction during the 2020-2021 school year with the support of the private behavior therapists and regional center support providers in the home, who helped Student maneuver the computer and the laptop and participate. Student was able to participate in the activities presented during whole group instruction through the modalities of his choice for that day. Some days Student was more verbal than other days. Gottfried provided different types of activities which permitted students to either verbally respond or to touch or point to objects on their screens, to respond.

During the 2020-2021 school year, Gottfried provided her students with various asynchronous activities to complete, including fine motor crafts and digital activities associated with their goals, virtual activities, and some physical hand on activities. For Student, she assigned him activities that were tailored to his needs and IEP goals. Gottfried determined Student completed the majority of online or asynchronous activities she provided because in the Google online portal she could see when Student logged on, how much time he spent logged on and which activities he completed. In addition, in Google Classroom, Parent marked activities as completed to indicate Student had watched or participated in his assignments. Gottfried's testimony was corroborated by Parent, who testified that during the 2020-2021 school year, with the assistance of the private providers in the home, Student accessed and completed his asynchronous and synchronous work. When Student did not finish his asynchronous work, Parent assisted Student in completing whatever schoolwork needed to be done and checked off the boxes that the work had been completed.

Gottfried was responsible to provide Student with at least 230 minutes of daily specialized academic instruction. Gottfried used her best estimate to provide Student with 230 minutes of daily specialized academic instruction, which included the online instruction she delivered and the amount of time she estimated it would take Student to complete the activities he was given to complete outside of live online instruction. She considered Student's needs and assigned Student work appropriate for him based on his rate of work completion, so that he had at least 230 minutes of total daily instruction. Gottfried also relied on Parent communication as to what Student was completing since she could not observe him during asynchronous work. Parents never told Gottfried that Student needed more work or additional activities.

Gottfried provided group instruction to both the students who had returned to in-person instruction and the students who remained in distance learning during the 2020-2021 school year. After group instruction, both sets of students received instruction which required they that they complete the work by themselves or with the support of an adult. In Student's case, he completed the instruction with the support of Parent, or a private behavior provider paid for by Parent's insurance. Beginning in October 2020 through the end of the 2020-2021 school year, Student also had the assistance of an adult paid for by the regional center for six to eight hours a day Monday through Friday to help him with his schoolwork. For students in distance learning, Gottfried was available to provide additional virtual sessions, if necessary. Parent did not ask Gottfried for additional assistance.

SAUGUS UNION COMMITTED A MATERIAL FAILURE TO IMPLEMENT THE  
SPECIALIZED ACADEMIC INSTRUCTION IN THE MAY 2020 IEP

In a failure to implement claim, the materiality standard does not require that the child suffer demonstrable educational harm in order to prevail. (*Van Duyn, supra*, 502 F.3d at p. 822.)

Although Student received 230 daily minutes of specialized academic instruction, his May 2020 IEP required that he receive 1,450 minutes weekly. Thus, Student did not receive 300 minutes, or five hours per week of specialized academic instruction he was entitled to under the May 2020 IEP between January 17, 2021, the day Parent signed the May 2020 IEP and the filing of the complaint on April 22, 2021. For the period between January 17 and April 22, 2021, the school calendar provided approximately 13 weeks of instruction excluding Saugus Union's spring break, April 5 through 9, 2021. Thus, Student did not receive approximately 65 hours of specialized academic instruction required by his IEP.

Saugus Union's assertion that it was only required to provide Student with 230 minutes of daily specialized academic instruction during the 2020-2021 school year is not persuasive. Education Code section 43501 merely set forth the minimum number of instructional minutes a local educational agency was required to provide to all students. Education Code section 43501 did not relieve a school district of the responsibility to provide the service minutes required by a child's IEP.

