

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2019101130

PARENT ON BEHALF OF STUDENT,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT.

DECISION

SEPTEMBER 25, 2020

On October 28, 2019, the Office of Administrative Hearings, called OAH, received a due process hearing request from Parent on behalf of Student naming Los Angeles Unified School District, referred to as Los Angeles. OAH initially continued this matter on November 20, 2019. On February 6, 2020, Los Angeles filed its response. On July 13, 2020, OAH granted Los Angeles' motion to dismiss Issues 2 and 3 for lack of jurisdiction.

Administrative Law Judge Jennifer Kelly heard this matter by videoconference in California on July 28 and 29, 2020.

David W. German and Omar Qureshi, Attorneys at Law, represented Student. Student's parent attended all hearing days. Patrick Balucan, Attorney at Law, represented Los Angeles. Eli Griffen, Legal Intern, Office of the General Counsel, attended all hearings days. Eric Young, Specialist, Office of Special Education attended all hearing days on Los Angeles' behalf.

At the parties' request, OAH continued the matter to August 17, 2020, for written closing briefs. The parties timely filed their closing briefs, the record was closed, and the matter was submitted on August 17, 2020.

ISSUE

- Did Los Angeles deny Student a free appropriate public education by abusing Student during the 2019-2020 school year causing Student psychological and physical harm and denying him educational opportunity?

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 jurisdiction of OAH is limited to these matters. (*Wyner v. Manhattan Beach Unified School. Dist.* (9th Cir. 2000) 223 F.3d 1026, 1028-1029.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents, and has the burden of proof by a preponderance of the evidence. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 57-58, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) Student filed the due process complaint and therefore had the burden of proof in this matter. The factual statements in this Decision constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

Student was five years old and entering kindergarten at the time of hearing. Student resided with Parent within Los Angeles' geographic boundaries at all relevant times. Student was eligible for special education services under the category of speech and language impairment.

ISSUE 1: DID LOS ANGELES DENY STUDENT A FREE APPROPRIATE PUBLIC EDUCATION BY ABUSING STUDENT DURING THE 2019-2020 SCHOOL YEAR CAUSING STUDENT PSYCHOLOGICAL AND PHYSICAL HARM AND DENYING HIM EDUCATIONAL OPPORTUNITY?

Student contended Los Angeles denied Student a FAPE by abusing Student during the 2019-2020 school year. More specifically, Student contended that on one occasion his teacher forced him to nap outside the classroom on a dirty rug and on another occasion violently shook Student. Student contended these actions were harmful and caused Student to suffer post-traumatic stress disorder and denied him educational opportunity.

Los Angeles contended during the 2019-2020 school year it offered Student a FAPE. Los Angeles denied all allegations of mistreatment and argued to the extent any prohibited interventions were used, it completed an appropriate investigation and determined the allegations were insufficient to warrant removal of the teacher from the classroom. Los Angeles further contended it provided Student speech and language services under his individualized education program during the 2019-2020 school year or was always willing do so, and that Student failed to meet his burden of proving he failed to make progress towards his speech and language goals.

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.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(3); 34 C.F.R. § 300.39; Ed. Code, § 56033.) "Related services" are transportation

and other developmental, corrective and supportive services that are required to assist the child in benefitting from special education. (20 U.S.C. § 1401(26)(A).)

Parents and school personnel must develop an individualized education program, referred to as an IEP, for an eligible student based upon state law and the IDEA. (20 U.S.C. §§ 1401(14), 1414(d)(1); and see Ed. Code, §§ 56033, 56032, 56341, 56345, subd. (a) and 56363, subd. (a); 34 C.F.R. § 300.501.) In general, the IEP describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in achieving the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. § 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

Once the IEP is consented to, a district must provide the special education and related services listed in the IEP. (34 C.F.R. § 300.323(c).) A child eligible for special education must be provided access to specialized instruction and related services which are individually designed to provide educational benefit through an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. (*Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201-204; *Endrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. ____ [137 S.Ct. 988, 1000].)

LIMITED SCOPE OF OAH JURISDICTION

A complaint brought under the IDEA must seek redress for a school district's failure to provide FAPE. The same conduct by the parties may violate other statutes or give rise to liability under common law. Accordingly, the Administrative Law Judge must

examine the substance of the complaint to determine if the claim falls within the protections of the IDEA. (*Fry v. Napoleon Community Schools* (2017) [137 S.Ct. 743, 197 L.Ed. 2d 46].)

OAH does not have jurisdiction to decide claims based on section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 701 et seq.), section 1983 of title 42 United States Code, the Americans with Disability Act (42 U.S.C. §§ 1201, et seq.), or the Unruh Civil Rights Act (Civ. Code, § 51). Although an IDEA claim is frequently combined with a claim under section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act, the IDEA does not allow for tort money damages as its purpose is to provide educational services, not compensation for personal injury. (*C.O. v. Portland Public Schools* (9th Cir. 2012) 679 F.3d 1162, 1167 [damages play no part in IDEA's comprehensive enforcement scheme]). OAH does not have jurisdiction to decide claims based upon criminal, contract, or tort law. OAH previously dismissed Issue 2 and Issue 3 for lack of jurisdiction.

Issue 1 alleges Los Angeles denied Student a FAPE by abusing Student, resulting in physical and psychological injuries and denying him educational opportunity. The complaint seeks compensatory educational programming, services and supports. In determining whether Student seeks relief for the denial of FAPE, the Administrative Law Judge must look to the gravamen of the complaint. (*Fry, supra*, 137 S.Ct. at pp. 746-748.)

Student alleged he was the subject of abuse. The IDEA and the California Education Code do not define the term "abuse," and OAH must have subject matter jurisdiction over the cases before it. However, the California Education Codes defines 'prohibited interventions' as actions designed to or likely to cause physical pain, subject

the student to verbal abuse, ridicule or humiliation, or preclude adequate supervision. (Ed. Code, § 56521.2, subd. (a)(1), (4) & (7).) This Decision will address whether the alleged acts of “abuse,” were “prohibited interventions” as defined by the Education Code.

The Supreme Court held in *Fry* that seeking relief available under the IDEA means the complaint seeks relief for the denial of a FAPE. (*Fry, supra*, 137 S. Ct. at p. 752.) In deciding whether a complaint seeks relief for a denial of a FAPE, courts look at the gravamen of a complaint, “setting aside any attempts at artful pleading.” (*Id.* at p. 755.) The Supreme Court suggested the following questions to determine “whether the gravamen of a complaint” concerns the denial of a FAPE: (1) could the claim be brought if the alleged conduct occurred at a public facility that was *not* a school?; and (2) “could an adult . . . have pressed essentially the same grievance?” (*Fry, supra*, 137 S.Ct. at p. 756 (emphasis in original)). “[W]hen the answer[s] [are] no, then the complaint probably does concern a FAPE, even if it does not explicitly say so; for the FAPE requirement is all that explains why only a child in the school setting (not an adult in that setting or a child in some other) has a viable claim.” (*Id.*)

Student could not have brought the claim alleged in Issue 1 against a public facility that was not a school, nor could an adult employee or visitor present the same grievance, because the relief sought is educational in nature, namely compensatory educational programming and supports to remedy his purported educational loss. (*Fry, supra*, 137 S. Ct. at p. 756 [claims are based on the IEP when issue is adequacy of special education].) The complaint also requests monetary damages stemming from the alleged deprivation of FAPE, presumably for the purpose of exhaustion of administrative remedies. (*Paul G. v. Monterey Peninsula Unified School District* (9th Cir. 2019) 933 F.3d

1096, 1102 [affirming district court's granting of motion to dismiss for failure to exhaust administrative remedies.]

