BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2020120161

PARENT ON BEHALF OF STUDENT,

v.

CHAFFEY JOINT UNION HIGH SCHOOL DISTRICT.

DECISION

August 20, 2021

On December 1, 2020, the Office of Administrative Hearings, called OAH, received a due process hearing request from Parent on Student's behalf, naming Etiwanda School District and Chaffey Union High School District. On January 13, 2021, OAH granted a continuance of the due process hearing.

Administrative Law Judge Adrienne L. Krikorian held the due process hearing by videoconference, beginning on June 8, 2021. The oral evidentiary portion of the hearing took place on June 10, 15, 16, 17, and July 14 and 16, 2021. Attorneys Sheila Bayne and

Lynda Williams represented Student. Student's mother, called Parent, attended the hearing on June 8 and 10, 2021, and testified on July 14, 2021. Attorney Sundee Johnson represented respondents. Elizabeth Freer, Director of Special Education for Etiwanda appeared on Etiwanda's behalf on June 8, 2021 and testified on June 10, 2021. Chaffey Special Education director Kelley Whelan attended all hearing days and testified on June 10 and July 14, 2021. Dr. Royal Lord, program manager of West End Special Education Local Plan Area, called SELPA, attended all hearing days and testified on June 10, 2021.

At the parties' request the matter was continued to August 4, 2021, for written closing briefs. The record was closed, and the matter was submitted on August 4, 2021.

ISSUES

OAH dismissed Issue 6 in Student's due process complaint on December 24, 2020. The hearing was adjourned on June 8, 2021, without witness testimony, for briefing on whether OAH had jurisdiction over Issue 1 pertaining to Etiwanda. The ALJ continued the matter to June 10, 2021. After receiving written sworn statements from the parties as part of briefing on whether OAH had jurisdiction over Issue 1 pertaining to Etiwanda, OAH dismissed Issue 1 and respondent Etiwanda Elementary School District for lack of jurisdiction on June 9, 2021.

On June 10, 2021, counsel for the parties and the ALJ discussed the remaining issues. The hearing proceeded as to the remaining issues after the parties and the ALJ clarified and agreed to the issues on June 10, 2021. Free appropriate public education is called FAPE. Independent educational program is called IEP.

2. Did Chaffey deny Student a FAPE by failing to implement Student's November 27, 2018 IEP as amended by the December 13, 2018 IEP, the April 12, 2019 IEP, and by the June 7, 2019 Settlement Agreement between Student and Etiwanda, when Student enrolled at Rancho Cucamonga High School for the 2019-2020 school year?

3. Did Chaffey deny Student a FAPE from August 5, 2019 through May 8, 2020, by failing to timely schedule an IEP team meeting to develop an IEP to address Student's educational needs in time to offer and provide Student needed services?

4. Did Chaffey deny Student a FAPE by failing to:

   A. appropriately review Student's educational file before the June 26, 2020 IEP team meeting;

   B. assess Student in the areas of psychoeducation, speech and language, and academics before the June 26, 2020 IEP team meeting;

   C. provide Parent with enough information at the June 26, 2020 IEP meeting concerning Student's existing educational program to allow Parent to meaningfully participate in the development of Student's IEP;

   D. accurately reflect in the June 26, 2020 IEP document the IEP team's discussion regarding Student's progress on her goals, and or Parent's comments and concerns; and

   E. address Parent's request at the June 26, 2020 IEP for changes to Student's IEP?

5. Did Chaffey deny Student a FAPE from March 2020 until December 1, 2020, by failing to implement Student's November 27, 2018 IEP as amended, by not providing Student with direct services in person during the 2020 Covid-19 pandemic?

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 (2006); Ed. Code, §§ 56501, 56502, and 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents, and has the burden of proof

by a preponderance of the evidence. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 57-58, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) Student had the burden of proof. 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 16 years old at the time of hearing and had completed 10th grade at Chaffey's Rancho Cucamonga High School. Student previously attended middle school in Etiwanda, an elementary school district. Student lived within the geographic boundaries of Chaffey at all relevant times. Student was eligible for special education under the category of specific learning disability.

ISSUE 2: DID CHAFFEY DENY STUDENT A FAPE BY FAILING TO IMPLEMENT STUDENT'S NOVEMBER 27, 2018 IEP AS AMENDED BY THE DECEMBER 13, 2018 IEP, THE APRIL 12, 2019 IEP, AND BY THE JUNE 7, 2019 SETTLEMENT AGREEMENT BETWEEN STUDENT AND ETIWANDA, WHEN STUDENT ENROLLED AT RANCHO CUCAMONGA HIGH SCHOOL FOR THE 2019-2020 SCHOOL YEAR?

The analysis of Issue 2 is limited for purposes of analysis and discussion to the period of August 5, 2019, when Student enrolled at Rancho Cucamonga, through March 13, 2020, when schools closed by order of California Governor Gavin Newsom due to the Covid-19 pandemic. The issue of IEP implementation for the remainder of the 2019-2020 school year overlaps Issue 5 and is therefore analyzed and discussed under Issue 5.

Student contends Chaffey failed to implement Student's amended November 2018 IEP, that the failure to implement was material and therefore denied Student a FAPE. Student contends that Chaffey should have placed Student in a highly structured classroom for specialized academic instruction away from general education students, consistent with the amended November 27, 2019 IEP.

Chaffey contends it implemented Student's amended November 27, 2018 IEP beginning in August 2019 after Student enrolled, by providing a comparable placement and class assignments, and by implementing the November 27, 2018 IEP goals and accommodations. Chaffey contends Student's educational program as implemented changed only by nature of the transition from middle school to high school. Chaffey contends Student made academic progress toward her five academic goals during the 2019-2020 school year and therefore the failure to literally implement the amended November 2018 IEP was not material.

A FAPE means special education and related services that are available to an eligible child that meets state educational standards at no charge to the parent or guardian. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) Parents and school personnel develop an IEP for an eligible student based upon state law and the IDEA. (20 U.S.C. §§ 1401(14), 1414(D)(1); and see Ed. Code, §§ 56031, 56032, 56341, 56345, subd. (a) and 56363 subd. (a); 34 C.F.R. §§ 300.320, 300.321, and 300.501 (2006).)

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 based upon 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].)

STUDENT'S TRANSITION FROM MIDDLE SCHOOL TO HIGH SCHOOL

THE SIGNED JUNE 7, 2019 FINAL SETTLEMENT AGREEMENT WITH ETIWANDA ELEMENTARY SCHOOL DISTRICT AMENDED STUDENT'S UNSIGNED NOVEMBER 27, 2018 IEP

Student attended middle school in Etiwanda during the 2018-2019 school year for eighth grade. Etiwanda was a local educational agency within the SELPA. Rancho Cucamonga was a high school in the Chaffey School District. Chaffey was also a member of the SELPA. Student's last signed and implemented IEP during eighth grade was her seventh grade November 2017 IEP. Parent did not sign Student's triennial IEP dated November 27, 2018.

In May 2019, Etiwanda attempted three times to schedule with Parent and hold an "articulation IEP" meeting to discuss Student's transition to high school at Rancho Cucamonga for ninth grade. Parent cancelled or did not respond to the invitations. Rancho Cucamonga special education case advisor Kelly Martinez attended at least two of the attempted IEP team meetings on behalf of Chaffey. Martinez was a credentialed education specialist with more than 20 years' experience, and 11 years' experience as a case advisor at Chaffey high schools. Martinez's role at the IEP as case advisor was to discuss classes, electives, placement and services available to Student at Rancho Cucamonga, and to make program recommendations based on Student's needs, goals

and accommodations. Parent did not attend any of the scheduled "articulation IEP" meetings and Etiwanda did not develop an "articulation" IEP for Student's transition to high school for the 2019-2020 school year.

Student filed a previous due process hearing request against Etiwanda and Chaffey in May 2019. OAH dismissed Chaffey from the previous matter for lack of jurisdiction. On June 7, 2019, Parent and Etiwanda signed a Compromise and Release Agreement in that case, which identified Etiwanda as the "District" responsible for enforcing the terms of the Settlement Agreement. Chaffey was not a party to, and did not participate in the development of, the Settlement Agreement. Parent and Etiwanda agreed that Etiwanda would develop an amendment to Student's November 27, 2018 IEP for implementation when Student transitioned to high school for ninth grade. The Settlement Agreement provided that the IEP amendment would include two terms relevant to this hearing.

First, Paragraph 4 required that, pursuant to an IEP amendment for implementation during the 2019-2020 school year, Student's placement would be in the general education setting 50 percent of Student's school day. Student's schedule would consist of specialized academic instruction for English, math and a resource support program, consisting of 150 minutes per day, five days a week, totaling 750 minutes weekly. Student would be in general education classes for physical education, history and science. Paragraph 4 supplemented the November 27, 2018 IEP, which provided that specialized academic instruction would be delivered in a "separate highly structured classroom with a small student-staff ratio and not among typically developing peers."

Paragraph 4 was the only paragraph of the Settlement Agreement that required an amendment of the IEP to incorporate its terms, contrary to Student's contention otherwise.

Second, Parent's signature on the Settlement Agreement was enough to constitute Parent's consent to the November 27, 2018 IEP, including placement, goals, accommodations, supports and services, to the extent the November 27, 20218 IEP was not inconsistent with the prospective placement in Paragraph 4 of the Settlement Agreement. Parent and Etiwanda agreed the prospective placement and services in Paragraph 4 of the Settlement Agreement would serve as Student's "stay put."

June 28, 2019 was the last day of the 2018-2019 school year at Etiwanda, and the last day on which Etiwanda was the local educational agency responsible for Student's education. On that date, Etiwanda drafted an amendment to Student's November 27, 2018 IEP incorporating the terms of Paragraph 4 of the Settlement Agreement. Parent did not sign the IEP amendment. Nevertheless, Student's operative IEP at the end of the 2018-2019 school year was the November 27, 2018 IEP as specifically amended by Paragraph 4 of the signed Settlement Agreement.

STUDENT TRANSITIONED TO RANCHO CUCAMONGA HIGH SCHOOL WITH A SIGNED AND AMENDED NOVEMBER 27, 2018 IEP

Student matriculated to Rancho Cucamonga on August 5, 2019. Etiwanda administrators transferred Student's educational records to Rancho Cucamonga beginning on June 1, 2019 and before August 5, 2019. Etiwanda uploaded electronic records into the SELPA's Special Education Information System, called SEIS, and

physically delivered paper copies of Student's records to Rancho Cucamonga. The transferred records included the unsigned November 27, 2018 IEP, unsigned December 2018 and April 2019 IEP amendments, the June 28, 2019 unsigned IEP amendment, previous assessment reports, and grade reports.

Etiwanda did not transfer the Settlement Agreement to Rancho Cucamonga. However, Rancho Cucamonga special education director Whelan spoke to Etiwanda's then special education director before August 5, 2019. Etiwanda's special education director told Whelan the terms of Paragraph 4 of the Settlement Agreement, that those terms amended the November 27, 2018 IEP, and that the amended November 27, 2018 IEP was Student's operative IEP.

