

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2021020860

PARENTS ON BEHALF OF STUDENT,

v.

RIALTO UNIFIED SCHOOL DISTRICT.

DECISION

August 16, 2021

On February 24, 2021 the Office of Administrative Hearings, called OAH, received a due process hearing request from Student naming Rialto Unified School District. On April 12, 2021, the matter was continued for good cause.

Administrative Law Judge June R. Lehrman heard this matter by videoconference on May 11 and June 2, 8, 9, 15, 16, 17, 23, 25, 28, and 30, 2021.

Deborah Reisdorph, attorney at law, represented Student. On the first day of hearing, Student was also represented by attorneys Coleman Alguire and Shayla White. Mother attended all days of hearing on Student's behalf.

Vivian Billups, attorney at law, represented Rialto. Lead Special Service Agent Bridgette Ealy attended all hearing days on Rialto's behalf. Program Manager for the East Valley Special Education Local Plan Area, Rick Homutoff, also attended some hearing days on Rialto's behalf.

At the parties' request the matter was continued to July 30, 2021 for written closing briefs. The record was closed, and the matter was submitted on July 30, 2021.

ISSUES

1. Did Rialto deny Student's rights to a free appropriate public education, or FAPE, by assigning Student to distance learning from March 2020 until the end of the 2019-2020 school year without continuing to provide in-person services in-person?
2. Did Rialto deny Student's rights to a FAPE by assigning Student to distance learning from March 2020 until the end of the 2019-2020 school year without:
 - a. evaluating Student,
 - b. providing necessary accommodations to ensure Student could obtain a FAPE through distance learning, and
 - c. implementing his individualized education program, or IEP?
3. Up until the filing of the complaint, did Rialto deny Student's rights to a FAPE by assigning Student to distance learning for the 2020-2021 school year without providing required in-person services in-person?

4. Did Rialto deny Student's rights to a FAPE by assigning Student to distance learning for the 2020-2021 school year to the filing of the complaint without:
 - a. evaluating Student,
 - b. providing all necessary accommodations needed to ensure Student could obtain a FAPE through distance learning, and
 - c. implementing his IEP?
5. Beginning in March 2020, for the 2019-2020 school year and extended school year, or ESY, and the 2020-2021 school year up until the filing of the complaint, did Rialto deny Student's rights to a FAPE by:
 - a. failing to adequately assess Student's suspected disabilities,
 - b. failing to develop an IEP that was reasonably calculated to enable Student to receive educational benefit by failing to address his needs for proper academic goals, and
 - c. failing to offer sufficient intensive individual services in the form of a one-to-one aide?
6. Did Rialto deny Student's rights by failing to address the regression Student suffered as a result of being assigned to distance learning from March 2020 until the end of the 2019-2020 school year and through the 2020-2021 school year to the filing of the complaint?

The Issues were framed by Student's counsel in the complaint, and re-stated virtually verbatim in the Prehearing Conference Order dated May 3, 2021. The Issues as stated above have been altered only insofar as the timelines governing each Issue were clarified by Student's counsel during the hearing. In addition, because they were (1) presented within the four corners of the complaint, (2) extensively litigated, and

(3) argued in the closing briefs, two Issues, specifically Issues 2(c) and 4(c), have been added above as separate issues, and are decided below.

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.) All future references to the Code of Federal Regulations are to the 2006 version, unless otherwise noted. 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 FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, and 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents, and has the burden of proof by a preponderance of the evidence. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 57-58, 62 [126 S.Ct. 528,

163 L.Ed.2d 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) Student had the burden of proof on all issues presented. 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).)

At the time of hearing Student was a 12-year-old boy who resided with his family in Rialto Unified School District. Student was eligible for special education and related services under the category of autism.

ISSUE 1: IN-PERSON SERVICES FROM MARCH 2020 UNTIL THE END OF THE 2019-2020 SCHOOL YEAR

Student contends that, during the COVID-19 pandemic, Rialto was required to provide him in-person services of specialized academic instruction, called SAI, speech-language therapy, occupational therapy, and a one-to-one aide. He argues that these IEP services were required to be provided in-person to provide him a FAPE.

Rialto contends that in spring 2020 after the schools were first closed due to the COVID-19 pandemic, and for the duration of the 2109-20 school year and ESY during the summer of 2020, it provided as much of Student's special education and related services as was feasible.

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), 56363, subd. (a); 34 C.F.R. §§ 300.320, 300.321, and 300.501.)

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

Student's operative IEP was dated September 27, 2019. It offered Student a placement at a nonpublic school with SAI in a group setting for 1,450 minutes a week, with a fulltime one-to-one behavioral aide, plus collaboration between a behaviorist and other members of Student's educational team. It also offered individual speech services for 30 minutes a week and collaboration between the speech therapist and other members of Student's educational team, adapted physical education for 60 minutes a week, and individual occupational therapy for 30 minutes a week, plus collaboration between the occupational therapist and other members of Student's educational team. For ESY in summer, it offered 19 total days of SAI for 240 minutes per day with a fulltime one-to-one behavioral aide. Related services, for the four weeks of ESY, were individual speech services for 30 minutes a week and collaboration between the speech therapist and other members of Student's educational team, adapted physical education for 30 minutes a week, and individual occupational therapy for 30 minutes a week plus collaboration between the occupational therapist and other members of Student's educational team. Mother consented to that IEP, and it governed Student's program during the entire time frame at issue here, having never been superseded by consent to any later IEP.