This Decision makes no findings of fact regarding whether Student suffered any physical injuries or psychological injuries for which Student may have remedies under non-IDEA law or common law.

Issue 1 seeks redress for a denial of FAPE and compensatory education for Student's loss of educational opportunity, which fall within the core guarantee of the IDEA. (*Fry, supra*, 137 S.Ct. at p. 746.) Accordingly, OAH has jurisdiction to adjudicate whether Los Angeles denied Student a FAPE regarding Student being allegedly forced to spend outside on a dirty rug and the September 25, 2019 shaking incident that constituted improper aversive behavioral techniques, as alleged in paragraphs seven through nine in Student's complaint. Whether these incidents constituted abuse that caused psychological and physical harm is not controlling whether those incidents denied Student a FAPE based on the IDEA and applicable California law. As the parties fully litigated whether these incidents, regardless how the incidents are labeled, denied Student a FAPE, OAH can decide if Los Angeles' actions in these incidents denied Student a FAPE. (See *M.C. v. Antelope Valley Union High School Dist.* (9th Cir. 2006) 858 F.3d 1189, 1196.)

STUDENT'S EDUCATIONAL PROGRAM

Student was referred by the South-Central Los Angeles Regional Center for an initial comprehensive assessment to determine if Student qualified for special education services. Los Angeles conducted a preschool team assessment of Student and report in April 2018.

Student's initial IEP was developed on May 19, 2018 when Student was four years old and attending the Ozzie Goren Head Start program. Los Angeles found Student eligible for special education due to a qualifying speech and language impairment. The IEP team recommended Student receive 120 minutes per month of speech and language services by a speech and language pathologist to address his articulation goal, and 120 minutes per month of early child itinerant teacher services to support his language goals. Head Start Integrated was Los Angeles' special education program that supported children with IEPs enrolled in designated classrooms. Special education staff were assigned to implement the goals of a child's IEP.

Student continued to attend pre-school at Ozzie Goren during the 2018-2019 school year. Student received the speech and language services designated in the May 19, 2018 IEP through Head Start Integrated. Student's annual IEP team meeting was held on May 23, 2019. The IEP team determined Student remained eligible for special education under the category of speech and language impairment. Student met his goal of producing two to three-word sentences and modeling and cueing and was able to verbally express himself. Student had not yet achieved his articulation goal in the initial May 19, 2018 IEP. The IEP team developed new goals for Student in the areas of articulation and use of language. The IEP team noted Student sometimes chose not to participate in his speech and language sessions and walked away from the instructor. The IEP team recommended accommodations for Student, including structured choice, props and pictures, and multiple opportunities to practice sounds, words and oral movement through selected books, music and instructional materials. The IEP team suggested facilitated peer interaction to support Student's use of language, as well as daily structured language activities facilitated by an adult to engage in questions, answers, and conversations.

For the 2019-2020 school year, the IEP team offered placement in the general education classroom at Ozzie Goren with 120 minutes per month of speech and language services to address Student's articulation goal and 120 minutes per month of early childhood itinerant teacher services to address Student's language goal. Parent consented to all components of the IEP.

STUDENT'S SIX-WEEKS AT 54TH STREET ELEMENTARY

Student's IEP team identified Ozzie Goren as Student's school of attendance for the 2019-2020 school year in the May 23, 2019 IEP. However, Parent enrolled him at 54th Street Elementary School, referred to as 54th Street Elementary. Parent enrolled Student in the Expanded Transitional Kindergarten class for children turning five years of age between December 3d and June 30th.

The 2019-2020 school year began on August 19, 2019, and all students reported to class on August 20, 2019. Student's first day of school was August 20, 2019. His last day at 54th Street Elementary was September 25, 2019; less than 6 weeks later. On one occasion between September 3d and 16, 2019, Student was allegedly left outside his classroom to nap. On September 25, 2019, Student's teacher allegedly shook his shoulders. Student's Grandparent took him home, and he did not return to 54th Street Elementary. Parent enrolled Student in Ozzie Goren on November 13, 2019.

Student's class at 54th Street Elementary was taught by Roberta Brandt. The class had approximately 24 students. At hearing, the evidence was undisputed the class was required to have had two classroom aides, but due to personnel changes and hiring issues no aides were assigned to the classroom. Brandt made requests to school administration at the beginning of the 2019-2020 school year for more help in the classroom.

Brandt had been employed by Los Angeles Unified for approximately 33 years. She had worked as an Expanded Transitional Kindergarten teacher at 54th Street Elementary for the past five years. She held a bachelor's degree in elementary education and a multi-subject cleared teaching credential. Prior to working as an Expanded Transitional Kindergarten teacher, Brandt taught in a school language readiness program for approximately 22 years. Over the past five years, Brandt had approximately three students in her class with IEPs. Brandt was aware Student had an IEP and qualified for special education services under the category of speech and language impairment. Brandt had no background in special education and had not received formal behavioral intervention training.

Brandt recalled that at the start of the of the school year Student was delightful, bright, curious and quiet, but approximately three weeks into the school year, Student's behavior drastically changed. Student refused to participate in group activities, screamed and ran around the room, failed to follow directions, and became aggressive. Student pushed and hit other children, tried to choke a classmate, and used a toy shovel to hit another child.

Brandt relayed her concerns about Student to principal Haywood Thompson. Thompson instructed Brandt to consult with school psychologist Veronica Ricci. Ricci observed Student in the classroom on two or three occasions. Ricci's first observation occurred the week of September 9, 2019. Ricci observed Student's speech delays and communicated to Brandt some of the group language activities used in the classroom were too language-heavy for Student. Ricci recommended Brandt provide alternative activities for Student. Brandt attempted a variety of behavioral interventions, including sitting Student next to her during reading time and letting him hold a heart shaped pillow. By September 16, 2019, the fifth week of school, Student engaged in four to six

disruptive incidents daily, particularly during naptime. Student was disruptive, loud and refused to stay on his mat.

Grandparent took Student to and from school each day and volunteered in Brandt's classroom two or three times during the six-week period Student attended 54th Street Elementary. Grandparent regularly communicated with Brandt during this period. Grandparent recalled that other than Brandt telling him Student moved around a lot and had difficulty maintaining attention during circle time, Brandt did not express any serious concerns about Student's behavior.

Parent had a detailed recollection of the facts and her testimony was sincere and earnest. She recounted during the first two weeks of school Student was excited to go to school. Student enjoyed playing with puzzles and blocks. Brandt told Parent that Student played well with his classmates and was a leader during story time.

Sometime around the week of September 9, 2019, the third week of school, Brandt called Parent and suggested she find a different program for Student. Brandt explained the class was too large and Student would do better in a smaller class. Parent recounted she was working full-time and relied upon Grandparent to take Student to and from school, and therefore it was not possible to change schools. Brandt called Parent on two additional occasions in mid-September and reiterated Student would do better in a smaller classroom. Brandt explained she was not experienced teaching children with speech and language impairments. Parent explained it was not possible for Student to change schools.

STUDENT'S UNSUPERVISED NAPTIME

An intervention that precludes adequate supervision of the child is prohibited.
(Ed. Code, § 56521.2, subd. (a)(7).)