Chaffey special education teacher and Student's case carrier Serena Lemus testified at hearing. Lemus's testimony was credible based upon her education, training and experience as a special education teacher, her knowledge of Student as the co-teacher in Student's math class and as her case carrier, and Lemus's active involvement in Student's educational program during the 2019-2020 school year. Lemus received and reviewed Student's November 27, 2018 IEP and the unsigned June 28, 2019 IEP amendment at the beginning of the school year. Lemus was generally aware of the terms of Paragraph 4 of the Settlement Agreement, as documented in the unsigned June 28, 2019 IEP amendment.

PLACING STUDENT IN GENERAL EDUCATION CORE CLASSES WITHOUT PARENTAL CONSENT CONSTITUTED A MATERIAL FAILURE TO IMPLEMENT THE AMENDED NOVEMBER 2018 IEP

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 the services provided to a disabled child fall "significantly short of the services required by the child's IEP." (*Van Duyn v. Baker School Dist. 5J* (9th Cir. 2007) 502 F.3d 811, 822 (*Van Duyn*).) 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 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. 815.) Implementation failures are not procedural errors. (*Id.,* at p. 819.)

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.

Here, Student's November 27, 2018 IEP required that Student's specialized group academic instruction must be delivered in a highly structured small setting outside of the general education classroom. The IEP required that a special education teacher was responsible for assuring that Student made progress toward and met Student's goals.

The Settlement Agreement limited Student's time in general education to 50 percent of the school day. Chaffey did not implement either of those two IEP requirements during the 2019-2020 school year.

Rancho Cucamonga administrators placed Student in six periods of general education classes at the beginning of the 2019-2020 school year. Student's electives were physical education and dance. Student's core classes were English, Spanish, Intermediate Math, and Biology. Student was on a diploma track. The assigned classes met California A through G requirements for entry to state universities and colleges. A general education teacher taught each of the core classes, each lasting 60 minutes. An instructional assistant was assigned to support the eight to 12 special education students in each of three core classes. Lemus was the collaborative credentialed special education teacher in Student's math class.

Lemus and Chaffey special education advisor Martinez credibly opined at hearing, based upon their knowledge of Rancho Cucamonga's special day classes and Student's school records, the special day classes offered by Rancho Cucamonga were not appropriate for Student. Lemus based her opinion in part on her review of Student's 2018 triennial assessments, other school records and Lemus' knowledge of Student's performance in ninth grade based upon teacher reports over the 2019-2020 school year. Classes at Rancho Cucamonga labeled "special day classes" were available to students who were classified as having mild to moderate or moderate to severe disabilities, which did not match Student's needs.

Education Code section 56325 addresses special education students who transfer between districts during the school year and requires the transferee district to follow the student's last agreed upon IEP or provide a comparable program. However, California

law is silent as to students who transfer during the summer and start a new school district at the beginning of a school year, implying that the transferee district must either follow the last agreed upon IEP in a comparable way, or develop a new IEP for the Student at the beginning of the school year.

In its Comments to 2006 IDEA Regulations, the U.S. Department of Education addressed whether it needed to clarify the regulations regarding the responsibilities of a new school district for a child with a disability who transferred during summer. The U.S. Department of Education declined to change the regulations, reasoning that the rule requiring all school districts to have an IEP in place for each eligible child at the beginning of the school year applied, such that the new district could either adopt the prior IEP or develop a one. (71 Fed. Reg. 46682 (2006).) When a student transfers to a new school district between school years, the new district is not required to fully implement a former district's IEP or give the student services that are "comparable" to those offered by a former district; it need only develop and implement an IEP reasonably calculated to provide the student a FAPE based on the information available to the district. (See, *Clovis Unified School Dist. v. Student* (2009) OAH Case No. 2008110569; see also, *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Bd. of Educ.* (3rd Cir. 1993) 993 F.2d 1031, 1041. The new public agency also has the option of adopting the IEP developed for the child by the previous public agency in the former district. (*Questions and Answers on Individualized Education Programs, Evaluations, and Revaluations* (OSERS 09/01/11) 111 LRP 63322; see also, *Eagle Mountain-Saginaw Indep. School Dist.* (SEA TX 2012) 60 IDELR 178.)

Here, because Student was a transfer student during the summer without a signed "articulation IEP", Chaffey was required to implement Student's last agreed upon IEP, the November 27, 2018 IEP as amended, or offer a comparable program, unless or until Chaffey timely developed a new IEP and received parental consent or an order from OAH to implement a new IEP. (See, *I.R. v. Los Angeles Unified School Dist.* (9th Cir. 2015) 805 F.3d 1164 *(I.R.)*; Ed. Code, § 56346 (f).) When parents and a school district disagree on the appropriate placement for a transferring student, providing services in accordance with the Student's previously implemented IEP pending further assessments effectuates the statute's purpose of minimizing disruption to the student while the parents and the receiving school district resolve disagreements about proper placement. (*A.M. ex rel. Marshall v. Monrovia Unified School Dist.* (9th Cir. 2010) 627 F.3d 773, 778-779.)

Special education director Whelan opined that Chaffey could not implement, as written, the amended November 27, 2018 IEP with respect to placement in a special day class 50 percent of the school day. Whelen opined Chaffey was required to attempt to meet a California Department of Education, called CDE, target that 52.3 percent of California schools' special education students must be in the general education classroom 80 percent of the school day. Chaffey aimed to meet that target. For that reason, Chaffey used a co-teaching model. Chaffey offered most special education students inclusive support in the general education classroom, including co-teaching by a general education teacher with a special education teacher or special education instructional assistant in general education classrooms. Whelan opined special education students in high school did not spend most of their day in a special day class.

Additionally, Chaffey did not have a "resource support program" for special education students in high school like that available in middle schools but used only the co-teaching model.

Chaffey's reasoning for not implementing the amended November 27, 2018 IEP with fidelity was not persuasive nor was the program implemented comparable. As discussed in more detail in Issue 3, Chaffey could have held, but did not hold, an IEP meeting at the beginning of the school year, to discuss with Parent a proposed amendment or to clarify in writing how Student would receive specialized academic instruction consistent with the operative IEP, or by amendment to that IEP.

Notably, neither Whelan, Lemus, or Martinez knew who determined Student's class schedule for the 2019-2020 school year or how Student's class schedule was developed. Nevertheless, someone at Chaffey allocated the three required 50-minute periods of daily specialized academic instruction in a special day class classroom differently from what the IEP required. Student's program instead consisted of four classes, 60-minute per class per day, of co-taught core general education classrooms based upon the school's daily schedule for the 2019-2020 school year. Chaffey did not document in an IEP amendment how much time Student received specialized academic instruction, by whom the specialized academic instruction would be taught, or whether Student received 750 minutes per week during the regular school year of specialized academic instruction as called for in her amended November 27, 2018 IEP.

CHAFFEY'S FAILURE TO IMPLEMENT STUDENT'S IEP THROUGH MARCH 13, 2020 WAS A MATERIAL FAILURE BECAUSE STUDENT DID NOT RECEIVE SPECIALIZED ACADEMIC INSTRUCTION DELIVERED AS REQUIRED BY HER IEP

Student proved by a preponderance of the evidence that, from August 5, 2019 until March 13, 2020, Chaffey failed to implement the amended November 27, 2018 IEP and that the failure was material.

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.) However, the child's educational progress, or lack of it, may be probative of whether there has been more than a minor shortfall in the services provided. (*Ibid.*) For instance, if the child is not provided the reading instruction called for and a shortfall exists in the child's reading achievement, that would tend to show that the failure to implement the IEP was material. (*Ibid.*) On the other hand, if the child performed at or above the anticipated level, that would tend to show that the shortfall in instruction was not material. (*Ibid.*)

From August 5, 2019, until the pandemic-related school closures on or about March 13, 2020, Student received direct instruction in her four core academic classes from credentialed general education teachers and she received some instruction from a special education teacher only in her math class. All four classes had special education students and general education students. Student's English, Spanish, and Biology classes had instructional assistants, instead of a highly qualified special education teacher qualified to deliver specialized academic instruction with the credentialed

general education teacher. (See, 34 C.F.R. § 300.18; Ed. Code § § 56058 and 56060.) Student's math class was co-taught by credentialed general education teacher Katrina Boggus and special education teacher Lemus. Although Lemus consulted with all teachers as the case manager, math was the only class in which Student received specialized academic instruction, of an unspecified number of minutes, by a highly qualified special education teacher, as required by the operative IEP.

The general education teachers from all four of Student's core academic classes, and Lemus, testified about Student's performance in the classroom at hearing. All educators credibly testified based on their professional credentials and teaching experience, their personal knowledge of Student and familiarity with her IEP goals and accommodations, and their knowledge and clear recollection of Student's performance in class during the 2019-2020 school year.

Student ended the school year with the following grades: three A's, one B, one C, and a D minus in Biology. Student's teachers provided Student with multiple opportunities to make academic progress through March 13, 2020. Teachers occasionally communicated with Parent regarding Student's program and her progress. Neither Parent nor anyone acting on Student's behalf informed any of the core class teachers, Lemus as case carrier, or special education director Whelan, of any concerns about Student's educational program or concern about lack of educational progress before March 13, 2020. Parent did not recall at hearing any details Student's progress at school. Student offered no credible evidence proving whether Student failed to make any educational progress.

Boggus worked with special education teacher Lemus to develop lesson plans for and delivering math instruction and assistance to the 8 to 10 special education students in the class of 36 students. Boggus was aware of and implemented one of Student's two IEP math goals and her accommodations. Boggus delivered lectures to the entire class, developed lesson documents and a class organizer for the students. Boggus and Lemus co-taught small group instruction, which included Student. Student struggled making friends when she first joined the class but overcame her social difficulties within a month. Student had difficulty focusing, was sometimes off topic, and talked with friends off topic. Student occasionally had trouble turning in assignments. Student responded favorably to tracking assignments, and by utilizing tracking she completed assignments. Student achieved her algebra and algebraic thinking goal with support. Student's final grade in math was an A minus, which reflected her ability to access the curriculum until March 13, 2020. This was the only class in which Student received specialized academic instruction, of an unspecified number of minutes, as required by the IEP.

However, Student nevertheless prevailed on Issue 2. More than a minor discrepancy existed between the educational services Chaffey provided to Student and the services required by the operative IEP. *(Van Duyn, supra,* 502 F.3. at p. 815.) Student did not receive any specialized academic instruction from a highly qualified credentialed special education teacher in three of her four core classes. Chaffey's failure to implement Student's operative IEP with specialized academic small group instruction in a small setting for the number of required minutes before March 13, 2020, was "material," such that the services provided to Student fell "significantly short of the services required" by the amended November 27, 2018 IEP. (*Ibid.*)

Although Student offered no persuasive evidence establishing that her grades were not bona fide or that Student failed to acquire knowledge from class instruction and assignments and progress during the applicable time period, the failure to implement was material for the reasons discussed above. However, Student's failure to offer such evidence impacted the remedy to which Student is entitled and will be discussed below under Remedies.