Student had significant needs. He was mostly non-verbal. He used an iPad with a software program to express himself. The program spoke a word when Student tapped an icon. Student expressed himself by tapping icons of the iPad, gesturing, pointing, and tugging. He stated simple sentences of one to three words. Student required a verbal and gestural prompt to use his iPad for social exchanges like greetings and farewells. He was able to speak to make requests using the core word "want," then label an object like food or preferred places, describe colors, and answer simple questions like "what do you want?" or "what is it?" He struggled identify a simple story's "main idea." He engaged in tantrums and self-injurious behavior including pinching, hitting, and slapping his own face and head. He also engaged in aggression by pinching others. He independently used the restroom, washed his hands, hung up his backpack and got his personal items like his iPad and lunchbox, opened and closed his containers, and cleaned up after himself with a verbal prompt.

Student's September 27, 2019 IEP contained 13 goals in the areas of receptive vocabulary, writing and typing, reading, functional math, community skills, behavior, adapted physical education, and functional communication. Each goal was to be met by the annual IEP date of May 13, 2020, and had short-term objectives to be met by December 13, 2019, and March 13, 2020. As discussed below, Student's next annual IEP, although technically due in May, was not convened until October 2020, then continued to February 2021, and Parents never consented to it. Thus his 2019 IEP remained in effect into the 2020-2021 school year, for the entire time period at issue here.

Since 2018, Student had been placed through his IEPs at a nonpublic school called Bliss Academy. Bliss was one of the entities operating under the auspices of an umbrella organization called Leroy Haynes Family of Programs. Haynes also ran a

nonpublic agency called Star Academy, which provided some related services. Rialto contracted with both Bliss and Star. Rialto, as the local educational agency, remained legally responsible for providing Student with a FAPE.

Student attended Bliss in-person until it closed due to COVID-19 in March 2020.

RIALTO HAD NO DUTY BETWEEN MARCH 4 AND APRIL 16, 2020, TO PROVIDE SERVICES TO STUDENT

On March 4, 2020, Governor Newsom declared a state of emergency in California due to COVID-19. Bliss was closed and did not provide instruction to any of its students for the first few weeks after the Governor's declaration. Then, Bliss' Spring Break ran from March 23-27, 2020. Thereafter, Bliss did not reopen until approximately April 16.

Student's operative IEP expressly excluded any obligation to educate Student while Student's nonpublic school was closed. It stated that services would be provided consistent with the school calendar and excluding holidays, vacations and "non-instructional days." The days Bliss was closed were non-instructional days. Thus, Student's governing IEP did not require Rialto to provide Student education or services while Student's nonpublic school was completely closed.

This fact by itself defeats Student's claim for the period of time from March 4 to April 16, 2020, the day Bliss resumed.

In addition, although Student attended a nonpublic school rather than a Rialto school, Rialto itself was closed until April 13, 2020. A school district that has closed to all students because of the pandemic does not violate the IDEA by closing to special education students. On March 12, 2020, the United States Department of Education Office of Special Education and Rehabilitative Services, called OSERS, issued informal

guidance that if a local educational agency closed to all students because of COVID-19, it was not required to provide services to students with disabilities during that time.

(OSERS, March 12, 2020 *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak*, Answer to Question A-1.)

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

N.D. acknowledged that even in the face of a system-wide shut down, a student might still have a claim that a school district's failure to provide the number of minutes and type of instruction guaranteed in an IEP constituted a material failure to implement the IEP. Here, however, because the IEP specifically excluded non-instructional days, such a claim is inapposite.

Student has thus failed to establish that Rialto had a duty to serve him while Bliss was closed from March 4 to April 16, 2020.

RIALTO'S DUTY TO PROVIDE STUDENT'S IEP SERVICES, TO THE
GREATEST EXTENT POSSIBLE, RESUMED AFTER APRIL 16, 2020, BUT DID
NOT REQUIRE IN-PERSON SERVICES

On or about April 16, 2020, Bliss resumed educating its students, using distance learning. The narrow question as pleaded by Student's complaint is whether his right to FAPE was denied because in-person services were not thereafter provided. According to all the guidance issued by both OSERS and the California Department of Education, the answer is no.

On March 13, 2020, Governor Newsom issued Executive Order N-26-20, which among other things, expressly authorized distance learning if local districts chose to close their schools. Order N-26-20 instructed the state departments of education and health to issue guidance that would ensure students with disabilities received a FAPE consistent with their IEPs during the pandemic.

The California Department of Education responded with guidance that encouraged school districts to deliver educational opportunities "to the extent feasible" through options such as distance learning and independent study. (Calif. Dep't. of Ed., *Special Education Guidance for COVID-19, COVID-19 School Closures and Services to Students with Disabilities* (March 20, 2020).)

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

of FAPE should be consistent with protecting the health and safety of the student and service providers, using accessible technology to provide services via alternate means.

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

It is important to emphasize that federal disability law allows for flexibility in determining how to meet the individual needs of students with disabilities. The determination of how FAPE is to be provided may need to be different in this time of unprecedented national emergency. (OSERS, March 21, 2020, *Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities*, pp. 2-3.)