As part of his daily routine, Thompson walked through the kindergarten yard and passed by Student's classroom. Sometime during the first two weeks in September 2019 Thompson found Student sleeping by himself on a rug outside the front of Student's classroom.

Thompson had been the principal at 54th Street Elementary for six years. He had worked for Los Angeles Unified for 34 years. He previously worked as an assistant principal, a general education teacher, a special education teacher and a resource specialist.

Thompson had known Brandt for approximately seventeen years. Thompson and Brandt previously worked together at another school. Thompson hired Brandt to work at 54th Street Elementary starting the 2015-2016 school year.

Thompson believed it was inappropriate for Student to sleep on the rug because it was dirty and unsanitary. Thompson picked up Student, found his shoes and took him to the Principal's office to finish his nap on the couch. Thompson provided an unclear and sometimes contradictory explanation about this event. Thompson initially recounted when he picked up Student the door to the classroom was closed, and Brandt opened the door when she heard Student protesting being moved and remarked Student had voluntarily elected to sleep outside. Thompson did not question Brandt at that time why she permitted Student to sleep alone outside on the rug. He proceeded to take Student to his office to sleep on his couch.

Thompson later changed his testimony and provided a different account, recalling the door was open when he picked-up Student, and he observed Brandt walking back and forth from within the classroom to the front door and checking on Student. When questioned further, he admitted he did not know if Brandt was checking on Student. Thompson offered no explanation why he took Student to his office, rather than returning him to Student's classroom, nor why he did so without first communicating his intention to Brandt.

Thompson did not discuss this event with Brandt or take any corrective action. His explanation for not doing so was because he believed Brandt was "having a rough time" with Student's behavior and was overwhelmed because of the lack of aides to support her in the classroom. Thompson appeared evasive when questioned about whether he had received complaints from other parents or teachers about Brandt's treatment of children. He initially testified he could not recall if he had received any complaints, but then changed his testimony and said there "might" have been complaints about Brandt experiencing frustration because she did not have classroom support.

Thompson's inconsistencies in his testimony about the details of this event negatively impacted his credibility. Thompson's second version of the facts claiming the classroom door was "open" and Brandt was supervising Student was not believable because Thompson hesitated, appeared nervous and changed his testimony. Thompson's response to the question about complaints about Brandt was equivocal and Thompson appeared reluctant to answer this question. Thompson's changing explanation of the facts and evasive answers affected his overall credibility and the weight given to his testimony on this issue.

At the time, Thompson did not discuss his actions or what he had witnessed with Student's Parent or Grandparent, or anyone else.

Brandt initially could not recall this incident, but then conceded it was possible she "might" have asked an adult volunteer in the classroom to take Student outside for a break if he was being disruptive to the other children. Brandt was visibly upset during her testimony. Brandt's testimony seemed rehearsed and guarded, particularly when it concerned her conduct towards Student. Brandt's inability to remember this event was not credible, particularly given the fact the principal intervened and removed Student from her classroom area.

Brandt changed her testimony and stated she "vaguely" recalled the event when Student was being disruptive during naptime and left her classroom with Thompson. Brandt did not recall any other details. She reasoned her memory was poor because it had been around ten months since Student had been in her classroom and she was overwhelmed due to the lack of support in her classroom, despite her repeated requests to Thompson. Brandt's testimony was not convincing because she changed her testimony regarding her memory and recollection of the event. Further, it seems unlikely Brandt would have forgotten the details of this incident when she later was removed from the classroom for approximately two weeks while Los Angeles investigated the appropriateness of her treatment of Student regarding this and other incidents. Brandt's memory difficulties and multiple inconsistencies negatively affected her overall credibility.

None of the witnesses could recall the exact date of Student's unsupervised nap. However, Thompson recalled at the time of the event he knew Brandt was "frustrated" with Student's behavior and the lack of classroom support. Brandt recounted Student's

behavior changed around the third week of school and problems often exhibited during naptime, and Student engaged in four to six negative behaviors each day by September 16, 2019. Brandt recalled she told Thompson about her concerns concerning Student's negative behavior around the third week of school. Therefore, the testimony of Thompson and Brandt was consistent with the nap incident taking place sometime between September 3d through 16, 2019.

The preponderance of the evidence established that on one occasion between September 3d and 16, 2019, Los Angeles failed to adequately supervise Student by allowing him to spend his naptime unattended outside the classroom, a prohibited intervention which deprived him of educational opportunity. (Ed. Code, §56521.2, subd. (a)(7).)

SEPTEMBER 25, 2019 INCIDENT

Schools are prohibited from authorizing, ordering or consenting to interventions designed or likely to cause physical pain. (Ed. Code, § 56521.2, subd. (a)(1).) Schools further are prohibited from using methods and procedures to eliminate a student's maladaptive behavior which cause pain, trauma, or are deemed unacceptable under Education Code section 49001, defining and prohibiting corporal punishment. (Ed. Code, § 56520, subd. (a)(4).)

Grandparent described an incident he and Shirley Faulk, the school crossing guard observed on September 25, 2019, between Student and his teacher.

That morning, Grandparent dropped Student off in his classroom around 8:00 AM. Grandparent then exited the school and walked to his car. He stopped to speak to Faulk.

Grandparent stood at the street corner near the school's cross walk, which was behind Student's classroom and the sidewalk. From his vantage point, Grandparent could see the classroom door and outside area and could recognize Brandt and Student.

Faulk directed Grandparent's attention to the outside of Student's classroom. Faulk asked Grandparent, "Who is that person with Brandt?" Grandparent recognized Student's coat, and saw Brandt standing outside speaking to Student. Grandparent's attention was momentarily diverted by the sounds of a screeching car and he looked away. When he looked back, Student and Brandt were no longer there.

Moments later, he noticed the door opened again. Brandt and Student walked out of the classroom. Brandt closed the door, bent down on her knees, placed her hands-on Student's shoulders and began to shake him. Initially, Brandt shook Student softly, but then more forcefully. Grandparent credibly testified the shaking was so hard he could see Student's head moving back and forth. Brandt shook Student's shoulders about five times.

Grandparent yelled to Brandt, "Why are you shaking my Grandson like that?" When Brandt did not respond, Grandparent yelled louder, "Why are you shaking my Grandson like that?" Brandt looked over and saw Grandparent. She appeared startled. She stood up and responded she was following the directions of the school psychologist, Ricci and said, "This is what you do to get Student's attention," or words to this effect. Grandparent responded this was, "Not true." Then, Brandt took Student back into the classroom.

Faulk did not testify at hearing. However, Faulk's statements of her observation of the event was recorded by Thompson as part of Los Angeles' internal investigation of this incident. Thompson testified at hearing concerning Faulk's statement. Thompson

recounted he interviewed Faulk within a few days of the September 25, 2019 incident. Faulk confirmed she was standing at the crosswalk speaking to Grandparent the morning of September 25, 2019. Faulk saw Brandt come out of the classroom with Student. She directed Grandparent's attention to Brandt and Student. Faulk observed Brandt shake Student. Thompson directed Faulk to prepare a written statement documenting her observation of the incident. Faulk prepared a written statement confirming her observation of Brandt shaking Student the morning of September 25, 2019. Thompson credibly explained he had no reason to doubt Faulk's veracity and she appeared to be truthful when making her statement. Further, Faulk's statement was near the time of the event, and therefore considered reliable.