ISSUE 3: DID CHAFFEY DENY STUDENT A FAPE FROM AUGUST 5, 2019 THROUGH MAY 8, 2020, BY FAILING TO TIMELY SCHEDULE AN IEP TEAM MEETING TO DEVELOP AN IEP TO ADDRESS STUDENT'S EDUCATIONAL NEEDS IN TIME TO OFFER AND PROVIDE STUDENT NEEDED SERVICES?

Student contends that Chaffey did not timely schedule an IEP meeting for Student after Student enrolled at Rancho Cucamonga and through May 8, 2020, although Student did not explain the significance of the May 8, 2020 date at hearing. Student contends Chaffey's failure to do so resulted in Student's IEP being outdated and therefore Chaffey denied Student a FAPE.

Chaffey contends it unsuccessfully attempted multiple times, beginning in September 2019, to schedule Student's annual IEP team meeting for November 2019 but Parent and Student's educational advocate either cancelled the meetings or did not respond with available dates. As a result, the annual IEP did not take place until June 2020, after the 2020 Covid-19 universal pandemic-related school closure. Chaffey contends its inability to hold a timely IEP meeting was due to lack of Parent's unexplained lack of responsiveness.

THE FAILURE TO HOLD AN IEP TEAM MEETING WAS A DENIAL OF FAPE

Parent did not know at the beginning of the 2019-2020 school year that a disparity existed between what Chaffey could offer Student for placement and services, and what the amended November 2018 IEP required. No one from Chaffey testified that anyone attempted to notify Parent of the discrepancy at the beginning of the school year. Chaffey's failure to involve Parent in the decision regarding Student's educational program for the 2019-2020 by the failure to schedule and convene an IEP team meeting was a significant procedural violation of the IDEA.

A local educational agency shall initiate and conduct meetings for the purpose of developing, reviewing and revising the individualized education program for a child with special needs. (Ed. Code § 56340; 34 C.F.R. § 300.323). A school district's failure to comply with a procedural requirement, such as the requirement of California Education Code § 56346(f), denies a FAPE when the procedural inadequacy impedes parental participation, "result[s] in the loss of educational opportunity" or "cause[s] a deprivation of educational benefits." (Ed. Code § 56505(f)(2); *M.M. supra,* 767 F.3d at p. 852 (quoting *N.B. v. Hellgate Elementary School Dist.),* (9th Cir.2008) 541 F.3d 1202, 1207.) The informed involvement of parents is central to the IEP process. (*Winkelman v. Parma City School Dist.* (2007) 550 U.S. 516, 524 [127 S.Ct. 1994].) Protection of parental participation is "[a]mong the most important procedural safeguards" in the IDEA. (*Amanda J. v. Clark Cnty. School Dist.,* (9th Cir. 2001) 267 F.3d 877, 882.) Parents are part of the cooperative team that determines the contents of the IEP. (See *M.M. v. Lafayette School Dist*., (9th Cir.2014) 767 F.3d 842, 851 (citing 20 U.S.C. §§ 1400(c)(5)(B), 1414(A)(1)(D), 1414(B)(4)(A); 34 C.F.R. § 300.306(a)(1).)

Parent never voiced concern about Student's program or lack of progress during the 2019-2020 school year. However, the lack of parental inquiry or voiced concerns about Student's educational program did not excuse Chaffey from its obligation to ensure Parent knew that Chaffey was not implementing the amended November 27, 2018 IEP with fidelity. (*M.C. v. Antelope Valley Union High School Dist.,* (9th Cir.2017) 858 F.3d 1189, 1198-99.) Parent had no way of knowing what program Chaffey was implementing, because Student did not transfer with an articulation IEP and no one told Parent Chaffey was not implementing the amended November 2018 IEP as written. (*Ibid.*)

Neither Part B of the IDEA nor the regulations implementing Part B of the IDEA establish timelines for the new public agency to adopt the child's IEP from the previous public agency or to develop and implement a new IEP. However, consistent with title 34 Code of Federal Regulations sections 300.323(e) and (f), the new public agency must take these steps within a reasonable period to avoid any undue interruption in the provision of required special education and related services. (*Questions and Answers on Individualized Education Programs, Evaluations, and Revaluations*, *supra,* 111 LRP 63322.) The IDEA does not state when the receiving district must begin providing the student FAPE, but the district must begin to do so as soon as possible based on the circumstances. (See *Christina School District* (SEA DE 2010) 54 IDELR 125; *Letter to State Directors of Special Education* (OSEP 2013) 61 IDELR 202; *N.B. v. State of Hawaii Department of Educ.* (D. Hawaii, July 21, 2014, No. CIV 13–00439 LEK–BMK) 2014 WL 3663452 (enrollment triggers the obligation to provide a FAPE to a transfer student).)

IEP's are clearly binding under the IDEA, and the proper course for a school that wishes to make material changes to an IEP is to reconvene the IEP team pursuant to the statute, not to instead decide on its own to no longer implement all or part of the IEP. (*Van Duyn, supra*, at 502 F.3d at p. 822; see also §§ 1414(D)(3)(F), 1415(b)(3).)

Chaffey should have scheduled an IEP team meeting for the beginning of the 2019-2020 school year. Chaffey should have notified Parent of the need to hold an IEP team meeting to discuss its proposed change of placement to all general education classes with embedded support, and to review Student's goals and accommodations to ensure they were consistent with the high school setting. This was particularly important because Chaffey's administrators knew about Student's amended November 2018 IEP before Student enrolled on August 5, 2019 and Chaffey knew it could not implement the IEP placement, or one of the two math goals, as written.

The California Education Code uniquely supplements the IDEA. The Education Code requires that "as soon as possible following development" of the IEP, "special education and related services shall be made available to the individual with exceptional needs in accordance" with the IEP. (Ed. Code § 56344(b); *I.R., supra*, 805 F.3d, *supra* at p. 1168). Education Code section 56346(f) also requires that once the school district determines that a component of an IEP is necessary, and that the parents will not agree to it, the district cannot opt to hold additional IEP meetings or continue the IEP process in lieu of initiating a due process hearing. Rather, the school district must initiate a due process hearing expeditiously. (*I.R., supra*, 805 F.3d, supra at p. 1169).

Chaffey did not send Parent an email proposing dates for Student's annual IEP team meeting in November 2019 until September 25, 2019, more than six weeks after school started. Parent referred Chaffey to Student's educational advocate,

James Peters III, who did not follow up by scheduling dates. Chaffey continued to unsuccessfully attempt to schedule Student's annual IEP with Parent and Peters from November 2019 until Lemus's last email to Parent on February 18, 2020. Parent still did not respond or agree to a date for the IEP team meeting.

Education Code section 56346(f) compels a school district to initiate a due process hearing when the school district and the parents reach an impasse. As the goal of the statute is to ensure that the conflict between the school district and the parents is resolved promptly so that necessary components of the IEP are implemented as soon as possible, a school district may not artificially prolong the process by failing to make the necessary determination to trigger section 56346(f)'s mandate. (*I.R.,* 805 F.3d, *supra* at p. 1169.)

Although Chaffey made multiple unsuccessful attempts to schedule Student's annual IEP meeting, it should have initiated the IEP process sooner. If Parent did not respond to Chaffey's IEP team meeting notices, Chaffey should have held the IEP meeting under Education Code section 56341.5(h), developed a proposed IEP offer, and then timely filed for due process to seek permission to implement its proposed IEP without Parent's consent. (*I.R., supra,* 805 F.3d at pp 1169-1170; Ed. Code, § 56346 (f).)

A vague hope that maybe an agreement with the child's parents will be reached someday is not enough to justify putting off the obligation imposed by section 56346(f). (*I.R., supra,* 805 F.3d at pp 1169-1170.) A parent's failure to cooperate in the development of the IEP does not negate a school district's duty to develop an IEP. (*Anchorage School Dist. v. M.P.* (9th Cir. 2012) 689 F.3d 1047, 1055 [School districts "…cannot excuse their failure to satisfy the IDEA's procedural requirements by blaming

the parents" citing *W.B. v. Board of Trustees of Target Range School Dist. No. 23, etc.* (9th Cir. 1992) 960 F.2d 1479, 1485, *superseded in part by statute on other grounds*)]; see also, 20 U.S.C. § 1414(D)(2)(A); 34 C.F.R. § 300.323(a).)

The due process hearing officer shall make its decision on substantive grounds based on a determination of whether the child received a FAPE. (20 U.S.C. § 1415 (f)(3)(E); Ed. Code, § 56505, subd. (f)(1).) In matters alleging a procedural violation, a due process hearing officer may find that a child did not receive a FAPE only if the procedural violation did any of the following: impeded the right of the child to a FAPE; significantly impeded the opportunity of the parents to participate in the decision-making process regarding the provision of a free appropriate public education to the child of the parents; or caused a deprivation of educational benefits. (20 U.S.C. § 1415 (f)(3)(E); Ed. Code, § 56505, subds. (f)(2); see also *Target Range, supra,* 960 F.2d at p. 1484.) A procedural error results in the denial of educational opportunity where, absent the error, there is a "strong likelihood" that alternative educational possibilities for the student "would have been better considered." (*M.L. v. Federal Way School Dist.* (9th Cir. 2003) 394 F.3d 634, 657.)

Student proved in Issue 3 that Chaffey committed a procedural violation from August 5, 2019 until May 8, 2020, the time frame by which Student limited the issue, by failing to hold an IEP meeting for Student to develop an appropriate placement, educational program and review Student's goals such that they were appropriate for high school. Chaffey's failure to hold an IEP meeting significantly impeded Parent's opportunity to participate in the decision-making process regarding the provision of Student's FAPE. (*Target Range, supra,* 960 F.2d at p. 1484.) Parent did not know that Chaffey was not implementing the amended November 27, 2018 IEP. Chaffey did not

provide Parent with any written notice at the beginning of the school year that Chaffey was changing Student's placement at Rancho Cucamonga to general education classes taught by a general education teacher, with instructional assistants in three of the four classes, instead of pulling Student out to a special day class setting taught by a credentialed special education teacher for 750 minutes a week.

Student proved by a preponderance of evidence that Chaffey's procedural violation in Issue 3 deprived Parent of the opportunity to meaningfully participate in the development of Student's high school IEP through May 8, 2020. Student's remedy will be discussed below.

ISSUE 4(A): DID CHAFFEY DENY STUDENT A FAPE BY FAILING TO APPROPRIATELY REVIEW STUDENT'S EDUCATIONAL FILE BEFORE THE JUNE 26, 2020 IEP TEAM MEETING?

Student contends Chaffey did not review Student's educational file before Student's June 26, 2020 IEP team meeting, including the unsigned June 28, 2019 IEP amendment. Chaffey contends it had access to all of Student's transferred educational records from Etiwanda, including unsigned IEP amendments, and information about Paragraph 4 of the Settlement Agreement. Chaffey asserts that its staff reviewed Student's educational records before Student enrolled in August 2019, and during the 2019-2020 school year.