As the Ninth Circuit recently recounted, in March 2020, the California State Public Health Officer issued a list of designated “essential” workers who were allowed to leave their homes to support specified critical infrastructure sectors. That list expressly included workers teaching at “public and private ... K-12 schools,” but only for “distance learning.” Although many schools had already independently decided to close by that time, the effect of these orders was to impose a new State mandate that schools remain limited to “distance learning.” (*Brach v. Newsom* (9th Cir. July 23, 2021, No. 20-56291) 2021 WL 3124310). By a follow-on May 7, 2020 order, the State Public Health Officer stated she would “progressively designate sectors, businesses, establishments, or

activities that may reopen with certain modifications.” On July 13, 2020, the State Public Health Officer issued an order generally closing a variety of services like bars, indoor dining, movie theaters, and museums, statewide, and closing other activities like gyms, places of worship, hair salons, and malls in counties that appeared on the State’s “County Monitoring List” for more than three days. On July 17, 2020, the California Department of Public Health issued a “Reopening In-Person Learning Framework for K-12 Schools” for the 2020–2021 school year, called the Framework. The Framework established “criteria” under which “local health jurisdiction[s]” could deviate from the otherwise applicable statewide ban on in-person learning. (*Ibid.*) Under the Framework’s criteria, a school generally could reopen for in-person instruction only if the school’s local health jurisdiction had not been on the County Monitoring List for the preceding 14 days. If the local health jurisdiction was on the County Monitoring List over that 14-day period, then the school was required to “conduct distance learning only.” (*Ibid.*) The evidence at hearing established that San Bernardino County, in which Student resided and where Rialto is located, was from March 2020 through the remainder of the 2019-2020 school year within the most restrictive “purple tier” on the County Monitoring List.

Thus, under these unique facts and circumstances, according to all the applicable California Department of Education and OSERS guidance, in-person services were not legally required in order to provide students with a FAPE. Student’s contention that in the face of a global pandemic, and in light of the Governor’s order, and resulting federal and state guidance, that Rialto was legally required to “provide in-person services in-person,” is not persuasive. (See *E.M.C. v. Ventura Unified School Dist.* (C.D. Cal. October 14, 2020 No. 2:20-CV-09024-SVW-PD) 2020 WL 7094071) (*E.M.C.*.)

In *E.M.C.*, a student argued she was entitled to a stay-put order, ordering in-person services notwithstanding the COVID-19-related statewide public health restrictions. The court found her argument was unlikely to succeed on its merits, thus defeating an application for a temporary restraining order. The unlikelihood-of-success analysis was based on the reasoning of *N.D.* In *E.M.C.*, the court reasoned that even if the student's IEP did provide for in-person services, her educational program had been modified by the statewide public health restrictions prohibiting in-person education pursuant to the statewide COVID-19 monitoring list. This system-wide change affected both disabled and non-disabled students alike. Under *N.D.*, the court reasoned, the IDEA does not "give the parents of disabled children veto power over a state's decisions regarding the management of its schools." (*E.M.C.*, *supra* at *6 [quoting *N.D.*]). Where an entire county's schools were limited to distance learning under the state-wide Framework, the student was "unlikely to be entitled to modify this system-wide decision." (*E.M.C.*, *supra* at *6.) The court rejected Student's argument that restrictions on in-person learning did not excuse a school district's obligation to provide in-person IEP services.

The same analysis applies here, and Student in this case does not prevail on the merits of his analogous argument.

E.M.C. recognized that on April 9, 2020, the California Department of Education issued guidance that stated that in some exceptional situations, in-person services might be required to maintain a student's mental or physical health and that if an individual determination was made of that necessity, a school district was "not necessarily precluded" from providing that in-person service by Governor Newsom's stay-at-home order. While recognizing that a limited exception to the stay-at-home order might allow for in-person services, *E.M.C.* found that no such individual

determination had been made and therefore the limited exception was inapplicable under the facts of that case. The same is true here. No individual determination of exceptional circumstances was made, nor do the facts suggest that it should have been made. Student did not meet his burden to show he was in need of in-person services to maintain his mental or physical health and safety. Thus, in-person services were not required under the facts of this case.

Student's Issue 1 narrowly concerns only whether the law required him to receive in-person services during the COVID-19 shutdown. Under all the federal and state guidance applicable during that time frame, it did not. Student does not prevail on Issue 1.

ISSUE 2(B): ACCOMMODATIONS TO ENSURE STUDENT COULD RECEIVE A FAPE THROUGH DISTANCE LEARNING FROM MARCH 2020 UNTIL THE END OF THE 2019-2020 SCHOOL YEAR

Student contends that, from March 2020 through the end of the 2019-2020 school year, Rialto did not give him the accommodations necessary to support him adequately in online instruction. Rialto maintains during that time period, although Bliss had resumed educating students, its activities were not "instructional days" and therefore no educational services were owed.

Rialto's argument, that Bliss was closed, is not persuasive. Bliss reopened for at least some educational activities on or around April 16, 2020.

Even though not required to provide in-person services, Rialto was required to deliver educational opportunities to the extent feasible through options such as distance learning and independent study. (Calif. Dep't. of Ed., March 20, 2020, Special Education

Guidance for COVID-19, COVID-19 School Closures and Services to Students with Disabilities; OSERS, March 21, 2020, Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities, pp. 2-3.) California Department of Education's March 20, 2020 guidance also stated that, when providing instruction through a distance learning model, districts must create access to the instruction for students with disabilities, including planning for appropriate modifications or accommodations based on the individualized needs of each student and the differences created by the change in modality (e.g., virtual vs. classroom-based). (Calif. Dep't. of Ed., March 20, 2020, Special Education Guidance for COVID-19, COVID-19 School Closures and Services to Students with Disabilities.

For the period of time from its re-opening on April 16 through the end of the 2019-2020 school year and ESY, in the summer of 2020, Bliss did not sufficiently accommodate Student. Bliss staff did not interact directly with Student by any method, during that entire time. As the local educational agency, Rialto is legally responsible for that failure.