Saugus Union's failure to implement Student's operative IEP's specialized academic instruction for the required number of minutes between January 17 and April 22, 2021, was "material," because there was "more than a minor discrepancy" between the specialized academic instruction provided to Student and the specialized

academic instruction required by Student's IEP. (*Ibid.*) The services provided to Student fell significantly short of the services required by the amended May 4, 2020 IEP. Student proved Saugus Union denied Student a FAPE by failing to implement his May 2020 IEP with regard to specialized academic instruction.

## SPEECH AND LANGUAGE SERVICES

Student's May 2020 IEP offer of special education and related services, included speech and language services in the amount of 480 minutes per month, 60 minutes a week in a group setting, and 60 minutes a week of individual services in three 20-minute sessions per week.

Speech pathologist Sangren kept a log of the speech services she provided to Student during the 2020-2021 school year. During the period from January 17 and April 23, 2021, Student was entitled to a total of 26 group sessions of 30 minutes and 39 individual sessions of 20 minutes in length. The weight of evidence established that between January 17 and April 22, 2021, Sangren provided 20 group sessions 30 minutes in length and 31 individual sessions 30 minutes long, and one 20-minute individual session. During that same period, Student was also absent or cancelled his speech therapy six times.

Overall, during these 14 weeks, excluding the week of spring break, Student received more than the required minutes of individual speech he was entitled to under his May 2020 IEP. It is true that, apart from one individual speech session, Saugus Union failed to strictly implement Student's May 2020 IEP because it did not deliver 31 of Student's individual speech in three 20-minute sessions on non-group speech days. However, Student failed to prove that this discrepancy was material. Further, although

Student only received 20 of his 26 group speech sessions during that same period, he was also absent six times. As such, Student failed prove that he was entitled to any additional group speech minutes.

Student failed to prove Saugus Union denied Student a FAPE by failing to implement his May 2020 IEP regarding speech and language services.

## 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: Saugus Union did not deny Student a FAPE from the March 2020 school closure until the end of the 2019-2020 regular school year by failing to offer or implement the services in the IEPs, in-person, face-to-face. Saugus Union prevailed on Issue 1a.

Issue 1b: Saugus Union did not deny Student a FAPE from the March 2020 school closure until the end of the 2019-2020 regular school year by failing to implement the accommodations in the IEPs, in-person, face-to-face. Saugus Union prevailed on Issue 1b.

Issue 1c(i): Saugus Union did not deny Student a FAPE during the 2019-2020 regular school year by failing to develop adequate and appropriately written goals for Student for a distance learning setting for the period between the March 2020 school closure and the May 2020 IEP. Saugus Union prevailed on Issue 1c(i).

Issue 1c(ii): Saugus Union denied Student a FAPE during the 2019-2020 regular school year by failing to develop adequate and appropriately written goals for Student for a distance learning setting in the May 2020 IEP. Student prevailed on Issue 1c(ii).

Issue 2a: Saugus Union did not deny Student a FAPE from the start of the 2020- 2021 school year to the filing of the due process complaint by failing to offer or implement the services in the IEP, in-person, face-to-face. Saugus Union prevailed on Issue 2a.

Issue 2b: Saugus Union did not deny Student a FAPE from the start of the of the 2020-2021 school year to the filing of the due process complaint by failing to implement the accommodations in the IEP, in-person, face-to-face. Saugus Union prevailed on Issue 2b.

Issue 3a: Saugus Union did not deny Student a FAPE developing Student's May 2020 IEP by failing to conduct any formal assessment of Student before the IEP team meeting on May 4, 2020. Saugus Union prevailed on Issue 3a.

Issue 3b: Saugus Union denied Student a FAPE developing Student's May 2020 IEP by failing to adequately determine Student's presents levels of performance and progress toward his goals. Student prevailed on Issue 3b.

Issue 3c: Saugus Union did not deny Student a FAPE developing Student's May 2020 IEP by failing to adequately evaluate the effect of remote learning on Student's educational program before the May 4, 2020 IEP team meeting. Saugus Union prevailed on Issue 3c.