To facilitate the transition for an individual with exceptional needs who transfers from another school district, the new school in which the individual with exceptional needs enrolls shall take reasonable steps to promptly obtain the pupil's records,

including the IEP's and supporting documents and any other records relating to the provision of special education and related services to the pupil, from which the pupil was enrolled. (Ed. Code, § 56325 (b)(1).)

Student did not meet her burden of proof in Issue 4(A). First, Student failed to clearly establish at hearing what part of the "educational file" Student contended the IEP team failed to review before the June 26, 2020 IEP meeting, or what was not "appropriate" about Chaffey's review of Student's educational records at any time from August 5, 2019 until June 26, 2020. Student offered no credible evidence that Chaffey IEP team members who attended the June 26, 2020 IEP meeting were unfamiliar with Student's needs or educational progress at any time during the school year, or before or at the June 26, 2020 IEP team meeting.

The gravamen of Issue 4(A) appeared to be Student's irrelevant assertion that Chaffey IEP team members were unfamiliar with the Etiwanda Settlement Agreement, and that lack of familiarity resulted in a denial of FAPE. The argument was not persuasive or legally sound. The Settlement Agreement explicitly stated that the compensatory services agreed upon between Parent and Etiwanda did not constitute "stay put." The Settlement Agreement provided that only those provisions of Paragraph 4, as incorporated into an amendment IEP, constituted Student's educational program going forward. Chaffey's administrative staff knew about the terms in Paragraph 4 of the Settlement Agreement, which was documented in the unsigned June 28, 2019 IEP amendment, which Chaffey had as part of Student's records. The Settlement Agreement was not otherwise relevant to Chaffey's obligations as the local educational agency responsible for offering Student a FAPE at the June 26, 2020 IEP team meeting.

Those Chaffey IEP team members present at the June 26, 2020 IEP team meeting were sufficiently familiar with Student's disability, previous goals, present levels of performance, and educational needs to collaborate with Parent to develop an appropriate IEP for Student's 2020-2021 10th grade school year. The IEP team acquired that information by numerous methods, including familiarity with Student's educational records and hands on experience with Student.

More specifically, Student offered no evidence that Lemus, as Student's case carrier, was not sufficiently familiar with Student's "educational file" such that she could not develop a draft IEP for discussion by the entire IEP team. Student's 2018 triennial assessment reports and grade reports were part of Student's cumulative file and accessible to teaching staff from the beginning of the school year. Lemus had access to all of Student's records and was familiar with them at the time of the June 26, 2020 IEP team meeting. Lemus received regular progress reports throughout the year from all Student's teachers, which Lemus used to develop new goals and updated present levels of performance at the June 26, 2020 IEP team meeting.

Math teacher Boggus attended the June 26, 2020 IEP team meeting. Boggus received a copy of Student's November 2018 IEP goals and accommodations at the beginning of the school year. She was familiar with Student and her individual needs as a special education student. Boggus credibly conveyed at hearing a clear recollection of Student's performance in the classroom during the year. She reported to the IEP team on Student's progress and class performance at the June 2020 IEP team meeting.

The IEP team, including Student's advocate Peters, had a robust discussion about Student's needs, progress, present levels of performance, and goals at the June 2020 IEP team meeting. Parent had no memory at hearing of the IEP team meeting or what

happened at that meeting. The IEP notes did not reflect that Parent voiced any concerns about Student's progress or questioned the fidelity of any progress report about Student. Peters raised one irrelevant complaint on Student's behalf concerning Etiwanda's alleged failure to implement the compensatory terms of the 2019 Settlement Agreement. At hearing, Parent could not recall whether Student accessed any of the compensatory education provided for Student in the Settlement Agreement.

Student offered no credible evidence to support her claim in Issue 4(A). Student failed to meet her burden of proof by a preponderance of evidence that Chaffey denied her a FAPE by failing to appropriately review Student's educational file before the June 26, 2020 IEP team meeting.

ISSUE 4(B): DID CHAFFEY DENY STUDENT A FAPE BY FAILING TO ASSESS STUDENT IN THE AREAS OF PSYCHOEDUCATION, SPEECH AND LANGUAGE, AND ACADEMICS BEFORE THE JUNE 26, 2020 IEP TEAM MEETING?

Student contends Chaffey should have assessed Student in the areas of psychoeducation, speech and language, and academics to determine Student's present levels of performance before the June 26, 2020 IEP team meeting. Student contends Student's needs changed because of the pandemic-related school closures, necessitating assessments pursuant to general orders issued by California Governor Gavin Newsom. Chaffey contends it had enough information about Student when it scheduled her annual IEP team meeting in November 2019, and throughout the remainder of the 2019-2020 school year. Chaffey contends it had no reason to suspect

that Student required assessments in any area of suspected or known need before the June 26, 2020 IEP team meeting.

STUDENT'S REEVALUATION WAS NOT DUE UNTIL FALL 2021 AND THE PARTIES DID NOT AGREE TO AN EARLIER REEVALUATION

A reassessment must occur not more frequently than once a year, unless the parent and the district agree otherwise, and must occur at least once every three years, unless the parent and the district agree, in writing, that a reassessment is unnecessary. (20 U.S.C. § 1414(A)(2)(B); 34 C.F.R. § 300.303(b) (2006); Ed. Code, § 56381, subd. (a)(2).) A reassessment performed every three years is commonly referred to as a triennial assessment. When developing an IEP, the IEP team must consider the child's strengths, the parent's concerns, the results of recent assessments, and the academic, developmental and functional needs of the child. (Ed. Code, § 56341.1, subd. (a).) Reassessment requires parental consent. (20 U.S.C. § 1414(C)(3).)

A district's failure to conduct appropriate assessments or to assess in all areas of suspected disability may constitute procedural violation that may result in a substantive denial of FAPE. (*Park v. Anaheim Union High School Dist*. (9th Cir. 2006) 464 F.3d 1025, 1032-1033; *Timothy O. v. Paso Robles Unified School Dist.* (9th Cir. 2016) 822 F.3d 1105, 1118-1119.) The U.S. Department of Education did not waive legal requirements relating to triennial assessments during school closures for Covid-19 and distance learning. (*CDE Special Education Guidance for Covid-19*, September 30, 2020.)

Student did not meet her burden of proof by a preponderance of evidence establishing that she required assessments in psychoeducation, speech and language, and academics before the June 26, 2020 IEP team meeting. Student's last triennial assessments were in the fall of 2018, before the November 27, 2018 IEP team meeting at

Etiwanda. At that time, Etiwanda conducted a psychoeducational assessment, including academics. Etiwanda also assessed Student in speech and language. Having been assessed in 2018, Student's triennial reassessments were not due until fall 2021. Student offered no evidence that Parent asked for an earlier assessment or that the parties agreed to conduct reassessments early. Chaffey had access to Etiwanda's assessments reports and Chaffey's staff, including Lemus, reviewed them before the June 26, 2020 IEP meeting. Chaffey was not required to conduct new assessments prior to the June 26, 2020 IEP team meeting.

STUDENT'S EXPERT DID NOT SUPPORT STUDENT'S CLAIM THAT STUDENT REQUIRED ASSESSMENTS IN ANY OF THE THREE AREAS ALLEGED IN THE COMPLAINT

Diann Tackett, Ph.D., offered expert testimony for Student at hearing. Tackett was a credentialed special education teacher in Colorado, with a doctorate degree in special education. Tackett worked as a crisis clinician assessment intake specialist at a psychiatric hospital where she trained staff how to work with individuals with autism and special needs. She had 34 years of experience in the field of special education, primarily working in institutional settings. Tackett's work experience focused on institutional behavioral support, functional behavioral assessments, and behavior therapy for children with special needs. Tackett was not a school psychologist and had no experience in administering psychoeducational assessments. She attended IEP team meetings and made recommendations for goals but did not otherwise develop IEP's.

Tackett served as an expert witness for advocate Peters since 2005. She testified before OAH approximately 10 times in special education due process cases, most of which were on behalf of students. Tackett could not clearly recall if she ever testified on behalf of a school district.

Tackett first met Student in 2017, when Tackett observed Student one time in middle school in various settings for approximately 45 minutes. Tackett did not assess Student in 2017. Tackett had no contact with Student again until approximately one week before Tackett testified at hearing in July 2021. At that time, Tackett telephonically interviewed Student and Parent. Tackett never assessed Student, or observed Student accessing her educational program virtually or in person prior to testifying.

Tackett was not a credible witness. Her testimony lacked a credible foundation of facts relating to Student's alleged need for assessments in the areas of psychoeducation, academics, or speech and language. Tackett's testimony was largely based upon anecdotal reports about Student from Tackett's July 2021 telephonic interview with Parent and Student.

Significantly, Parent's testimony was notably and purposefully evasive at hearing, which negatively impacted Tackett's opinions about Student because Tackett's opinions were at least in part based on information she acquired from Parent during a 45 minute phone call one week earlier. Parent was competent when Parent testified, which she verified at hearing. Yet, Parent could not answer many basic questions, claiming she could not recall. Parent's inability to recall important facts about Student's educational progress and her interactions with school staff during the preceding school year raised significant doubt as to whether Parent was biased in her reporting to Tackett. Parent's

lack of recollection at hearing impacted Tackett's credibility specifically regarding Student's needs because Parent was one of only two primary sources for Tackett's knowledge about Student, the other being Student.

The focus of Tackett's testimony was her opinion that children with specific learning disabilities could demonstrate behaviors that could impede learning. In her opinion, a learning disability could cause a student to be overwhelmed, frustrated and anxious. However, Tackett admitted that she had not observed Student experience any of these characteristics, which was substantiated by case manager Lemus who testified that Student was never a behavior problem in any of her classes. Tackett offered no evidence that she independently or otherwise was able to corroborate through any of Student's teachers or case carriers that Student's behaviors interfered with her access to education. Tackett's opinions at hearing regarding Student's behavioral needs did not support a finding that Student required new assessments in the psychoeducation, academics or speech and language before the June 2020 IEP team meeting.

Significantly, Tackett offered no opinion as to whether Student required assessments in psychoeducation, academics, and speech and language. Although Tackett asserted several times that Student would benefit from a functional behavioral assessment, Tackett's opinion regarding the possible need for a functional behavioral assessment was not persuasive or relevant because Chaffey had no notice of such a claim by Student and did not consent to litigate that issue. A complaint for due process must include a description of the alleged violation by the public agency that forms the basis of the complaint. (20 U.S.C. § 1415(b)(6).)

STUDENT DID NOT PROVE THAT CHAFFEY HAD ANY REASON TO SUSPECT THAT STUDENT REQUIRED ASSESSMENTS BEFORE THE JUNE 2020 IEP TEAM MEETING

To determine the contents of an IEP, school districts must assess a student eligible for special education under the IDEA in all areas related to his or her suspected disability. (20 U.S.C. § 1414(B)(3)(B); Ed. Code, § 56320, subd. (f).) When developing an IEP, the IEP team must consider the child's strengths, the parent's concerns, the results of recent assessments, and the academic, developmental and functional needs of the child. (Ed. Code, § 56341.1, subd. (a).)