There was no online instruction from March through June 2020 or during ESY until the following 2020-2021 school year began in August. For March 2020 through the end of the school year, except for one attempt at a group online instructional session, no Bliss staff worked directly with Student through computer or telephonic means. Only Mother interacted with Student from March to June 2020. As far as contact with Mother, the only interaction by Bliss service providers with Mother was telephone contact. Bliss did set up a Google classroom platform that students could voluntarily log onto to obtain materials, but that was optional and not supervised. Except for the one online group instructional session that occurred in or about April 2020, online interactive instruction was not up and running until August 2020.

During the 2019-20 school year through ESY, behaviorist Yanelli Diaz had weekly phone calls with Mother in which she attempted to guide Mother how to prompt and re-direct Student. Service logs show that an occupational therapist created a home program to support Student's writing goal, and materials were emailed and sent to Mother in April and May 2020. For speech services, the speech-language pathologist created a home program and booked two telehealth visits for May 21, 2020, and May 28, 2020, to which the family did not appear online. These were the only staff contacts with the family, and none were directly with Student.

Bliss sent packets to families starting in April. Some of these contained what it called "enrichment activities," which were not individualized to any particular students' IEP goals. These were optional and contained social skills activities, art, and physical education exercises. The evidence was conflicting as to when the enrichment activities became individualized and directed toward IEP goals. ESY ran from June 15, 2020 to July 10, 2020. Bliss became better organized during ESY. Teacher Wendy Sobodowski began logging her contacts with Mother, noting when packets were sent home to Mother. The packets became more individualized than the prior optional "enrichment activities." Mother recalled getting packets during ESY every Tuesday. The packets contained Student's IEP goals, worksheets, books, and some fun activities. There were math worksheets to work on Student's goal of writing numbers one through 10. There were exercises to add numbers. Mother worked with Student, about 20 minutes each day or as long as Student could tolerate, after which he would tell her "no, no, no" or "all done." Bliss staff told Mother it was optional to return Student's worksheets to Bliss.

There was still no online instruction during ESY. Mother recalled Bliss providing some guidance regarding how to work with Student, but not exactly when this began. At some point, Bliss staff told Mother how to "run the goals." For example, she was told

to place icons in front of Student to allow him to identify nouns by pointing at the correct icon, for example “show me the cat.” During ESY Bliss also made instructional videos available. Student required redirection and prompting, which Mother accomplished to the best of her ability.

Bliss personnel persuasively described the difficulties it faced in moving its education of students online. Bliss teachers had to be trained, software had to be obtained and learned, and database platforms had to be secured. However, from April 16, 2020, when Bliss reopened through the end of the 2019-2020 school year and through ESY, Bliss provided no instructional services to Student. If Rialto contends that a more complete provision of IEP services to Student was impossible, impracticable, or not feasible, it failed to establish such a defense. As the evidence pertaining to the 2020-2021 school year showed, below, Bliss could have done, and later did do, much more to ensure Student received access to his education. For the April through June 2020 time frame, what Bliss provided fell far short of the “access to the instruction for students with disabilities, including planning for appropriate modifications or accommodations based on the individualized needs of each student and the differences created by the change in modality (e.g., virtual vs. classroom-based)” that California Department of Education’s March 20, 2020 guidance suggested. (Calif. Dep’t. of Ed., March 20, 2020, Special Education Guidance for COVID-19, COVID-19 School Closures and Services to Students with Disabilities.)

Student failed to make progress on his goals during this time period from April 16, 2020, through the end of ESY 2020 and was thereby denied a FAPE. Contemporaneous progress notes handwritten by teacher Sobodowski reported that prior to the COVID-19 shutdown, on December 10, 2019, and March 13, 2020, Student had met academic Goal 5, in the area of reading, and Goal 7 in the area of functional

math, both of which required that certain tasks be accomplished with 100 percent accuracy. Student was also showing progress in math Goal 6, requiring 80 percent accuracy. Sobodowski anticipated that goal would be met by May 2020.

After the COVID-19 closures began, when reporting on these goals on June 4, 2020, Sobodowski stated the goals could not be sufficiently evaluated because of distance learning.

After the beginning of the following school year, during the next reporting period on October 16, 2020, Sobodowski reported that for Goal 5, which had previously been met with 100 percent accuracy, Student had partially met the goal by achieving only 30 percent accuracy. For Goal 7, previously met with 100 percent accuracy, Student was achieving only 80 percent accuracy. For Goal 6, requiring 80 percent accuracy and previously substantially met, Student was now achieving only 50 percent accuracy.

Thus, from April 2020 through ESY 2020, when Student was receiving no online interaction of any kind, and only minimal “distance learning” through the provision of packets to Mother, Student did not receive FAPE. Contrary evidence in the form of report cards showing satisfactory or excellent performance is discounted as unreliable and not supported by the testimony of Sobodowski, who graded Student. Student therefore prevails on Issue 2(b).

ISSUE 2(C): IMPLEMENTATION, OTHER THAN IN-PERSON SERVICES, FROM MARCH 2020 THROUGH THE END OF THE 2019-2020 SCHOOL YEAR

Within the language of Student’s Complaint are allegations that Student’s IEPs were not implemented, in respects other than the specifically-framed issue of in-person services. Both parties submitted copious evidence, for example, concerning the number

of online SAI minutes Bliss provided during distance learning, whether Bliss' service logs concerning its online services were accurate, and concerning whether any group instruction was provided online. Rialto argued at hearing that "Student got all his minutes." Therefore, since the issue of implementation of the IEP in respects other than in-person services is stated in the complaint, even if not framed in bold font as an issue, and since it was actually litigated, it is now addressed. (*M.C. v. Antelope Valley Union High School Dist.* (9th Cir 2017) 858 F.3d 1189.)