Issue 3d: Saugus Union did not deny Student a FAPE developing Student's May 2020 IEP by failing to offer a one-to-one aide in the May 2020 IEP. Saugus Union prevailed on Issue 3d.

Issue 3e: Saugus Union denied Student a FAPE developing Student's May 2020 IEP by failing to offer adequate and appropriately written goals in the May 2020 IEP. Student prevailed on Issue 3e.

Issue 4: Saugus Union did not deny Student a FAPE by failing to address Student's regression resulting from Student being assigned to distance learning from March 2020 until the filing of the due process complaint. Saugus Union prevailed on Issue 4.

Issue 5: Through the filing of the due process complaint, Saugus Union denied Student a FAPE by failing to implement adequate specialized academic instruction required by the May 4, 2020 IEP or any amendments. Through the filing of the due process complaint, Saugus Union did not deny Student a FAPE by failing to implement adequate speech and language services required by the May 4, 2020 IEP or any amendments. Student prevailed on Issue 5 on the part of the claim regarding the specialized academic instruction. Saugus Union prevailed on Issue 5 on the part of the claim regarding the speech and language services.

## REMEDIES

Student prevailed on Issues 1c(ii), 3b, 3e, and 5 regarding specialized academic instruction. As a remedy, Student's closing brief requests compensatory education for the services he was not provided from March 2020 through the filing of the complaint, including transportation costs associated with the compensatory education. Student

also seeks an order that Saugus Union develop appropriate goals for Student based on appropriate evaluations and present levels of progress, write appropriate baselines specific to Student's areas of need and accurately report progress on progress reports, including report cards. Student also asks that Saugus Union provide training regarding appropriate goal writing, data collection, observation and writing of progress reports. The other remedies sought by Student include academic assessments, a one-to-one aide and reimbursement for out-of-pocket costs.

Under federal and state law, courts have broad equitable powers to remedy the failure of a school district to provide FAPE to a disabled child. (20 U.S.C. § 1415(i)(2)(C)(iii); see also, *School Committee of the Town of Burlington, Massachusetts v. Dept. of Education* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385].) 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.* (2009) 557 U.S. 230, 244, n. 11 [129 S.Ct. 2484, 174 L.Ed.2d 168].) An ALJ can award compensatory education as a form of equitable relief. (*Park v. Anaheim Union High School Dist.*, 464 F.3d 1025, 1033.)

School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Ibid.*; *Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.) These are equitable remedies that courts may employ to craft "appropriate relief" for a party. An award of compensatory education need not provide a "day-for-day compensation." (*Id.* at p. 1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.) Compensatory education is a prospective award of educational services designed to catch-up the student to where he should have been absent the denial of a FAPE. (*Brennan v. Regional School Dist. No. 1*



(D. Conn. 2008) 531 F.Supp.2d 245, 265.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid ex rel. Reid v. Dist. of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be fact-specific and "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.*)

An order requiring training of school district personnel can be an appropriate remedy to compensate a student for a school district's violations. (*Park v. Anaheim Union High School Dist., supra*, 464 F.3d at p. 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].)

On all Issues in which Student prevailed, there was a dearth of evidence to support reimbursement of any kind. Parent testified that she obtained regional center support in the home during the 2020-2021 school year that was completely funded by the regional center. In addition, both the private behavior and speech services were ongoing services prior to March 16, 2020, and, as such, no causal connection to the issues on which Student prevailed existed. To the extent that Parent obtained additional private services after March 16, 2020, Student failed to adequately establish the necessary causal connection to the Issues on which Student prevailed. Regardless, Student presented no persuasive evidence as to the amount of Parent's out-of-pocket costs. Parent testified that the behaviorist was obtained through Parents' insurance. Although Parent claimed to pay premiums and a deductible, she claimed at one point to not know the amounts and her testimony was otherwise insufficient to substantiate any out-of-pocket costs.