After a school district deems a child eligible for special education, it must perform reassessments if warranted by the child's educational or related services needs. (20 U.S.C. § 1414 (a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).) Absent an agreement to the contrary between a school district and a student's parents, reassessments must not occur more than once a year, or more than three years apart. (20 U.S.C. § 1414 (a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).)

Student offered no evidence that anyone reported to Chaffey staff or teachers that Student had any psychologically-based needs before the June 26 2020 IEP team meeting that put Chaffey on notice that Student required an updated psychoeducational assessment. Student did not prove she had issues with her ability to communicate in the classroom putting Chaffey on notice that she required reassessment. Nor did Student demonstrate a need for an updated academic assessment. Parent did not recall whether she expressed any concerns about Student or requested any assessments from anyone at Chaffey at any time before the June 26, 2020

IEP team meeting. Lemus and all of Student's teachers credibly testified Parent never requested assessments or expressed concern raising the need for assessments before the June 26, 2020 IEP meeting regarding Student.

None of Student's teachers, including Lemus, had any reason to suspect Student required assessments in the three areas at issue. Student made academic progress during the 2019-2020 school year until the Covid-19 closures. Student ended the 2019-2020 school year with passing grades, including three A's, despite distance learning. Lemus communicated with Parent every few weeks about Student's progress. Student offered no legal authority that supported a conclusion that, simply because of distance learning, Chaffey should have unilaterally initiated assessments in psychoeducation or academics to find out whether Student required specific support.

The mandates by California during school closures, discussed in Issue 5, were provided as guidance to school districts, but the basic requirements of the IDEA and Education Code as those authorities pertained to the duty to assess remained unchanged by Congress. (*U.S. Dept. of Educ., Secretary DeVos Reiterates Learning Must Continue for All Students, Declines to Seek Congressional Waivers to FAPE, LRE Requirements of IDEA*., April 27, 2020 Press Release).

Student offered no evidence that she had communication issues during the school year, or after the March 2020 school closures, prompting anyone to suspect she required a speech and language assessment before the June 26, 2020 IEP team meeting. Testimony from all four core academic class teachers during the 2019-2020 school year, and Lemus as case carrier and co-teacher in math, established that they were familiar with and addressed Student's needs, her IEP accommodations, and her goals. Student's

core class teachers all credibly testified that Student was quiet but communicated effectively with the teachers and classmates. Although Student was shy, she interacted with teachers and asked for help when needed.

Parent never requested a speech and language assessment during ninth grade or noted any concerns to school staff before the June 20, 2020 IEP team meeting. At hearing, Parent could not credibly recall any concerns about Student's communication skills, other than to recall that "someone" asked, on Student's behalf, for a speech and language assessment at the June 26, 2020 IEP team meeting. Notably, however, Parent did not sign an assessment plan for a speech assessment when Chaffey offered it to Parent based upon discussions at the June 2020 IEP team meeting. Parent had no recollection why she did not sign the assessment plan.

No one at Chaffey had any reason to suspect that Student required assessments in any area of need before the June 26, 2020 IEP team meeting that should have triggered the duty to assess. Student did not meet her burden of proof by the preponderance of evidence that Chaffey denied Student a FAPE by failing to assess Student in the areas of psychoeducation, speech and language or academics in preparation for the IEP team meeting on June 26, 2020.

ISSUE 4(C): DID CHAFFEY DENY STUDENT A FAPE BY FAILING TO PROVIDE PARENT WITH ENOUGH INFORMATION AT THE JUNE 26, 2020 IEP MEETING CONCERNING STUDENT'S EXISTING EDUCATIONAL PROGRAM TO ALLOW PARENT TO MEANINGFULLY PARTICIPATE IN THE DEVELOPMENT OF STUDENT'S IEP?

Student contends in Issues 4(C) that Chaffey did not "provide" Parent with "enough" information at the June 2020 IEP meeting about Student's existing educational program to meaningfully participate in the June 26, 2020 IEP team meeting. Chaffey contends, in addition to the draft proposed IEP, the IEP team discussed in detail Student's educational program, her present levels of performance, her progress toward goals, and Chaffey's proposed educational program for the 2020-2021 school year.

Student did not meet her burden of proof on Issue 4(C) that Chaffey did not provide her with "enough" information at the June 26, 2020 IEP team meeting about Student's existing educational program to allow her to meaningfully participate. Student did not establish that Parent did not know what classes Student was taking, or what her "existing" educational program was, at the time of the June 26, 2020 IEP meeting, such that she could not participate in the meeting.

Throughout the 2019-2020 school year, Lemus providing Parent progress and grade reports, thereby putting Parent on notice of what classes Student was taking during the school year. Parent had no recollection at hearing of what happened at the June 26, 2020 IEP team meeting. The June 26, 2020 IEP meeting notes reflect that Lemus discussed the structure of Student's current educational program during distance

learning. The IEP notes also establish that, with Parent participating by telephone, the IEP team reviewed Student's present levels of performance and her progress toward the goals in the amended November 27, 2018 IEP.

Parent did not credibly establish at hearing that she was unaware of the transition to distance learning after school closures, such that she could not participate in a discussion of Student's "current program" at the June 2020 IEP team meeting. Rancho Cucamonga notified all parents, including Parent, in writing within three weeks after school closures in March 2020 of the plan for distance learning. Student's individual teachers notified Student regarding access to assignments, office hours, and resources for additional assistance during distance learning. Student's teachers unsuccessfully attempted to contact Parent by email, and therefore communicated with Parent by mail about Student's participation in the distance learning program. Parent did not deny at hearing receiving this information, only claiming that she did not recall whether she received any information from Chaffey. Parent's general lack of recall throughout her testimony detrimentally impacted her credibility.

As to Issue 4(C), Parent had access to enough information from Chaffey regarding Student to be prepared for and participate in the June 26, 2020 IEP meeting. Student offered no persuasive or credible evidence to the contrary.

ISSUE 4(D): DID CHAFFEY DENY STUDENT A FAPE BY FAILING TO ACCURATELY REFLECT IN THE JUNE 26, 2020 IEP DOCUMENT THE IEP TEAM'S DISCUSSION REGARDING STUDENT'S PROGRESS ON HER GOALS, AND OR PARENT'S COMMENTS AND CONCERNS?

The IEP is a written statement for a child with exceptional needs that includes a statement of present levels of performance, a statement of measurable annual goals, and a description of the child's progress toward meeting the annual goals. (Ed. Code § 56345(a).) Section 56345 includes numerous other requirements for inclusion in the IEP that are not applicable to this issue.

Student did not meet her burden on Issues 4(D). Student cited to no persuasive legal authority that established that the IDEA requires an IEP document to reflect "Parent's comments or concerns" or that not doing so, if proven, results in a denial of FAPE. Additionally, Student cited to no persuasive legal authority that established that an IEP document must include meeting notes, or a detailed description of what discussions occurred at the meeting.

Chaffey provided a draft IEP document to Parent and Peters before the June 26, 2020 IEP team meeting. The draft IEP included a statement of Student's five 2018-2019 IEP goals, with a summary of Student's progress toward each of those goals. The draft IEP included, in more than one place, a description of four new proposed goals.

Parent attended the virtual June 26, 2020 IEP team meeting by telephone. Student's educational advocate and attorney attended the meeting by videoconference. Special education teacher/case carrier Lemus, special education advisor Martinez, math teacher Boggus, and school psychologist Janine Bauman also virtually attended the IEP team meeting by videoconference.

The optional June 2020 IEP team meeting notes, consisting of two full pages, reflect in detail that Student's advocate asked for an update about Student's progress, an outline for the meeting, and when Student was last seen by her providers. Lemus shared Student's progress during the school closure. The IEP team members discussed Student's present levels of performance, whether she made progress toward her 2018-2019 goals, and year-end grades. The IEP document included reference to Student's progress in more than one place, including in the statement of goals, present levels of performance, and notes. The Chaffey team members discussed the structure of Student's services, including that Student was in general education classes, with specialized academic instruction provided through a collaboration model. The IEP team discussed Student's progress in each of her classes. The IEP team discussed the need for statewide assessments. The IEP team discussed the proposed transition plan and Student's goals.

Parent participated in the meeting, as did Student's advocate, who asked questions on Parent's behalf and proposed additional services and supports. Their comments were documented in detail in the IEP notes. During discussion of present

levels of performance, the IEP team asked Parent for input and concerns. Parent and the advocate shared that due to school closures Student was not provided all services, specifically the compensatory Lindamood Bell services called for in the Settlement Agreement, which Chaffey was not responsible for providing, as discussed earlier.

Peters expressed concern about "potential regression" since March 2020 due to distance learning. The IEP team proposed that the IEP team meet again before summer break 2021 to determine whether Student required extended school year services. Peters asked about the absence of English teacher Cooper at the IEP meeting. The IEP team informed Parent and Peters that English teacher Thomas Cooper could not attend the meeting but he had provided input to Lemus in preparation for the meeting.

The IEP team proposed new goals and accommodations, which were documented in the draft IEP. The IEP team discussed special factors that might require assistive technology and the discussion was reflected in the IEP notes.

The IEP document, in its entirety, was comprehensive and reflected the substance of conversations, and the identity of those who spoke at the IEP team meeting, Student's progress toward goals, proposed new goals, accommodations, the advocate's requests on Parent's behalf, Parent's concerns, and the IEP offer.

Student offered no credible evidence that Chaffey deprived Parent of any opportunity to acquire information about Student's progress for Parent to be appropriately informed at and participate in the June 2020 IEP team meeting. Student offered no evidence that the draft IEP document was incomplete, lacked any required information, or was otherwise deficient such that Parent was not informed.

ISSUE 4(E): DID CHAFFEY DENY STUDENT A FAPE AT THE JUNE 26, 2020 IEP TEAM MEETING BY FAILING TO ADDRESS PARENT'S REQUEST FOR CHANGES TO STUDENT'S IEP?

Public agencies must ensure that, if agency personnel bring drafts of some or all of the IEP content to the IEP meeting, there is a full discussion with the child's parents, before the child's IEP is finalized, regarding drafted content and the child's needs and the services to be provided to meet those needs. (*Assistance to States for the Education of Children Disabilities*, *supra*, 64 Fed. Reg. 12478-12479.)

The IEP notes reflect that Peters spoke on Parent's behalf at the meeting and made requests. The IEP team reviewed the draft IEP document. Parent's requests for changes in the IEP, made by Peters, were fully discussed and addressed during the IEP team meeting and reflected in the notes. For example, the IEP described in detail Peters' request at the meeting, on Parent's behalf, that Chaffey agree to extend deadlines for compensatory services from the Etiwanda Settlement Agreement. Because Chaffey IEP team members were not aware of the terms of the Settlement Agreement except for Paragraph 4, Martinez agreed to research the issue after the meeting. The IEP document reflected that Chaffey would respond to Peters' request to extend the Settlement Agreement terms.