A school district violates the IDEA if it materially fails to implement a child's IEP. (20 U.S.C. § 1401(9)(D).) A material failure occurs when there is more than a minor discrepancy between the services provided to a disabled child and those required by the IEP. (*Van Duyn v. Baker School Dist.* 5J, (9th Cir. 2007) 502 F.3d 811, 822.) Local educational agencies must continue to implement a student's IEP, including SAI minutes, during distance learning. (Calif. Dep't of Ed., September 30, 2020, Special Education Guidance for COVID-19.)

For the 2019-2020 school year and ESY, the issue of implementation is already subsumed within Issue 2(b). Since Student was not offered any instructional or related services of any kind, even via an online, distance learning platform, none of the instructional minutes or related services in his IEP were implemented. Student therefore prevails on Issue 2(c). The remedy for this time period is already addressed below with regard to Issue 2(b). Later time frames are addressed below in Issue 4(c).

ISSUE 3: IN-PERSON SERVICES FROM THE 2020 SCHOOL YEAR TO THE FILING OF THE COMPLAINT

Student makes similar contentions for the 2020-2021 school year as stated above with regard to Issue 1, arguing that during distance learning made necessary by the COVID-19 pandemic, Rialto was required to provide him in-person services to provide him a FAPE.

Rialto contends that it provided as much of Student's special education and related services as was feasible. Rialto contends that in the 2020-2021 school year, Bliss began providing SAI, speech language therapy, occupational therapy, and aide services directly to Student online, as was legally authorized. Rialto further contends that it provided Student a FAPE during distance learning, and that it provided all the services Student was due.

For the same reasons as stated above with respect to Issue 1, Student does not prevail on Issue 3. Furthermore, for the 2020-2021 school year encompassed within Issue 3, additional law authorized distance learning in addition to the federal and state guidance cited above.

Senate Bill No. 98, amending numerous Education Code sections in response to the COVID-19 pandemic, became law on June 29, 2020. Section 43500 defined "distance learning" generally as instruction in which the pupil and instructor were in different locations, to include computer, video, audio, and written instruction. Section 43503 provided that distance learning should include computer access, grade-level content, and academic supports. It should also include daily live interaction with certificated employees and peers for instructional purposes, that might take the form of

internet or telephonic communication, or other means permissible under public health orders if feasible. These provisions were generally applicable to all public education beginning June 29, 2020.

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

In light of the Governor's orders, and resulting guidance, and new California law, and for the same reasons stated above, Student's contention that Rialto was legally required to provide him with "in-person services in-person," for the 2020-2021 school year, is not persuasive. Student did not prevail on Issue 3.

ISSUE 4(B): ACCOMMODATIONS TO ENSURE STUDENT COULD RECEIVE A FAPE THROUGH DISTANCE LEARNING FOR THE 2020-2021 SCHOOL YEAR TO THE FILING OF THE COMPLAINT.

Newly-enacted Education Code section 43503 required that distance learning include accommodations necessary to ensure that a student's IEP can be executed in a distance learning environment, and it specified how distance learning should be implemented. During the 2020-2021 school year, Bliss, and by extension Rialto, met these requirements.

During the 2020-2021 school year, Sobodowski and one-on-one aide Ashley McCoy created individualized weekly packets for Student. Mother confirmed that these arrived every Tuesday. These contained worksheets for exercises, laminated cards and

folders, and arts and crafts. For example, Bliss provided a laminated sheet for math facts with cards on which Student could write the answer. McCoy also provided Student with math worksheets with dots to count. There was also a sheet with Velcro numbers he could select to post on the board. These materials matched what would have been provided in-person at school. These materials included shapes to trace and color, and the laminated sheets had a story text and showed three options with Velcro, that Student could select and post on the laminated sheet to identify a story's "main idea." Bliss also sent paper, books, and coloring activities in the weekly packets. It also sent items for Student to practice matching and sorting exercises. Bliss also sent a "token board," a "first/then" board, squishy balls, and a texture disc. In accordance with the accommodations listed on Student's IEP, Bliss sent home chewable items to assist with self-regulation. Bliss provided multimodal instruction including verbal, visual, kinesthetic, and auditory learning opportunities. It sent home sensory items. Bliss also provided the IEP accommodation of work modification, offering alternative modes of learning.

The materials changed over time in response to Student's needs. For one example, the laminated cards supporting Student's goal of identifying a story's "main idea" were simplified, with the potential answers re-organized on the page. For another example, instead of asking Student to point to a word, the materials changed to give Student manipulatives, for example the word on a Velcro-backed sheet he could pick up and adhere to the laminated sheet. For Goal 6, to identify numbers one through 20, Bliss provided visuals that Student could write on and erase. For math goals, Bliss reduced the number of problems per page to reduce distraction. Additionally, Sobodowski and McCoy created worksheets with fewer rows of dots to count. Mother turned Student's worksheets in to Bliss every week.

Rialto provided Student with a computer. Bliss provided online services via a Zoom platform starting August 24, 2020, the first day of the 2020-2021 school year. Sobodowski and McCoy, as well as occupational and speech therapists, began meeting Student face-to-face on Zoom to provide SAI and related services directly. McCoy's demeanor at trial showed her intelligence, passion, enthusiasm, and dedication. McCoy had been Student's full-time one-to-one aide prior to COVID-19, since he began attending Bliss in 2018. She worked closely under the supervision of teacher Sobodowski. Her descriptions at hearing of Student's traits and characteristics indicated her devoted attention to his wants and needs. She remembered his goals with great detail, and also how these were implemented both before and during distance learning.