On Issue 1c(ii), Issue 3b and Issue 3e, except for training, Student failed to establish that his proposed resolutions are appropriate remedies for Saugus Union's failure to develop adequate and appropriate written goals and determine Student present levels of performance and progress toward his goals in the May 2020 IEP. Student requested that OAH order that Saugus Union develop and write appropriate goals and baselines and to accurately report progress. However, after Student filed his complaint in this case Saugus Union held Student's annual IEP on June 4, 2021, at which time new present levels of performance, baselines, progress, annual goals, including new speech goals were proposed. The adequacy of that June 2021 IEP was not at issue in this case. In addition, fine motor was not identified as an area of need. As such, it is inappropriate to order Saugus Union to develop new goals or baselines or present levels of progress. There was no showing made that an academic assessment or a one-to-one aide are appropriate remedies on these issues.

However, the evidence does support an order for special education training of special education staff including service providers on a school district's obligations regarding reporting present levels of performance and progress on goals and development of new goals. Saugus Union failed to appropriately report progress on some of Student's April 2019 IEP goals and failed to update his present levels of performance in all areas at the May 2020 IEP. Saugus Union also failed to develop appropriate goals in all areas of need, and goals which could be implemented in distance learning in the May 2020 IEP. Thus, as a remedy, Saugus Union shall provide at least four hours of special education training to its special education administrative and special education teaching staff, including its special education service providers.

On Issue 5, Saugus Union was required to provide Student with 1,450 weekly minutes of specialized academic instruction pursuant to his May 2020 IEP, which Parent did not sign until January 17, 2021. As discussed in Issue 5, Saugus Union made available to Student 1,150 minutes of specialized academic instruction weekly, specifically 230 minutes per day of a combination of online synchronous and asynchronous instruction between January 17, 2021, and the filing of the complaint on April 22, 2021, excluding holidays, vacations and non-instructional days or days Student was absent. Thus, Student did not receive approximately 300 minutes, or five hours per week of specialized academic instruction he was entitled to under the May 2020 IEP. For the period between January 17 and April 22, 2021, there were approximately 13 weeks of instruction excluding Saugus Union's spring break, April 5 through 9, 2021. Accordingly, Student did not receive approximately 65 hours of specialized academic instruction required by his IEP. Student did not show that an academic assessment or a one-to-one aide are appropriate remedies on this issue in light of the compensatory award below.

Saugus Union argues based on OSERS March 12, 2020 guidance that the claim for compensatory education is premature because it is something that should be individually determined by the IEP team upon the return to normal school operations which has not yet occurred. It also argues that for the 2021-2022 school year, it will be providing opportunities for all students to recoup skills that were lost during the school closure, and Student will have access to those opportunities. Neither of those arguments is persuasive.

OSERS March 12, 2020 guidance does not preclude a student from filing a due process complaint with OAH requesting compensatory education. Nor does it prevent OAH from awarding compensatory relief. Although Saugus Union anticipated the need for providing students with additional support during the 2021-2022 school year, that does not preclude Student from obtaining compensatory education in this case.

## ORDER

1. Saugus Union shall fund 65 hours of specialized academic instruction for Student.
2. Specialized academic instruction shall be provided by a certified nonpublic agency of Parent's choice. Saugus Union shall establish direct payment to any certified nonpublic agency selected by Parent. All hours will be available to be used until June 1, 2023. If unused, they will expire at midnight on June 1, 2023.
3. Saugus Union shall provide four hours of special education training to its special education staff, including its special education administrative and teaching staff, and special education service providers.
4. The special education training shall include instruction on the required contents of an IEP, and instruction on writing appropriate present levels of performance, goals and progress on goals, and the timelines for providing such information to parents.
5. The training shall be completed by no later than the end of the 2021-2022 regular school year.

## 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/*

Laurie Gorsline

Administrative Law Judge

Office of Administrative Hearings