The IEP team discussed Parent's concern that Student's previous IEP did not include speech or language services. In response, Chaffey offered Parent an assessment plan for a speech and language assessment, which Parent did not sign.

Student offered no evidence at hearing, other than what was written in the IEP document, that Parent made any other requests of Chaffey during the IEP meeting.

Parent notably did not recall what happened at the meeting and did not offer any evidence of any requests that Chaffey did not address. The meeting concluded and Parent did not consent to the finalized draft IEP.

In July 2020, after the meeting concluded, and upon learning that Chaffey was not a party to the Settlement Agreement, Martinez sent a prior written notice to both parents and Peters on behalf of Rancho Cucamonga and Chaffey explaining that Chaffey declined to assume any responsibility for the terms of the Etiwanda Settlement Agreement.

Student did not prove that Chaffey denied Student a FAPE by failing to accurately address Parent's requests for changes to the IEP. Student did not meet her burden of proof on Issue 4(E).

ISSUE 5: DID CHAFFEY DENY STUDENT A FAPE FROM MARCH 2020 UNTIL DECEMBER 1, 2020, BY FAILING TO IMPLEMENT STUDENT'S NOVEMBER 27, 2018 IEP AS AMENDED, BY NOT PROVIDING STUDENT WITH DIRECT SERVICES IN PERSON DURING THE 2020 COVID-19 PANDEMIC?

This issue overlaps with Issue 2 as to the time period after school closures and covers the time period after March 13, 2020 until December 1, 2020.

Student contends that because of the Covid-19 related school closures Chaffey did not implement Student's amended November 27, 2018 IEP, including by delivering any academic instruction "in person", thereby denying Student a FAPE. Chaffey contends it complied with governmental mandates and provided access to virtual instruction to Student during school closures, which Student had the opportunity to

access at all relevant times. Chaffey argued that it informed all parents after the school closure that when school resumed in-person instruction, Chaffey was prepared to hold an IEP meeting to discuss making up any missed instruction, rendering Student's claims in this due process action premature. Chaffey also argued that Student made up missed credits during summer school in 2021.

CHAFFEY COMPLIED WITH FEDERAL AND STATE SCHOOL CLOSURE ORDERS DURING FROM MARCH 2020 THROUGH DECEMBER 1, 2020

Issue 2, as it relates in part to the time period after March 13, 2020, and Issue 5 arise out of the universal 2020 COVID-19 pandemic, during which California's Governor Newsom, consistent with the federal government and local governments, issued a Proclamation of a State of Emergency dated March 4, 2020 and ordered a statewide shutdown of businesses and schools. 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 federal critical infrastructure sectors. (Governor's Exec. Order No. N-33-20 (March 19, 2020).) The U.S. Department of Education initially issued guidance about the school shutdowns in March 2020. The Governor issued an executive order on March 22, 2020, granting local educational agencies the authority to close schools, accompanied by a directive to the CDE, to develop guidance that included "ensuring students with disabilities" receive a FAPE consistent with their IEP's, and local educational agencies meeting other procedural requirements under the IDEA.

A local education agency that offers "distance learning" opportunities for its general education students has a concomitant duty to "make every effort to provide special education and related services to the child in accordance with the child's individualized education program." (*U.S. Dept. of Educ., Questions and Answers on*

Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak (March 12, 2020) at p. 2.) School districts must "ensure that students with disabilities also have equal access to the same opportunities [as general education students], including the provision of FAPE," and, "to the greatest extent possible, each student with a disability can be provided the special education and related services identified in the student's IEP developed under IDEA."(*Ibid.)*

In subsequent guidance, the Office of Special Education and Rehabilitative Services, known as OSERS, recognized that educational institutions are "straining to address the challenges of this 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) at p. 1.) OSERS assured school districts that "ensuring compliance with the IDEA should not prevent any school from offering educational programs through distance instruction." (*Ibid*.). OSERS noted the provision of FAPE might include, as appropriate, special education and related services provided through distance instruction provided virtually, online, or telephonically." (*Id*. at pp. 1-2.) OSERS reiterated its March 12, 2020 guidance on compensatory education. "Where, due to the global pandemic and resulting closures of schools, there has been an inevitable delay in providing services" IEP teams must make an individualized determination "whether and to what extent compensatory services may be needed when schools resume normal operations." (*Id*. at p. 2.)

The CDE issued similar guidance on March 20, 2020, and April 9, 2020. (*Cal. Dept. of Educ., Special Education Guidance for COVID-19* (March 20, 2020); *Cal. Dept. of Educ., Special Education Guidance for COVID-19, COVID-19 School Closures and Services to Students with Disabilities* (April 9, 2020).). The CDE advised that if a local educational agency can continue providing special education and related services as outlined in the

IEP or an agreed-upon amendment to the existing IEP, it should do so through a distance learning model. (*CDE Guidance* (March 20, 2020), *supra,* at Point 1.) The local educational agency could also consider alternative service delivery options such as in-home service delivery, meeting with individual students at school sites, or other appropriate locations to deliver services. The CDE also encouraged local educational agencies to work collaboratively with nonpublic schools and agencies to ensure continuity of services, including moving to virtual platforms for service delivery to the extent feasible and appropriate. (*Ibid.*)

When a local educational agency offers distance learning for instructional delivery instead of regular classroom instruction during a school site closure for students, it must also provide equitable access to those services for students with disabilities. A local educational agency must create access to the instruction, including "planning for appropriate modifications or accommodations based on the individualized needs of each student and the differences created by the change in modality such as a virtual classroom." (*CDE Guidance* (April 9, 2020), *supra*, at Point 2). Educational and support services should be commensurate with those identified in the IEP for each student to ensure educational benefit. *(Ibid.*)

Local educational agencies may consider the use of accessible distance technology, instructional phone calls, and other curriculum-based activities that have been "scaffolded" based on student needs. (*CDE Guidance* (April 9, 2020), *supra*, at Point 2.) The local educational agency could also consider alternative service delivery options such as in-home service delivery, meeting with individual students at school sites, or other appropriate locations to deliver services. (*CDE Guidance* (March 20, 2020), *supra,* at Point 1.)

On April 27, 2020, the U.S. Secretary of Education announced through a Department of Education press release that the U.S. Department of Education was "not recommending Congress pass any additional waiver authority" concerning the FAPE and least restrictive environment requirements of the IDEA, noting again that "learning must continue for all students during the COVID-19 national emergency." (*U.S. Dept. of Educ., Secretary DeVos Reiterates Learning Must Continue for All Students, Declines to Seek Congressional Waivers to FAPE, LRE Requirements of IDEA*., April 27, 2020 Press Release).

On June 29, 2020, Senate Bill 98 amended Education Code section 56345 to require that IEP's developed at regularly scheduled annual IEP meetings moving forward from the date of the amendment describe the means by which the IEP will be provided under emergency conditions where instruction or services cannot be provided at school or in person for more than 10 school days, taking into account public health orders.

STUDENT DID NOT ACCESS THE MAJORITY OF VIRTUAL SCHOOL ASSIGNMENTS FROM MARCH 13, 2020 THROUGH THE END OF THE 2019-2020 SCHOOL YEAR

Chaffey stopped delivering in-person instruction after March 13, 2020 to all students due to the Covid-19 State of Emergency. Spring break occurred from March 22 through March 26, 2020. On April 6, 2020, Chaffey resumed instruction, through distance learning, for all students. The last day of the regular school year was May 21, 2020. Student missed two weeks of direct in-person instruction, including specialized academic instruction in a small group taught or supervised by a credentialed special education teacher, between March 13, 2020 and April 6, 2020, accounting for spring break. Student missed almost seven weeks of direct in-person instruction from

April 6, 2020 until May 21, 2020. Although extended school year was called for in Student's IEP, Chaffey did not hold extended school year for any students in 2020. Student missed four weeks of direct in-person instruction, including 960 minutes per week of specialized academic instruction, during extended school year. Thus, Student missed a total of 13 weeks of direct in-person instruction, including specialized academic instruction, for the 2019-2020 school year through extended school year.

Student established that Chaffey did not implement Student's last signed amended November 27, 2018 IEP during the Covid-19 school closures between March 13, 2020 and June 25, 2020. However, under *Van Duyn*, *supra*, 502 F.3d at p. 822, and in the context of the 2020 Covid-19 school closures, Chaffey's failure to implement Student's IEP must be material, meaning that the failure must fall "significantly short of the services required by the child's IEP."

Under the circumstances of the 2020 school closures, Chaffey could not deliver in-person instruction, by order of the California government. Instead, Chaffey developed a distance learning model for all students. The distance learning model provided that all students had access to the same classroom assignments they accessed during the school year using online platforms, including Google and AERIES, and to their teachers using the secure Loop communication tool. When students returned to school on April 6, 2020 those resources remained available to all students.

As explained below, Student proved that Chaffey's failure to deliver direct in-person general and specialized academic instruction to Student after March 13, 2020 and through 2020 extended school year, resulted in "more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP" because the services were not provided "in person" in a small group in a

small setting for the number of minutes required by the IEP. (*Id.* at p. 815.). However, Student did not prove she did not make any academic progress during the school closures. As discussed in Issue 2, Student received some academic benefit before the 2020 school closure, when her teachers and instructional assistants were available to help her as needed during in-person learning. She completed assignments and progressed through the curriculum offered to her with help from the instructional assistants and teachers. This progress was consistent with Student's expert Tackett's opinion that Student's specific learning disability caused her to be distracted, necessitating direct intervention by an adult during class time, which she received.

During distance learning after March 12, 2020, Student's ninth grade core class general education teachers provided Student with virtual extra-credit assignments as part of her distance learning program. Some of those assignments were developed by the online program developers to assist Students during post-closure distance learning. Student had access to all assignments virtually, which was no different than before school closures. Student's core class general education teachers were prepared to and made available to Student all relevant accommodations in her IEP, including more time for assignments. Student did not receive any specialized academic instruction from a special education teacher from March 16, 2020 through the end of the 2019-2020 school year.

Spanish teacher Karla Mata made extra credit assignments available to Student during the school closure. Student accessed those assignments and increased her B plus grade to an A minus at the end of the school year. Math teacher Boggus was available two days a week from 8:30 a.m. to 2:30 p.m. for all students after the March 2020 school closure. Boggus provided, but Student did not participate in, online extra-credit assignments during this period. Boggus reached out to Student by phone

regarding her choice not to participate for extra credit. English teacher Cooper reminded all students that they could bring up their grades in English if they did the extra credit assignments that he made available to them online. Student did not access those opportunities.

Biology teacher Ellis Stevens provided assignments for extra credit online to all Students. Stevens scheduled regular office hours and was available during additional times if Student needed help. Stevens reached out to Student through Zoom, attempted to meet with her during office hours, unsuccessfully tried to call her, and ultimately asked Lemus to contact Student. Student never accessed extra credit assignments or reached out to Stevens after the school closure. Parent never contacted Stevens during the school closures or expressed concern that Student was struggling with accessing her Biology assignments.