Grandparent's earnest demeanor and detailed recollection of the facts of this event supported his credibility. His testimony, therefore, was afforded substantial weight. Further, Grandparent's recounting of the event was corroborated by the eye-witness account of Faulk as recounted by Thompson. (Cal. Code of Regs., tit, 5, § 3082, subdivision (b).)

Grandparent went immediately to Thompson's office to report the incident. Thompson was not currently available. Grandparent went to Student's classroom because he was concerned about Student's physical safety. He collected Student and his belongings and walked out of the classroom. Brandt was on the telephone at the time. Grandparent and Brandt's testimony was consistent about Grandparent's removal of Student from the classroom, except Brandt testified Grandparent made a threatening remark to her as he was exiting the classroom, but then later apologized. However, whether Grandparent made a negative comment is irrelevant to the issue of whether Los Angeles denied Student a FAPE by committing a prohibited intervention.

As Grandparent exited the school, Thompson and Ricci approached him. Brandt followed Grandparent out of the classroom and stood next to Thompson. Grandparent explained what he observed Brandt do to Student to Ricci and Thompson. Grandparent asked Ricci if she had instructed Brandt to shake Student, and Ricci denied she gave this advice. Grandparent then went with Thompson to his office and met with him for around 20 minutes and discussed what he had observed and expressed his concerns about Student's safety. Thompson agreed Brandt's behavior was inappropriate and Brandt should not have placed her hands-on Student. Thompson then told Grandparent about the incident when he found Student sleeping unsupervised on the rug during naptime.

Brandt's testimony was largely consistent with that of Grandparent, except she adamantly denied shaking Student. Brandt explained the previous day she saw Student hit a classmate with a plastic shovel. Ricci happened to be present in the area when this occurred. Brandt spoke with Ricci about the incident. Ricci then approached Student, lowered herself to eye-level with Student, placed her hand on Student's shoulder and spoke firmly to him. Brandt recounted Ricci told her she should use this technique with Student and that, "Student's parents do that at home." A few moments later, Student ran away from his speech and language service provider. Ricci again approached Student, lowered herself to eye-level with Student and placed her hand on his shoulder to redirect his behavior. Brandt explained she modeled this technique the next day.

Brandt recalled the morning of September 25, 2019. When Student arrived, she told him she expected him to behave appropriately. Almost immediately, he began disrupting other students by hitting them and failed to follow Brandt's instructions. Brandt took Student outside the classroom. She admitted placing her hands-on Student's shoulders but denied shaking him. Brandt recalled she looked at Student in

the eyes and said, "We keep our hands to ourselves." She then brought him back into the classroom.

After they returned to the classroom, Student began screaming and Brandt took Student outside again because she did not want to disrupt the other children or embarrass Student. Brandt again knelt, placed her hands-on Student's shoulders, and told him, "We do not scream."

Brandt's testimony that she did not shake Student's shoulders was not credible. Her testimony seemed rehearsed and insincere. Brandt showed no remorse for her actions or sympathy towards Student. She described in detail Student's negative behaviors that morning, as if to suggest he was partly to blame. Brandt insisted Grandparent and Faulk lied about having observed her shake Student.

Brandt attempted to justify her behavior towards Student by relying on the technique she observed Ricci use with Student. Brandt's testimony regarding her conversations with Ricci was based on uncorroborated hearsay and therefore was afforded little weight. (Cal. Code of Regs., tit, 5, § 3082, subdivision (b).) Thompson recalled he spoke with Ricci following the incident and she confirmed she did not instruct Brandt to place her hands-on Student's shoulders. Grandparent's testimony was consistent with that of Thompson. Grandparent credibly testified Ricci told him the day of the incident that she did not instruct Brandt to place her hands-on Student. The weight of the evidence established Ricci did not direct Brandt to place her hands-on Student.

The preponderance of the evidence proved Brandt used a prohibited intervention by shaking Student's shoulders. This fact was established by Grandparent's credible, contemporaneous eye-witness account of the events, his immediate reporting of the

event to Thompson, and Thompson's interview of Faulk. No evidence was introduced showing Brandt, a highly experienced teacher, intended to cause hurt Student or cause him pain. Rather, Brandt was overwhelmed and understaffed in the classroom, and lacked training on appropriate behavioral techniques.

STUDENT DID NOT RETURN TO A LOS ANGELES SCHOOL FOR SIX-WEEKS

Grandparent explained he called Parent following his meeting with Thompson and told her about what had happened and then took Student home. Student told Parent that his arm and shoulder hurt and, "My teacher did this to me." Parent brought Student to the emergency room the day of the incident but had to return the following day because of the long wait. No evidence was introduced about the extent of Student's injuries, if any, or how any physical injuries impacted Student's ability to access his educational program.

Parent convincingly testified that prior to the September 25, 2019 incident, Student went to sleep each night at a standard time and slept without difficulty. Following the September 25, 2019 incident and continuing through the date of hearing, Student had trouble falling asleep and had nightmares three to four times each week. Student began wetting his bed two times per week following the event, which continued until approximately December 2019. Student expressed fear of going to school immediately following the September 25, 2019 event. Parent did not return Student to 54th Street Elementary after the September 25, 2019 event.

Student did not receive any general education instruction or special education services during the six-week period he was out of school.

On November 13, 2019, Student returned to school at the Ozzie Goren campus. No evidence was offered suggesting Student remained fearful or reluctant to attend school after he started at Ozzie Goren on November 13, 2019. Parent credibly testified Student did well in the smaller class at Ozzie Goren and received the speech and language services delineated in the IEP during the entirety of his attendance at Ozzie Goren. She explained Student graduated from the Ozzie Goren program at the end of the 2019-2020 school year and was preparing to enter kindergarten at the time of the due process hearing.

Stephanie Jones was an early child special education specialist at Los Angeles. She oversaw 14 Head Start agencies on behalf of Los Angeles. She was responsible for, among other things, overseeing implementation of special education services. Jones confirmed at hearing that Parent enrolled Student at Ozzie Goren on November 13, 2019. Student attended Ozzie Goren for the remainder of the 2019-2020 school year. During the time Student was at Ozzie Goren, Los Angeles provided speech and language services to Student as set forth in his IEP.

The preponderance of the evidence proved Los Angeles committed a prohibited intervention that was likely to cause physical pain. (Ed. Code, §56521.2, subd. (a)(1).)

LOS ANGELES FAILED TO PREPARE A BEHAVIORAL EMERGENCY REPORT AND CONVENE AN IEP TEAM MEETING WHICH RESULTED IN EDUCATIONAL LOSS

Los Angeles reported the September 25, 2019 incident to law enforcement within a day of the incident. Los Angeles also conducted an internal investigation concerning the September 25, 2019 incident and concluded no abuse occurred. Thompson took

witness statements of Grandparent, Faulk, two adult classroom volunteers, and Student's classmates. Faulk's witness statement was consistent with Grandparent's testimony in that they both recalled seeing Brandt shake Student's shoulders several times. The two adult volunteers and other children did not observe the incident. Brandt was relieved of her classroom duties on September 26, 2019 pending the results of the investigation. Los Angeles ultimately concluded no significant harm resulted from the incident and Brandt returned to her classroom approximately two weeks later.

Student did not allege that Los Angeles did not timely and appropriately investigate the incident.