Although Student had a short attention span and therefore was only able to attend for 15 to 30 minutes at a time, or up to a full hour for his related services, McCoy's credible testimony established that she and Student worked on all of Student's goals every single day. Mother confirmed this. Student counted from zero to 10, added numbers one plus two, up to 10, and did tracing and coloring. Student and McCoy worked on pointing to body parts, and worked on life skills like brushing teeth, lacing shoes, and dressing oneself. Mother's testimony confirmed that for the 2020-2021 school year, Student logged in every day at the time dictated by Student's distance learning plan, Monday to Friday at 11:30 a.m., and that McCoy was always online, serving solely Student as his dedicated one-to-one aide, during that time frame. McCoy greeted Student and worked with him on identifying "safety signs," for example the sign for railroad crossings or "walk/don't walk," on his iPad. They also worked on stories to identify the "main idea," although Mother felt Student was guessing at the answers.

Sobodowski circulated amongst her students via the online Zoom platform. She serviced four or five other students and “made her rounds,” just as she would have done in an in-person classroom.

Bliss provided occupational therapy via Zoom, every Friday once a week from 12:00 to 12:30 p.m. for 30 minutes, with the therapist and McCoy both online. The therapist did warmups with play-doh that Bliss supplied in the packets sent home to Student, which Student rolled into balls. The therapist also worked on matching skills using pins that Bliss sent in the packets. The therapist worked on a worksheet for writing and typing, by sharing a screen where she posted a word and Student then typed the word she posted. Student also performed physical writing exercises, but the therapist could not see the paper unless Mother held it up to the screen. The occupational therapist asked Mother if she had any questions, and they discussed information about the next week’s program. The occupational therapist logged these conversations into a service log as “collaboration,” and according to Mother’s testimony, the entries were accurate. Adapted physical education was provided online twice per week. Online speech therapy sessions were on Thursdays for 30 minutes.

In sum, during the 2020-2021 school year, Bliss and by extension Rialto, provided ample accommodations to ensure Student could receive a FAPE through distance learning for the 2020-2021 school year to the filing of the complaint. Rialto provided special education and related services designed to allow Student to access specialized instruction and related services, individually designed to provide educational benefit, and reasonably calculated to enable Student to make progress. For these reasons, Student does not prevail on Issue 4(b).

ISSUE 4(C): IMPLEMENTATION, OTHER THAN IN-PERSON SERVICES, FOR THE 2020-21 SCHOOL YEAR

Student's closing arguments, and the evidence presented by both parties at hearing, addressed specific implementation failures, other than in-person services. The first was the total number of SAI and behavioral minutes Bliss provided during distance learning. The second was the absence of any group instruction. The third was asynchronous instruction, or independent study.

The contention that the total number of SAI and behavioral minutes failed to implement Student's IEP was persuasive. Student's IEP called for 1,450 minutes per week or approximately five hours of SAI each day with full-time one-to-one aide services. Bliss made approximately three hours per day of instruction available to Student via Zoom on-line, from 11:30 a.m. to 2:30 p.m. each day, with one-to-one aide services for that time frame. This did not comport with Student's IEP.

After the passage of SB 98, the Principal of Bliss, Margarita Olado, formulated distance learning plans for Bliss students that provided both synchronous – online sessions scheduled with school staff – and asynchronous or independent study, as the new law allowed. (Ed. Code, § 43500, subd. (a)(2) & (3).) Bliss had an understanding that 240 daily minutes of synchronous online instruction were required, based on a new "Part" of the Education Code, Part 24.5 entitled "School Finance, Instruction and Accountability in the 2020-21 School Year." Specifically, new Education Code section 43501, subdivision (c), stated that for the 2020-2021 school year, the minimum school day for a local education agency would be 240 instructional minutes in grades four through 12. Section 43502 guaranteed apportionments and funding if this number of instructional minutes were provided. (Ed. Code, § 43502(d).) These provisions for

minimum school-day hours, apportionment, and funding led Bliss to create its distance-learning class schedules. Bliss created two daily cohorts, one in the morning and one in the afternoon. Student was assigned to the afternoon cohort from 11:30 a.m. to 2:30 p.m.

Bliss' scheduling, thus, made available three daily hours of on-line instruction and aide support. This did not comport with SB 98, falling a full hour short each day of the required 240 minutes. But, even if it had supplied the full 240 daily minutes, it also misunderstood the impact of Part 24.5. The guarantee of funding and apportionments, if providing a minimum number of minutes per day, related to school financing but should not have translated automatically to a diminution in the number of instructional or behavioral minutes implemented pursuant to an IEP. California Department of Education guidance specifically stated that the number of SAI minutes in an IEP should be implemented despite SB 98's requirements for instructional minutes. (Calif. Dep't of Ed., September 30, 2020, *Special Education Guidance for COVID-19*.) Thus, for the 2020-2021 school year up until the filing of the complaint, Student's IEP was not implemented in regard to the number of SAI and accompanying behavioral minutes Bliss made available.

The evidence also established that there was no instruction in a group setting, as the IEP called for, because the Zoom sessions were only one-on-one between Student and Bliss staff. Behavioral Goal 11, which stated that Student would independently request attention from staff and peers using his communication device five times a day in 80 percent of opportunities, could not be implemented in the absence of any peer interaction. Bliss staff opinions expressed at hearing, that staff, Mother or Student's siblings could substitute for peer interactions, were unconvincing.