Neither Student or Parent responded to Student's teachers, nor did either of them provide feedback regarding Student's ability to access online assignments. Nevertheless, Student did not access the assignments or turn in any work between the date of the school closure until the end of the school year. Student also had access to office hours for all her teachers and had access to additional support from her core teachers as needed. All four of Student's core teachers unsuccessfully attempted to reach out virtually to Student from April 4, 2020 until the end of the 2019-2020 school year.

After April 5, 2020, Student did not receive the specialized academic instruction called for in her amended November 27, 2018 IEP. Thus, under *Van Duyn*, *supra*, 502 F.3d at p. 822) Student proved that Chaffey's failure to implement Student's amended November 27, 2018 IEP during distance learning was a material failure.

DURING THE FIRST SEMESTER OF THE 2020-2021 SCHOOL YEAR STUDENT STRUGGLED TO ACCESS VIRTUAL INSTRUCTION

When the 2020-2021 school year began on August 5, 2020 and through at least December 1, 2020, Chaffey continued to provide distance learning. Student's operative IEP remained the amended November 2018 IEP from middle school. Special education teacher Amber Brown was Student's case manager in the 2020-2021 school year. Brown credibly testified at hearing based upon her credentials and teaching experience, her knowledge of Student and of Student's educational file.

Student's fall 2020 class schedule consisted of Geology 1, English 2, Spanish 2, Intermediate Math 2, World History 1 and physical education. None of Student's virtual general education class curriculums were modified for Student. A general education teacher taught Student's history and math classes, each co-taught by a credentialed special education teacher. A general education teacher taught Student's English and Geology classes, each supported by an instructional assistant, which was not specialized academic instruction as required by the operative IEP.

Student attended her virtual classes more regularly than many of Brown's other students. However, Student struggled with Geology at the beginning of the school year, failing to use available interventions to improve her learning or make progress. Student failed to complete work assignments and projects in Spanish. Student's math teacher and collaborative assistant worked well with Student. They reported to Brown concerns about participation and work completion during fall 2020. Student struggled with distance learning in English class. The general education teacher offered her more support in breakout rooms, which helped because Student had virtual one-to-one assistance.

From August 5, 2020 until December 1, 2020, Student met with Brown virtually using Zoom first twice weekly then every day for one-to-one help with Student's assignments. Brown helped Student with all of Student's classes during Brown's office hours. Brown often met virtually with Student for an hour or more each day. Student preferred at the beginning of the semester to work with Brown instead of the class collaborative teacher. As the semester progressed, and Parent and teachers talked about Student's progress, Student began working with the collaborative teachers more often instead of exclusively with Brown.

Student sought the most support from Brown for Student's history class. Student had difficulty reading materials and retaining information. Student stopped doing assignments that were challenging. Student was not interested in Spanish and struggled with assignments. Student requested a study skills class which she received after school, eventually improving her grade in math from F to C. Brown introduced Student to the Snap&Read program to assist with reading. Student used a virtual breakout room after working with Brown to work on program materials. Student's teachers worked with Brown to ensure they modified assignments or assignments were excused if Student struggled. Teachers graded Student based on a reduced workload, if needed.

Student reported to Student's expert Tackett in July 2021, a week before this hearing, that Student had a hard time staying on task, avoided those tasks on which she had a hard time staying focused, but Student wanted to continue her education. Tackett opined being successful was important for Student. Student described to Tackett that she attempted to do assignments and when frustrated put her head down

and thought about something else. Student reported to Tackett she did not "learn anything" during distance learning because she could not stay focused and was distracted by other family members in the home.

Tackett opined, based on her 45 minute telephonic interview with Student, Student would benefit from visual assisted interventions, self-monitoring, assistance from another adult or peer, or a one to one aide. Tackett opined Student's disability interfered with her ability to benefit from distance learning because she was easily distracted, and had trouble staying on task and focused. Tackett's testimony on this point was credible because the opinion was consistent with testimony from several of Student's teachers regarding Student's lack of participation after the school closures.

Student proved Chaffey's failure to implement direct in-person instruction after school closures, from March 16, 2020 through the 2020 extended school year, and from August 5, 2020 until December 1, 2020 was a material failure to implement Student's IEP. Chaffey's failure to deliver any specialized academic instruction in at least two of Student's core classes through a credentialed special education teacher was also a material failure to implement the IEP. The failure to implement impacted Student's ability to access her educational program and make academic progress. Despite having access to a considerable amount of support from Student's teachers in ninth grade, and from Brown in 10th grade, and accommodations implemented by all her teachers, Student struggled to access her curriculum virtually and struggled to make progress during distance learning. Student ended the first semester of 10th grade with a B- in English, an F in Spanish II, a C in Intermediate Math, a B in physical education, a C in Geology, and a D- in World History.

Student met her burden of proof by a preponderance of evidence that Chaffey's failure to implement Student's IEP by providing in-person instruction, including specialized academic instruction for her core classes, during the Covid-19 school closures was a material violation of the IDEA and denied Student a FAPE. (*Van Duyn*, *supra*, 502 F.3d at p. 822.)

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. Issues 1 and 6 were dismissed before or during hearing.

Issue 2: Chaffey denied Student a FAPE by failing to implement Student's November 27, 2018 IEP as amended by the December 13, 2018 IEP, the April 12, 2019 IEP, and by the June 7, 2019 Settlement Agreement between Student and Etiwanda, when Student enrolled at Rancho Cucamonga High School for the 2019-2020 school year until March 13, 2020. Student prevailed on Issue 2.

Issue 3: Chaffey denied Student a FAPE from August 5, 2019 until May 8, 2020, by failing to timely schedule an IEP team meeting to develop an IEP to address Student's educational needs in time to offer and provide Student needed services. Student prevailed on Issue 3.

Issue 4(A): Chaffey did not deny Student a FAPE by failing to appropriately review Student's educational file before the June 26, 2020 IEP team meeting. Chaffey prevailed on Issue 4(A).

Issue 4(B): Chaffey did not deny Student a FAPE by failing to assess Student in the areas of psychoeducation, speech and language, and academics before the June 26, 2020 IEP team meeting. Chaffey prevailed on Issue 4(B).

Issue 4(C): Chaffey did not deny Student a FAPE by failing to provide Parent with enough information at the June 26, 2020 IEP meeting concerning Student's existing educational program to allow Parent to meaningfully participate in the development of Student's IEP. Chaffey prevailed on Issue 4(C).

Issue 4(D): Chaffey did not deny Student a FAPE by failing to accurately reflect in the June 26, 2020 IEP document the IEP team's discussion regarding Student's progress on her goals, and or Parent's comments and concerns. Chaffey prevailed on Issue 4(D).

Issue 4(E): Chaffey did not deny Student a FAPE by failing to address Parent's request at the June 26, 2020 IEP for changes to Student's IEP. Chaffey prevailed on Issue 4(E).

Issue 5: Chaffey denied Student a FAPE from March 16, 2020 until December 1, 2020, by failing to implement Student's amended November 27, 2018 IEP, as amended, by not providing Student with direct services in person during the 2020 Covid-19 pandemic. Student prevailed on Issue 5.

REMEDIES

Student proved in Issue 2 that Chaffey materially failed to implement Student's amended November 27, 2018 IEP, including by failing to provide the required specialized academic instruction in a separate highly structured classroom with a small student-staff ratio and not among typically developing peers by a highly qualified

special education teacher who supervised Student's academic progress toward her goals. Student proved in Issue 3 that Chaffey denied Student a FAPE by depriving Parent of the opportunity to participate in a meaningful way in Student's educational program when Student began school at Rancho Cucamonga on August 5, 2019 and until May 8, 2020. Student proved in Issue 5 that Chaffey's failure to implement Student's amended November 2018 IEP from March 16, 2020, until December 1, 2020, by not providing direct in-person academic instruction, including 750 minutes a week taught or directly supervised by a highly qualified special education teacher was a material violation justifying a compensatory remedy.

REMEDY FOR ISSUE 3

As to Issue 3, and based upon the evidence presented, an appropriate remedy is an order that Chaffey provide two hours of training to all administrative personnel within Chaffey, including special education directors, case advisers and case carriers, who are responsible for special education students transitioning from middle school to Rancho Cucamonga.

Staff training is an appropriate compensatory remedy under these facts. The IDEA does not require compensatory education services to be awarded directly to a student. Staff training can be an appropriate compensatory remedy and is appropriate in this case. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025,1034 [student, who was denied a FAPE due to failure to properly implement his IEP, could most benefit by having his teacher appropriately trained to do so].) Appropriate relief considering the purposes of the IDEA may include an award that school staff be trained concerning areas in which violations were found, to benefit the specific pupil involved, or to remedy procedural violations that may benefit other pupils. (*Ibid*. Also, e.g.,

Student v. Reed Union School Dist., (Cal. SEA 2008) Cal. Ofc. Admin. Hrngs. Case No. 2008080580] [requiring training on predetermination and parental participation in IEP's]; *Student v. San Diego Unified School Dist.* (Cal. SEA 2005) 42 IDELR 249 [105 LRP 5069] [requiring training regarding pupil's medical condition and unique needs].)

The training shall be provided by qualified professionals selected by Chaffey, but not employed by SELPA or Chaffey. Training must be provided by professionals who are knowledgeable about the requirements and procedures for the following topics below which must be covered by the training:

a) Obtaining school records for transferring students from other school districts and informing case managers, case carriers, and IEP team members, about those school records, including special education assessment reports, settlement agreements, and IEP documents, and regarding educational and implementation requirements for transferring special education students.

b) The required procedures for including parents in any decisions made by school personnel regarding changes to a transferring a student's IEP because of incompatibility with the elementary school district's transferring IEP documents.

c) A school district's responsibilities for convening an IEP team meeting when Parent does not agree to attend, and a school district's obligation under *I.R., supra,* 805 F.3d at p.p. 1169-1170, to pursue a remedy through due process where a Parent declines to consent to an offer for special education and related services from the transferee school district.

Training under the principles raised in *I.R.* is particularly important in this case where Parent cancelled or ignored Chaffey's attempts to schedule an IEP team meeting and declined to sign Student's IEP's and IEP amendments every year after 2017, except when she signed the Settlement Agreement. Chaffey did not convene an IEP team meeting and did nothing to pursue an order permitting it to implement any new and updated IEP's without parental consent since Student enrolled at Chaffey.

REMEDY FOR ISSUES 2 AND 5

Student offered no persuasive or credible evidence that supported the amount and type of compensatory remedies sought in Student's complaint. Student requested hundreds of hours of tutoring, behavioral psychological counseling, speech and language services, including assessment, Lindamood Bell services, reimbursement for unspecified educational costs in an unspecified amount, changes to Student's unspecified prospective IEP, and a fund of $150,000 for Student to fund costs for unspecified "present levels of services" for a year.

School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Student W. v. Puyallup School Dist.* (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 or hour-for-hour compensation. (*Id.* at pp. 1496-1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.)