When school staff uses emergency interventions on a disabled student, the parents must be notified within one school day, if appropriate, to prevent the emergency interventions from being used in lieu of "planned, systematic behavioral interventions." (Ed. Code, § 56521.1, subd. (e).) "A behavioral emergency report shall immediately be completed and maintained in the file of the disabled student. (Ed. Code, § 56521.1, subd. (e)(1)-(5).) The behavioral emergency report must be forwarded immediately to a designated responsible administrator for review. (Ed. Code, § 56521.1, subd. (f).)

A behavioral emergency report must be prepared for a student with exceptional needs who does not have a behavioral intervention plan when an emergency intervention is used. (Ed. Code, § 56521.1, subd. (g).) The designated responsible administrator must within two days schedule an IEP team meeting to review the emergency report, to determine the necessity for a functional behavioral assessment, and to determine the necessity for an interim plan. (*Id.*)

Student's IEP did not contain a behavior intervention plan. Neither Student nor Los Angeles offered evidence whether a behavioral emergency report was prepared following the September 25, 2019 incident. A behavioral emergency report should have been prepared and within two days an IEP team meeting scheduled to determine the necessity for a functional behavioral assessment. (Ed. Code, § 56521.1, subds. (e), (f) & (g).)

Furthermore, regardless of whether the emergency behavior report was prepared, Los Angeles should have scheduled an IEP team meeting following the incident. The IDEA requires local educational agencies to ensure the IEP team revises a student's IEP as appropriate to address, among other things, any lack of expected progress toward the annual goals and in the general education curriculum, information about the child's anticipated needs, or other matters. (20 U.S.C. § 1414(d)(4)(A)(ii), (iv).) The IDEA places the obligation on the local educational agency to revise a student's IEP in response to new information and events.

Los Angeles did not schedule an IEP team meeting to address the behavioral emergency, Student's educational program, or determine the extent to which interventions, supports or services, including positive behavioral interventions and supports and other behavioral strategies might be needed and, if necessary, reevaluate Student. The prohibited interventions and Parent's removal of Student from school were significant events impacting Student's educational needs. Accordingly, an IEP team meeting should have been promptly convened to consider Student's needs and supports as well as remedy any denial of FAPE. (20 U.S.C. § 1414(d)(4)(A)(ii), (iv).)

Because Los Angeles failed to complete a behavior emergency report or schedule a timely IEP team meeting after the shaking incident, it resulted in an educational loss to Student. Student's education program was in limbo when Los Angeles should have been taking action to ensure Student received the services in his IEP. These failures impeded Student's ability to access his educational program for the six-week period he was out of school and resulted in an educational loss.

DENIAL OF FAPE AND LOSS OF EDUCATIONAL OPPORTUNITY BASED UPON TWO PROHIBITED INTERVENTIONS

The issue is whether the prohibited interventions used against Student constituted a denial of FAPE. In analyzing the impact of the two prohibited interventions used, the young age of Student and his speech and language impairment were considered.

It is fundamental that a safe and healthy environment is necessary to an appropriate educational program. Public and non-public schools must "provide an appropriate and meaningful educational program in a safe and healthy environment for all children regardless of possible physical, mental, or emotionally disabling conditions." Some disabled children have significant behavioral challenges that adversely impact their ability to learn. (Ed Code, §§ 56520, subd. (a)(1) & (2), 56521.) Research and experience demonstrate that providing positive behavioral interventions and supports are effective in addressing the learning and behavioral needs of children with disabilities. (20 U.S.C. § 1400(c)(5)(F); Ed. Code, § 56520, subd. (a)(3).)

The California Legislature intends for children with serious behavioral challenges to receive timely and appropriate assessments and positive supports and interventions.

(Ed. Code, § 56520, subd. (b)(1).) When a child's behavior impedes the child's learning or that of others, the IEP team must consider strategies, including positive behavior interventions, and supports to address that behavior. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i) & (b); Ed. Code, § 56341.1, subd. (b)(1).)

When behavioral interventions, supports, and other strategies are used, they must be used in consideration of the student's physical freedom and social interaction and be administered in a manner that respects human dignity and personal privacy. (Ed. Code, § 56520, subd. (b)(3).)

Aversive behavioral interventions are negative consequences or stimuli used to change a student's problematic and disruptive behavior that impedes his ability to access his education. (*Bryant v. New York State Educ. Dept.* (2d Cir. 2012) 692 F.3d 202, 213.)

Procedural violations do not automatically require a finding of a denial of FAPE. (*W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1483-1484, superseded on other ground by statute (referred to as *Target Range*).) A procedural error results in a denial of 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 regarding the provision of FAPE; or
3. caused a deprivation of educational benefits.

(20 U.S.C. § 1415(f)(2)(E)(ii); 34 C.F.R. § 300.513(a)(2); Ed. Code, § 56505, subd. (f)(1) & (2); *Target Range, supra*, 960 F.2d at 1483-1484).)

In determining whether procedural violations resulted in the denial of FAPE, the hearing officer must find:

1. the procedural errors resulted in the loss of an educational opportunity to the student; or
2. interfered with the opportunity of the parent to participate in the formulation process of the individualized education program.

(Ed. Code, § 56505, subd. (j).)

The Ninth Circuit has held a procedural error resulting in a loss of any educational opportunity denies a student a FAPE. (*Doug C. v. Hawaii Department of Education* (9th Cir. 2013) 720 F. 3d 1038, 1047.) "A procedural error results in the denial of an educational opportunity where, absent the error, there is a 'strong likelihood' that alternative educational possibilities for the student 'would have been better considered.'" (*Ibid.*, quoting concurring opinion of Judge Gould in *M.L. v. Federal Way School Dist.* (9th Cir. 2005) 394 F.3d 634, 657.)

Only material failures to implement the IEP are a substantive violation of the IDEA. "[T]he materiality standard does not require that the child suffer demonstrable educational harm in order to prevail. However, the child's educational progress, or lack of it, may be probative of whether there has been more than a minor shortfall in the services provided." (*Van Duyn v. Baker School Dist.* (9th Cir. 2007) 502 F. 3d 811, 822 (*Van Duyn*); 20 U.S.C. §§ 1401(9)(D), 1414(d), 1415(f)(3)(E)(i).)

The courts have not definitively developed a standard for determining when the use of unauthorized prohibited interventions deny students a FAPE. Some courts have suggested even one incident of physical mistreatment may constitute a violation of a

student's IEP and in turn the IDEA. (*Shadie v. Forte and Hazelton Area School District* (MD. Pa. April 22, 2013, Civil Action No. 3:10–2121.) 2013 WL 1729368.). The courts and administrative agencies that have considered this issue have generally evaluated the use of the prohibited intervention, how the school district responded to the incident and whether the conduct prevented the student from accessing their educational program. *Doe v. Clark Co. Board of Ed.* (D. Nev. August 28, 2007, No. 02:03–CV–01500–LRH–RJJ.) 2007 WL 2462615 [mistreatment must be shown to interfere with student's right to FAPE]; (*In Re Student with a Disability* (SEA MT March 18, 2014) 2014-01, 114 LRP 34648 [teacher's improper use of mechanical restraints, coupled with school district's failure to address the reports of mistreatment, deprived student of FAPE]; *Beaumont Independent School District* (SEA TX August 28, 2014) 162-SE-0214, 114 LRP 41599 [use of behavioral interventions, including striking child on the hand with a yardstick, denied child FAPE where significant portion of IEP not implemented.].)