In terms of asynchronous independent study, although authorized when appropriate by the new law governing distance learning, here it was inappropriate because Bliss expected it to be implemented without aide supervision. As discussed above, aide supervision was not made available except for the three hours of synchronous instruction.

Education Code, section 43500, subdivision (a)(3), specifically stated that distance learning could include the use of print materials incorporating assignments that are the subject of written or oral feedback. Olado and Sobodowski established at hearing that independent study was consistent with class schedules that pre-dated COVID-19. Sobodowski was not always focusing on Student, as she made rounds amongst the other students.

However, when Student worked on tasks independently in class, using a "task box" containing exercises and activities he could always work under the supervision of his one-to-one aide. Student's behavior intervention plan, incorporated into the IEP, provided for a protocol establishing "first, then" rules, verbal priming before transitions, timers and transition objects as needed, a behavior protocol to demand easier tasks first then harder tasks, and work modification such as reducing or modifying workload, offering alternatives modes of learning, changing order of assignments, etc., and continuous attention and praise in the absence of problem behaviors. Asynchronous instruction or independent study did not warrant the diminution of Student's one-to-one aide services from full-time down to three hours. Student argues that his IEP "did not include self-study, nor is that consistent with his disabilities." Given Student's individual needs for behavioral services, this argument is persuasive.

Implementing Student's IEP's full number of instructional SAI and behavioral minutes, and making available peer interactions, might have been accomplished online and did not necessarily require in-person services. Thus, the fact that Bliss did not do so constituted a material failure to implement the IEP. In conclusion, Student proved by the preponderance of the evidence that Rialto denied Student a FAPE when it failed to materially implement Student's IEP in these particular respects. Student prevailed on Issue 4(c).

ISSUES 2(A), 4(A) AND 5 (A): EVALUATIONS

Student contends in Issue 2(a) that beginning in March 2020, for the 2019-2020 school year and ESY, Rialto denied Student's rights to a FAPE by assigning him to distance learning without first re-assessing him. Student's Issue 4(a) repeats that contention for the 2020-2021 school year. Student's Issue 5(a) generally contends that Rialto failed to adequately assess his disabilities. There is no merit to any of these contentions.

A local educational agency must assess a special education student in all areas of suspected disability. (20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4); Ed. Code, § 56320, subd. (f).) A local educational agency must use a variety of assessment tools and strategies to gather relevant information (20 U.S.C. § 1414(b)(2)(A)), and shall not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability. (20 U.S.C. § 1414(b)(2)(B); 34 C.F.R. § 300.304(b)(2)). Assessments must be sufficiently comprehensive to identify all of the child's special education and related service needs, whether or not commonly linked to the disability category of the child. (34 C.F.R. § 300.304(c)(6).) The school district must use technically sound testing instruments. (20 U.S.C. § 1414(b)(2)(C); 34 C.F.R. § 300.304 (b)(3).)

After a child has been deemed eligible for special education, reassessments must be performed if the district determines that is 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).) Upon parent request, the local educational agency must conduct a reassessment, even when the school determines that no additional data is needed to determine the student's educational needs. (20 U.S.C. § 1414(a)(2)(A)(ii); Ed. Code, § 56381, subds. (a)(1) & (d); 34 C.F.R. § 300.303(a)(2).)

To the extent that Student contends a reassessment was required before assigning him to distance learning, the contention is without support in any of the law and guidance cited above. Prior to the enactment of SB 98, none of the federal or state guidance concerning the unique COVID-19 circumstances indicated that an assessment was required prior to undertaking distance learning while schools were closed. SB 98 explicitly authorized distance learning. Had the legislature intended that distance learning should not be undertaken without an assessment, it could have so stated. Moreover, *E.M.C.*, in finding that stay-put did not prohibit distance learning, indicated that distance learning did not in and of itself constitute a change of placement. (*E.M.C. supra*, at *3-4.) Thus, assigning Student to distance learning, in and of itself, did not trigger the duty to reassess.

Moreover, here, none of the three circumstances triggering an assessment applied. Rialto did not determine that reevaluation was necessary, Student's parents did not request a reevaluation, and fewer than three years had elapsed since Student's last triennial evaluation. (See *M.S. v. Lake Elsinore Unified School Dist.* (9th Cir 2017))

678 F. App'x. 543 (unpublished).) None of the facts known to Rialto triggered the duty to re-assess. Although at some point Mother felt Student's behaviors had worsened substantially, to the point of exhibiting a new behavior of pinching his own genitals, she did not ever share this information with Rialto or Bliss. At IEP team meetings in October 2020 and February 2021, Mother expressed her view that because of COVID-19, Student was not receiving a proper education and was missing out on services, and asked for in-person and compensatory services, but did not specify any change in Student's needs. She did not request an assessment. Bliss undertook an investigation and found that Student's service providers all agreed, contrary to Mother's perception, that Student was able to access remote learning. Student fails to specify any event or information during his experience with online learning that would have triggered the duty to assess. The law only requires reassessments within a three-year period, if parent asks or "if the local educational agency determines" that a reassessment is 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).) Student failed to meet his burden of proof on Issues 2(a), 4(a), and 5(a).

ISSUE 5(B): GOALS

Student contends Rialto denied his rights to a FAPE for the 2019-2020 school year and ESY, and the 2020-2021 school year, by failing to develop an IEP that was reasonably calculated to enable him to receive educational benefit, by failing to address his needs for proper goals. Specifically, for the proposed goals in the October 2020 IEP, Student alleged that because of distance learning, Bliss had not seen Student in-person

since March 2020 and could not draft accurate goals for the following year. Student also contends that the proposed goals could not be implemented in a distance learning environment.