ALJ's have broad latitude to fashion appropriate equitable remedies for FAPE denials. (*School Comm. of Burlington v. Department of Educ.* (1985) 471 U.S. 359, 370 [105 S.Ct. 1996, 85 L.Ed.2d 385] (*Burlington*); *Puyallup, supra,* 31 F.3d at p.1496.) 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)(2006).) "[E]quitable considerations are relevant in fashioning relief." (*Burlington, supra*, 471 U.S. at p. 374.) Appropriate relief means "relief designed to ensure that the student is appropriately educated within the meaning of the IDEA." (*Puyallup, supra,* 31 F.3d. at p. 1497.)

Compensatory education is an equitable remedy that depends upon a fact-specific and individualized assessment of a student's current needs. (*Puyallup, supra,* 31 F.3d at p. 1496; *Reid v. District of Columbia* (D.C.Cir. 2005) 401 F.3d 516, 524 (*Reid*).) The award must be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place" (*Reid*, *supra*, 401 F.3d at p. 524; *R.P. ex rel. C.P. v. Prescott Unified Sch. Dist.*, 631 F.3d 1117, 1125 (9th Cir. 2011).).

The CDE noted in its March 20, 2020 *Guidance* for COVID-19, that for purposes of considering compensatory services once a local educational agency resumes regular session, educational need may be measured by assessing whether the child continued to make progress toward IEP goals, or experienced regression during the school closure. (*CDE Guidance* (March 20, 2020), *supra*, at Point 3.)

First, Student offered no credible evidence that Student required behavioral psychological counseling or a speech and language assessment or services, as requested. Moreover, Chaffey offered a speech and language assessment in June 2020, and Parent did not sign the assessment plan. Student is therefore not entitled to any assessments as a remedy for Chaffey's denial of FAPE.

Next, Student did not meet her burden of proof of showing that she was entitled to the amount of money and compensatory hours sought. Student offered no credible evidence that Student made little or no academic progress from August 5, 2019 until December 1, 2020, that would justify a substantial award of compensatory education. Student offered no expert testimony, or any other evidence, that established by a preponderance of evidence that Student failed to make some academic progress during distance learning.

Specifically, for the 2019-2020 school year, Student received academic instruction in all core classes, although not specifically as called for in her IEP as to three of the classes. Student improved her grade in Spanish from an F to a B plus by March 2020. After the Covid-19 school closure, Student accessed virtual extra credit assignments in Spanish, and increased her grade to an A minus at the end of the school year. Student did not prove that she gained no academic benefit in Spanish.

Student made progress in Cooper's English class by independently achieving her vocabulary and writing goals. Student needed occasional prompts for writing assignments but completed assignments. Student interacted with peers, never spoke out of turn, and interacted during collaboration with the instructional assistant. Cooper implemented Student's accommodations by providing teaching in a structured format, giving her extra time in class and at home to complete assignments. Student was motivated to complete assignments when she realized failing to do so would impact her grade. Student's quality of work was average, and she demonstrated progress. Student did not prove that she gained no academic benefit in English. Student was working on an online reading comprehension literature program prior to the school closure on March 13, 2020. Instructions for the program were available to Student online. Cooper opined that, with accommodations for completion time, Student completed the

assignments for the online program before the school closure. No one contacted Cooper on Student's behalf to express concern about Student having trouble learning online. Cooper opined the class was appropriate for Student, she did well in the class, and received a passing grade of C up to the time of school closure. However, because of distance learning, Student did not access extra credit assignments through the end of ninth grades, justifying some amount of remedy.

Student continued to struggle with access to distance learning during the first semester of the 2020-2021 school year. However, Student offered no evidence, including expert testimony, that she failed to make any academic progress until December 1, 2020. The evidence established that Student accessed her academic program, with extensive help from special education teacher Brown, and other general education teachers. Student did not prove by a preponderance of evidence that she did not make some academic progress in the first semester of 10th grade justifying the amount of damages she requested.

Student offered no credible evidence as to the type or amount of compensatory services to which Student should be entitled, including Lindamood Bell. The only testimony Student offered relating to remedies was from Tackett, who focused only on recommending a functional behavioral assessment, and one-to-one support for Student. However, Tackett did not know that Chaffey had recently offered, and Student had successfully participated in, at least one credit recovery program for missing classwork, which Student completed. This evidence established that Student mitigated some loss of learning, in part, and the evidence impacted the credibility of Student's claimed necessity for extraordinary amounts of compensatory relief.

Student is entitled to a modest remedy for Chaffey's failure to provide specialized academic instruction by a special education teacher pursuant to her IEP, as discussed in Issue 2, and during the pandemic related school closure as discussed in Issue 5. For purposes of calculating remedies, the ALJ relied on the school calendars for the 2019-2020 and 2020-2021 school years and the evidence at hearing, including grade and progress reports, and witness testimony.

If a local educational agency, called LEA, closes its schools to slow or stop the spread of COVID-19 and does not provide any educational services to the general student population, then an LEA would not be required to provide services to students with disabilities during that same period. Once school resumes, the LEA must make every effort to provide special education and related services to the child in accordance with the child's IEP. (*U.S. Dept. of Educ., Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak* (March 12, 2020) at p. 1.) Chaffey argued, however, that providing a remedy for the school closures before Chaffey had an opportunity to propose a remedy for missed educational time was premature. The argument was not persuasive because it ignored a student's right under the IDEA to file for due process and seek appropriate remedies during the applicable two year period.

Senate Bill 98, passed and signed by Governor Newsom in June 2020, addressed funding for distance learning by adding Education Code section 43500, et seq. Section 43501 established a minimum number of minutes per day of instruction during distance learning for the 2020-2021 school year, which in Student's case was 240 minutes. Section 43503(b)(4) provided for distance learning for special education and related services pursuant to a student's IEP, with necessary accommodations for access to distance learning.

Here, Student's IEP required Chaffey to deliver to Student specialized academic instruction by a special education teacher in a small group for 750 minutes a week during regular school days. The IEP required Chaffey to deliver 960 minutes a week of group specialized academic instruction during extended school year.

Student missed two weeks of group specialized academic instruction from March 16 through March 19, 2020, and March 29 through April 2, 2020, before distance learning began on April 6, 2020. Although general education students also missed those weeks of instruction, Student's IEP contemplated that Student would receive a specific number of minutes of specialized academic instruction during the school year, justifying a modest remedy for that missed time based on the failure to deliver IEP services. The second semester of the 2019-2020 school year, from April 5, 2020, until the end of the 2019-2020 school year consisted of approximately seven school weeks through May 21, 2020, which Student missed in-person specialized academic instruction. Student was eligible for and missed four weeks of group specialized academic instruction in person during extended school year. Student missed a total of 13 weeks of small group specialized academic instruction, in person, during the remainder of the 2019-2020 school year and extended school year. The first semester of the 2020-2021 school year, from August 5, 2020, until December 1, 2020, when the complaint was filed, and considering holidays and when school was not in session, consisted of approximately 15 school weeks, at a minimum of 240 minutes a day five days a week. Student missed a total of 28 weeks of in-person small group specialized academic instruction by a special education teacher in a classroom during the relevant time period.

The school closures did not excuse Chaffey from making up missed instructional time required by the operative IEP. Student did not fully access her curriculum March 16, 2020 until the end of the 2019-2020 extended school year, justifying some hours for recovery of instruction. However, Student did not offer any credible evidence that she did not make some academic progress or improve her academic skills, particularly with Brown's assistance during the 15 weeks of school closure for the 2020-2021 school year, necessitating the extraordinary number of compensatory hours requested. All of Student's core-class teachers made materials available to Student online and were available virtually to work with Student one-to-one. Student had the opportunity to complete work and raise her grades in the last part of the 2019-2020 school year, without penalty if she did not do so. Student offered no credible evidence as to why Student did not access the available instruction during that time.

Student also did not prove by any credible evidence that she was entitled to or required hour-for-hour reimbursement because of the school closures. Student did not prove that, in addition to the credit recovery Student achieved, the virtual one-to-one services provided by Brown and other teachers were not effective in mitigating some loss of in-person instruction during the relevant time period due to distance learning.

When considering equitable relief, an appropriate remedy to make up for the lack of in-person small group specialized academic instruction for the 28 weeks from March 16, 2020 until December 1, 2020, is a bank of 112 hours of one-to-one in-person specialized academic instruction from an appropriately credentialed special education teacher contracted by Chaffey to compensate for missed educational instruction and to assist her in completing her requirements for graduation. This remedy is based upon portions of Student's amended November 2018 IEP which provided for specialized

academic instruction in a highly structured separate setting with a small student-staff ratio. This award is also based upon documentary evidence, testimony from special education teachers Lemus and Brown indicating some educational progress, and the lack of any other persuasive evidence relating to remedies from Student.

The award is based upon one hour a week, for each of Student's four core academic classes for the 28 weeks of missed in-person instruction. The amount takes into consideration that the amended November 27, 2018 IEP did not require one-to-one instruction, the reduced school day of 240 minutes allowed by SB 98 for the 2020-2021 school year, and that Student received some one-to-one instruction from a special education teacher during the first semester of the 2020-2021 school year. The remedy will provide Student the opportunity for intensive one to one specialized academic instruction by a special education teacher, as called for in her amended November 27, 2018 IEP, to make up for lost instructional time.

ORDER

1. Chaffey shall provide two hours of training to all administrative personnel within Chaffey, including special education directors, case advisers and case carriers, who are responsible for special education students transitioning from elementary school districts within the SELPA to Rancho Cucamonga. The training shall be provided by qualified professionals selected by Chaffey, but not employed by SELPA or Chaffey. Training must be provided by professionals who are knowledgeable about the requirements and procedures for the following topics below which must be covered by the training:

a. Obtaining school records for transferring students from other school districts and informing case managers, case carriers, and IEP team members, about those school records, including special education assessment reports, settlement agreements, and IEP documents, and regarding educational and implementation requirements for transferring special education students.

b. The required procedures for including parents in any decisions made by school personnel regarding changes to a transferring a student's IEP because of incompatibility with the elementary school district's transferring IEP documents.

c. A school district's responsibilities for convening an IEP team meeting when Parent does not agree to attend, and a school district's obligation under I.R., supra, 805 F.3d at p.p. 1169-1170, to pursue a remedy through due process where a Parent declines to consent to an offer for special education and related services from the transferee school district.

2. Chaffey shall fund 112 hours of compensatory specialized academic instruction provided by an appropriately credentialed special education teacher contracted by Chaffey either individually or through a certified nonpublic agency. The hours may be used during school breaks, after school, or at any other time mutually agreed upon by Chaffey and Parent or Student. Student shall have access to the compensatory hours from the date of this Decision through the last school day of Chaffey's 2022-2023 regular school year. If Student fails to access the compensatory hours by the last school day of Chaffey's 2022-2023 regular school year, Student will forfeit the unused hours.

3. All other relief requested by Student is denied.

RIGHT TO APPEAL THIS DECISION

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

/s/

Adrienne L. Krikorian

Administrative Law Judge

Office of Administrative Hearings