Student did not display behavioral problems at the start of the school year, but around the third week of school his negative behaviors inexplicably increased. Student's anxiety level increased in the school environment as he became more disruptive and his negative behaviors escalated to the extent that by the September 16, 2019, he engaged in four to six negative behaviors daily. Student's IEP recommended facilitated peer interaction to support Student's use of language, as well as daily structured language activities facilitated by an adult to engage in questions, answers and conversations. The weight of the evidence established the classroom lacked necessary adult supports. Student's increased negative behaviors can reasonably be explained by the lack of structured activities and adult support within the classroom.

Student's change in behavior seemed to coincide with the unsupervised nap incident. Brandt explained Student often was disruptive during nap time. Although

Brandt denied recalling the details of the unsupervised nap incident, she admitted she “might” have asked an adult to take Student outside to “take a break.” The evidence clearly established that on one occasion in September 2019 Student spent naptime unattended outside his classroom on a rug. Thompson admitted this was wrong.

Brandt was admittedly frustrated by the lack of support in her classroom and the failure of the school administration to rectify the situation. Thompson confirmed Brandt’s classroom lacked the required number of aides and he knew Brandt was overwhelmed. However, Brandt’s action of allowing Student to spend his naptime sleeping alone outside without adequate supervision was a prohibited intervention.

When behavioral supports and strategies are administered, they must be done in a manner that allows for physical freedom and social interaction and respects a student’s dignity. (Ed. Code, § 56520, subd. (b)(3).) Student, who was four years old at the time, should not have been permitted to sleep alone outside because of Brandt’s inability to control Student’s behavior problems because of insufficient staffing in the classroom. (Ed. Code, § 56521.2, subd. (a)(7).) This action was unsafe, isolated Student from his peers and was injurious to his dignity.

Emergency interventions must only be used to control spontaneous and unpredictable behavior which pose an immediate threat of harm to the student or others. Emergency interventions must not be a substitute for a systematic behavioral intervention plan designed to change, replace, modify or eliminate an undesirable targeted behavior. (Ed. Code, § 56521.1 subds. (a) & (b).)

Here, on September 25, 2019, Brandt admitted removing Student from the classroom because he was hitting other students and not following instructions. Brandt took Student outside and restrained him by placing both hands on his shoulders.

Although Brandt denied shaking Student's shoulders repeatedly, the weight of the evidence proved otherwise. Two eye-witness accounts, including Grandparent and Thompson's investigation and interview of Faulk, established that Brandt restrained Student by placing her hands on his shoulders and shaking them up to five times. Restraining and shaking Student's shoulders was a prohibited aversive intervention when there was no behavioral emergency. (Ed. Code, § 56521.2, subd. (a)(1).)

Even though the weight of the evidence established that Brandt did not intend to harm Student, the acts of physically restraining and shaking Student's shoulders were likely to cause pain. (Id.) These actions were the antithesis of the positive behavioral interventions and supports effective in addressing the learning and behavioral needs of children with disabilities. (20 U.S.C. § 1400(c)(5)(f); Ed. Code., § 56520, subd. (a)(3).)

Los Angeles argued in its closing brief it remained willing and able to provide Student his IEP services during the six-week period he was out of school. However, it presented no evidence it made any efforts to provide these services to Student. The burden was on Los Angeles, not Student, to implement Student's IEP.

Further, Los Angeles relied on *M.L. v. Federal Way School District*, supra, 394 F.3d 634, 650-651, for its argument no denial of FAPE occurred. In *M.L.*, the Ninth Circuit established a standard for determining when a teacher's failure to take action to prevent other students from bullying a disabled student constitutes a denial of FAPE. The present case does not involve bullying of Student by other students or Student's teacher. However, the reasoning of *M.L.* is instructive. The Ninth Circuit determined the student failed to demonstrate the teasing resulted in the loss of an educational benefit. (Id. at p. 651.) The student also failed to establish any, "violence, or threat of physical contact between another student and M.L." (Id.)

Here, Student was left unsupervised on one occasion and was physically shaken on one occasion, resulting in Student being removed from school for 33 school days and resulting in an educational loss caused by Brandt's actions. Therefore, *M.L.*, by analogy, supports rather than negates a finding that Los Angeles denied Student a FAPE.

The preponderance of the evidence proved that the prohibited interventions resulted in loss of educational opportunity to Student. Student's last day of school at 54th Elementary was September 25, 2019 and he did not return to another Los Angeles school until November 13, 2019. Following the incident, Parent spoke with Karen Brown at Los Angeles. Ms. Brown provided Parent a list of other potential school sites. Parent called each of the schools on the list, but none of them had available space for Student. Other than providing Parent a list of schools and suggesting Student return to Brandt's classroom, Los Angeles made no effort to find an alternative placement for Student nor did it convene an IEP team meeting.

On October 4, 2019, Parent met with Thompson. Thompson encouraged Parent to return Student to 54th Street Elementary. Parent told Thompson she did not want Student to return to the same classroom because she did not want Student to have contact with Brandt. She explained Student was having nightmares, wetting his bed, and expressed fear and reluctance to return to school.

While Van Duyn does not require demonstrable harm for Student to prevail, the preponderance of the evidence established Student suffered an educational loss. Student missed 33 days of school following the September 25, 2019 incident until November 13, 2019, the date he enrolled at Ozzie Goren. Student not only was deprived of access to his general education curriculum during this period, but he missed 100 percent of the special education services provided in his IEP for this time period.

Student's May 23, 2019 IEP provided him with 120 minutes a month of speech and language services by a speech language pathologist, and 120 minutes a month of direct service instruction by an early childhood itinerant teacher to support his language goals. Student was deprived of these services during the 33 missed school days.

Regarding the procedural violation, the weight of the evidence proved Student lost educational benefits as a result of the two prohibited interventions. (Target Range, *supra*, 960 F.2d 1479, 1483-1484.) Further, Los Angeles committed a substantive violation by failing to implement Student's IEP due to Brandt's conduct.

PSYCHOLOGICAL EVALUATION OF STUDENT BY DR. ESTHER CHON

A psychological assessment of a pupil must be conducted by a credentialed school psychologist who is trained and prepared to assess appropriate cultural and ethnic factors. (Ed. Code, §§ 56322, 56324, subd. (a).).

Student seeks compensatory damages. Student argued that he suffered physical and psychological harm as a result of the two incidents of prohibited intervention and required specific compensatory remedies. As detailed above, this Decision makes no finding of fact whether Student suffered physical or psychological harm. This Decision considers only whether the prohibited interventions denied Student a FAPE resulting in the loss of educational opportunity, and Student's entitlement to compensatory education.

Student's expert witness Dr. Esther Chon had been a licensed clinical psychologist in private practice in California since 2007. She received a master's degree in teaching English to Speakers of Other Languages and a master's degree in International Education. She received her doctorate in clinical psychology. Chon testified at hearing.

Chon entered private practice in 2013. Much of her practice involved providing mental health therapy for children and adults affected by medically related trauma. At the due process hearing, Chon detailed her experience in the area of education. As a psychology intern, Chon provided individual, family and group therapy in the elementary school setting through the Child, Youth and Family Services Consortium. She was a behavioral sciences extern for Children's Hospital of Los Angeles and participated in IEP team meetings to assist with the transition of children with cancer-related medical diagnoses transition into the school environment. She worked as a supervisor in a cooperative effort with the Department of Child Foster Care Services to re-integrate foster care children back to their home environments.

Chon had a wide range of experience working with children and adults impacted by trauma. Some of this experience touched upon the educational setting, including participating in IEP team meetings and providing feedback to teachers on addressing her clients' social and emotional needs. However, Chon was not a school psychologist. She did not hold a California teaching credential nor a California special education credential. Chon was not a board-certified behavior analyst.

Chon's opinions were based on information she obtained around July 19, 2020, less than nine days prior to the due process hearing. She interviewed Parent and Grandparent, reviewed the results of two surveys completed by Parent, and observed Student in two play trauma therapy sessions. Parent and Grandparent told Chon about the two incidents at school. Chon opined Student met the criteria for post-traumatic stress disorder for children under the age of six years old. She based her diagnosis on the intrusiveness of the memory, Student's hyper-vigilance in play therapy, his dissociative symptoms, Parent's reports of Student playing alone, Student's avoidance in discussing the event, and physiological changes, including bed wetting.

Chon's recounting of some of the key facts about the two incidents was inconsistent with Parent and Grandparent's testimony, which negatively impacted her credibility. For example, Chon recounted that starting in mid-September 2019 Student did not want to go to school and began wetting his bed and having recurring nightmares. Parent and Grandparent explained Student did not express school avoidance or begin bedwetting and experiencing recurring nightmares until after the September 25, 2019 incident.

Chon explained that after the September 25, 2019 incident Student preferred to play alone rather than with his peers and was distrustful of his teachers. However, neither Parent nor Grandparent testified to these facts. Parent and Grandparent explained Student was fearful of returning to Brandt's classroom, but they did not recount he was fearful of going to school after he started at Ozzie Goren. Chon did not offer any facts supporting her conclusion Student had difficulties interacting with classmates and being distrustful towards his teachers while at Ozzie Goren. At the time Chon spoke with Parent and Grandparent Student had been attending Ozzie Goren for approximately seven months. Chon's failure to consider Student's progress at Ozzie Goren negatively impacted her credibility.

Chon reported she spoke to Student about how he felt about school, and in response he put his head down and did not respond, which reflected stress-avoidance. However, she then provided a contradictory recitation of the facts and recalled Student told her, "she did a million mean things to me" and "she made me sleep on a dirty rug." Chon's multiple factual inconsistencies negatively impacted her overall credibility.

Chon opined that the data Parent provided on the Trauma Symptoms Checklist for Young Children reflected clinically significant signs of stress-intrusion and stress-

avoidance. She opined Student's recurrent nightmares and reluctance to talk about the school related events were indicative of post-traumatic stress disorder. Chon also explained that the feedback Parent provided on the Child Behavior's Checklist was clinically significant because Student's fear of sleep and recurrent nightmares suggested Student was experiencing post-traumatic stress.

At hearing, Chon did not detail the information gleaned from the questionnaires, Parent's answers, or the survey scoresheets. Chon offered no explanation how or why these surveys were administered, what they were intended to measure or assess, the subject matter of the questions, how the answers were scored or how the data was interpreted. Chon did not explain the protocols for diagnosing a child under the age of six years old with post-traumatic stress disorder and speech and language impairment. Chon did not provide a written report. Chon's failure to explain the relevance of these tools to her assessment weakened the basis of her opinions.

Chon explained the significance of the play trauma sessions she administered to Student. She first met Student at his home sometime after July 19, 2020. She first spoke with Student and then engaged in play therapy. She set-up toy scenes depicting a school, playground, home and hospital setting. She opined young children with post-traumatic stress disorder may act out traumatic events in their play or be hyper-vigilant for signs that the trauma may occur again. For example, a child who has experienced physical abuse may play roughly with classroom objects, dolls or other students because aggressive conflict resolution or interactions with others may be considered normal.

Chon reported Student's play within the toy home setting reflected positive, healthy interactions. She did not describe what play by Student demonstrated she considered to be positive interactions in the home setting. Chon opined Student's play

in the school environment, however, demonstrated internal conflict. She reported Student toppled over dolls, made a doll fall from the top of the building, and stuck a doll's head in the toilet.

Approximately two days after her initial visit with Student, Chon met Student in her office and engaged in another play therapy session. She did not explain what she observed in the second play trauma session.

Chon's opinion that Student suffered post-traumatic stress as a result of the two prohibited interventions was not credible given the factual inconsistencies in her testimony and failure to explain how Student met the criteria for this diagnosis. More importantly, for purposes of the issue before OAH, Chon did not persuasively explain how Student's diagnosis of post-traumatic stress disorder resulted in an educational loss to Student. Chon offered general opinions about how post-traumatic stress disorder can negatively impact a student's ability to learn. She explained a child who is experiencing post-traumatic stress is in a constant state of "fight or flight" which reduces the connections in the frontal lobe of the brain and negatively impacts his ability to learn. She further opined sleep disruptions can lead to cognitive deficits. When questioned about how the two incidents impacted Student in the educational environment, she offered a lengthy, scientific answer about how post-traumatic stress generally affects brain functioning.

Chon's testimony reflected a lack of knowledge about how Student functioned in the educational environment while attending Ozzie Goren. The credible testimony of Parent, Grandparent and Jones established Student thrived in the small group, general education program at Ozzie Goren, between November 13, 2019 through the end of the

2019-2020 school year and that Student received his speech and language services during that period.

Chon made recommendations at hearing to remedy the damage allegedly suffered by Student as a result of the prohibited interventions. Chon recommended:

1. a complete psychoeducational evaluation;
2. weekly, one-hour trauma processing therapy for a period of one year; and
3. twice weekly, one-hour clinic based occupational therapy for a six-month period to address Student's disassociation tendencies.

However, Chon did not explain why these services were necessary to address the failure of Los Angeles to provide Student a FAPE for six weeks or to compensate Student for any loss of educational benefit by failing to receive the services set forth in his IEP. Chon's recommendations were not persuasive because her proposed resolutions for Student in the educational context were based on generalities and not on Student's unique needs, and therefore her opinions were afforded little weight.

Additionally, Chon's recommendations for proposed resolutions were not persuasive because she did not conduct any formal or standardized testing of Student to determine whether Student's stress affected his educational performance. She did not evaluate Student's ability to function in the school environment with general education supports. She did not observe him in the classroom environment either on-site or virtually. Chon did not discuss Student's academic, behavioral or social functioning with anyone from Los Angeles, including Student's teachers at Ozzie Goren or anyone on his IEP team. Yet, she testified it was her general practice when working with children impacted by trauma to obtain input from the child's teachers and other

adults to develop tools to support social/emotional functioning. She agreed it would have been helpful to have spoken to Student's teacher before making her diagnosis.

Chon's unfamiliarity with Student's present levels of performance, goals and progress towards his goals following the relevant incidents and failure to communicate with Student's teachers and IEP team members negatively impacted her credibility and the basis for her proposed resolutions. Chon did not establish how the incidents, or her diagnosis of post-traumatic stress disorder, adversely impacted Student's educational performance. Therefore, her testimony was not persuasive and recommendations for proposed resolutions were given little weight.

Student argued in his closing brief Student continued to exhibit hyper-vigilance, sleep disturbance, and fear of being hurt by his teachers. However, Student offered no evidence that Student exhibited hyper-vigilance or fear of his teachers at Ozzie Goren. Parent credibly explained that Student continued to have sleep disturbances after the September 25, 2019 event through the date of hearing, but Student failed to prove how this impeded access to his educational program. Student did not offer any evidence his language and speech regressed, or that he failed to make progress towards his language and articulation goals following the September 25, 2019 incident. None of Student's teachers or IEP team members were called to testify about any educational impediments by Student during his time at Ozzie Goren. The weight of the evidence proved Student that Los Angeles provided Student the speech and language services required by his IEP while attending Ozzie Goren and he successfully completed the 2019-2020 school year.

Therefore, the preponderance of the evidence proved Student's right to a FAPE was impeded and he suffered an educational loss for the six-week period he missed

school following the prohibited interventions. However, Student did not prove he suffered an educational loss following his enrollment at Ozzie Goren.

CONCLUSIONS AND PREVAILING PARTY

As required by California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided.

Issue 1: Did Los Angeles deny Student a free appropriate public education by abusing Student during the 2019-2020 school year, causing Student psychological and physical harm and denying him educational opportunity?

Student prevailed on Issue 1.

REMEDIES

Student sought the following remedies in his closing brief: an independent educational evaluation in the area of psychoeducation by an assessor of Parent's choice; 52 hours of compensatory counseling by a non-public agency; and 52 hours of clinic-based occupational therapy by a non-public agency.

Under federal and state law, courts have broad equitable powers to remedy the failure of a school district to provide a FAPE to a disabled child. (20 U.S.C. § 1415(i)(1)(C)(iii); Ed. Code, § 56505, subd. (g); see *School Committee of the Town of Burlington, Massachusetts v. Department of Education* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385] (*Burlington*).) This broad equitable authority extends to an Administrative Law Judge who hears and decides a special education

administrative due process matter. (*Forest Grove School Dist. v. T.A.* (2009) 557 U.S. 244, fn. 11 [129 S.Ct. 2484, 174 L.Ed.2d 168] (*Forest Grove*).)

In remedying a FAPE denial, the student is entitled to relief that is appropriate considering the purposes of the IDEA. (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3).) The purpose of the IDEA is to provide students with disabilities a free appropriate public education which emphasizes special education and related services to meet their unique needs. (*Burlington, supra*, 471 U.S. 359, 374.) Appropriate relief means relief designed to ensure that the student is appropriately educated within the meaning of the IDEA. (*Student W. v. Puyallup School Dist.* (9th Cir. 1994) 33 F.3d 1489, 1497 (*Puyallup*).) The award must be fact-specific and be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.)

Parents may be entitled to reimbursement for the costs of placement or services that they have independently obtained for their child when the school district has failed to provide a FAPE. (*Burlington, supra*, 471 U.S. at pp. 369-371.; *Puyallup, supra*, 33 F.3d at pp. 1489, 1496.) An independent educational evaluation at public expense may be awarded as an equitable remedy, if necessary, to grant appropriate relief to a party. (*Los Angeles Unified School Dist. v. D.L.* (C.D. Cal. 2008) 548 F.Supp.2d 815, 822-23.)

A school district also may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Park, supra*, 464 F.3d at p. 1033.) Compensatory education is a prospective award of educational services designed to catch-up the student to where he should have been absent the denial of a FAPE.

(*Brennan v. Regional School Dist. No. 1* (D.Conn. 2008) 533 F.Supp.2d 245, 265; *Orange Unified School Dist. v. C.K.* (C.D. Cal. June 4, 2012, No. SACV 11–1253 JVS (MLGx)) 2012 WL 2478389, *12.) An award of compensatory education need not provide a day-for-day compensation. (*Puyallup, supra*, 33 F.3d 1489, 1496-1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.)

These are equitable remedies that courts may employ to craft “appropriate relief” for a party. An award need not provide a “day-for-day compensation.” 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, supra*, 401 F.3d 516, 524.) The award must be reasonably calculated to provide educational benefits that likely would have accrued from special education services the school district should have provided in the first place. (*Ibid.*)

Accordingly, the following compensatory services are deemed to be appropriate.

Los Angeles is ordered to conduct a psychoeducational evaluation of Student. At Parent’s option, initiation of the assessment may be put on hold until no more than three months after students are permitted to physically return to school campuses without restriction on the number of students, as determined by the governing Health Department.

Student missed school from September 26, 2019, through November 12, 2019, a total of 33 school days as a result of the prohibited interventions and Parent’s reasonable decision not to return Student to Brandt’s classroom. The missed school days were calculated using Los Angeles’ academic calendar for the 2019-2020 school year.

Los Angeles is ordered to provide Student with compensatory academic support to remedy Student's loss of educational opportunity for his missed school days.

Los Angeles is ordered to provide Student with 16.5 hours of academic support or tutoring, representing one hour for every two days of missed school days based on a total of 33 missed school days. The tutoring shall be provided by a provider of Los Angeles' choice who can deliver the services at Student's home, via videoconference, or on campus, as determined by the governing Health Department. Student shall have until December 31, 2021 to use those tutoring hours. Any time not expended by that date shall be lost.

Los Angeles is ordered to provide Student 2.5 hours of speech and language services by a licensed speech and language pathologist, representing 30 minutes per week (120 minutes each month) for the six-week period Student missed school. The speech and language services shall be provided by a provider of Los Angeles' choice who can deliver the services at Student's home, via videoconference, or on campus, as determined by the governing Health Department. Student shall have until December 31, 2021 to use the speech and language service hours. Any time not expended by that date shall be lost.

Los Angeles is ordered to provide Student 2.5 hours of early childhood itinerant teaching services to support Student's language functions, representing 30 minutes per week (120 minutes each month) for the six-week period Student missed school. The early childhood itinerant teaching services shall be provided by a provider of Los Angeles' choice who can deliver the services at Student's home, via videoconference, or on campus, as determined by the governing Health Department. Student shall have until December 31, 2021 to use the early childhood itinerant teaching hours. Any time not expended by that date shall be lost.

ORDER

1. Los Angeles is ordered to conduct a psychoeducational evaluation of Student. At Parent's option, initiation of the assessment may be put on hold until no more than three months after students are permitted to physically return to school campuses without restriction on the number of students, as determined by the governing Health Department.
2. Los Angeles is ordered to provide Student with 16.5 hours of compensatory academic support or tutoring. The tutoring shall be provided by a provider of Los Angeles' choice who can deliver the services at Student's home, via videoconference, or on campus, as determined by the governing Health Department. Student shall have until December 31, 2021 to use those tutoring hours. Any time not expended by that date shall be lost.
3. Los Angeles is ordered to provide Student speech and language therapy by a licensed speech and language pathologist. Los Angeles is ordered to provide Student with 2.5 hours of speech and language therapy. The speech and language therapy shall be provided by a provider of Los Angeles' choice who can deliver the services at Student's home, via videoconference, or on campus, as determined by the governing Health Department. Student shall have until December 31, 2021 to use the speech and language service hours. Any time not expended by that date shall be lost.
4. Los Angeles is ordered to provide Student 2.5 hours of early childhood itinerant teaching services to support Student's language functions. The early childhood itinerant teaching services shall be provided by a provider of Los Angeles' choice who can deliver the services at Student's home, via videoconference, or on campus, as determined by the governing Health Department. Student shall have

until December 31, 2021 to use the early childhood itinerant teaching hours. Any time not expended by that date shall be lost.

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.

Jennifer Kelly

Administrative Law Judge

Office of Administrative Hearings