Rialto contends Student's goals were appropriate.

An IEP is a written document for each child with a disability that includes: a statement of the child's present levels of academic achievement and functional performance; and a statement of measurable annual goals, including academic and functional goals, designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum, and meet each of the child's other educational needs that result from the child's disability. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.320; Ed. Code, § 56345, subd.(a).) The IEP shall show a direct relationship between the present levels of performance, the goals and objectives, and the specific educational services to be provided. (Cal. Code Regs., tit. 5, § 3040.) The IEP should include a description of how the child's progress toward meeting the annual goals will be measured, and when periodic reports of the child's progress will be issued to the parent. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.320; Ed. Code, § 56345, subd. (a)(3).)

In the event of a procedural violation, a denial of FAPE may only be found if the procedural violation impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a FAPE, or caused deprivation of educational benefits. (20 U.S.C. § 1415 (f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2); Ed. Code, § 56505, subds. (f)(2) & (j).)

First, although Student's Issue 5(b) encompasses both the 2019-2020 and 2020-2021 school years, Student offered no evidence that the development of the goals in the September 2019 IEP that governed his program was inappropriate in any way. Therefore, Student failed to meet his burden of proof as to the goals in that IEP. The 2019 IEP was consented to in September 2019, before distance learning began.

The October 2020 IEP stated Student's present levels of performance in behavior. The IEP noted that during distance learning, Student engaged in self-injurious wrist hitting an average of 1.3 times a day and self-injurious face slapping an average of 4.9 times a day. Self-injurious pinching and chin hitting were "currently" at 0.1 times a day. "Currently," he was able to independently engage in sensory strategies an average of 63 percent of opportunities and otherwise required one verbal and gestural prompt. Proposed Goals 4, 5, and 6 in the area of behavior, were derived from the present levels of performance and were legally required to correlate to them. Similarly, the proposed behavior intervention plan stated the frequency, intensity, and duration of behaviors at different time periods, including the time period of the October 2020 IEP. The proposed behavior intervention plan stated that self-injurious pinching occurred 0.1 times per day, self-injurious chin injuries occurred at 0.1 per day, self-injurious face slapping occurred 4.9 times per day, self-injurious wrist or hand injuries occurred at 1.3 per day, aggression happened 0.3 times per day, and outbursts were at 0.1 per day.

This information was not reliable. At the October 2020 IEP team meeting, Mother expressed concern with how Student's prior year's goals were being measured since Student had not been in a physical school since March and service providers had not been able to meet with him in person. Bliss staff explained that the data for goal progress during distance learning was the data that was able to be collected during Zoom sessions.

The behavioral data that were able to be taken during Zoom sessions were incomplete and unreliable. Because Student only remained online for 15 to 30 minutes at a time, or up to an hour at most, each session for which data were taken was truncated. The data, as reflected in Student's present levels of performance on the proposed IEP, stated that Student had certain numbers of behaviors "per day." However, the "day" was calculated based on the time Student was on Zoom and could have therefore been as little as 15 minutes. There would be vast difference between a frequency of 4.9 incidents of face-slapping per "day," and 4.9 incidents of face-slapping every 15 minutes, which the present levels of performance did not capture. Without knowing the duration of the "day," no frequency or rate of his behavior could accurately be determined. This ambiguity in the present levels of performance constituted a procedural violation.

However, Student did not establish any resulting denial of FAPE. There was no impeding of Student's right to FAPE nor deprivation of educational benefit. Nor was there any significant impediment to Parents' participatory rights. An analogous argument was rejected in *Nunez v. Grossmont Union High School Dist.* (S.D.Cal. September 30, 2019, No. 17-CV-2097-L-MDD) 2019 WL 4849172) (*Nunez*). That case held that a school district did not deny the parent of an 11th-grade student an opportunity to meaningfully participate in an IEP meeting where the present levels were arguably inadequate. There, as here, Student contended that his IEP was deficient because his present levels of performance were not updated. An ALJ rejected this contention because the student did not address the goals on the merits. Instead, the contention rested entirely on the general proposition that an IEP cannot include appropriate goals if it does not include adequate baselines or current levels. The District Court found parent had amply participated in the development of IEPs, and that even if

the IEP did not include adequate present levels, any procedural violation was harmless and there was no denial of participatory rights. (*Nunez, supra*, at *6-9.)

The same is true for Student here. Other than the procedural deficits in the baselines for the behavioral goals, Student established no deficits in the goals themselves and did not argue they were deficient in any way, nor that Mother's participatory rights were negatively impacted. Thus, here as in *Nunez*, "[t]he failure to update the present levels ... was a procedural violation of the IDEA. However, Plaintiff's parents were not significantly impeded in their opportunity to meaningfully participate in the decision-making process. Accordingly, the procedural violation did not rise to the level of denying Plaintiff [a] FAPE." (*Nunez* at *7).

And, for all the remaining proposed goals other than behavioral Goals 4, 5 and 6, Student failed to establish any deficits in those goals. They were measurable, included academic and functional goals, designed to meet Student's needs that resulted from his disability to enable him to be involved in and make progress, and meet his educational needs that resulted from his disability, as the law requires. No evidence indicated otherwise. The proposed IEP's Goals 7, 8, 9, 10, 11, 12, and 13 were academic goals in the areas of reading, writing, math and social skills, based on present levels of performance observed by McCoy and Sobodowski, of which they took contemporaneous notes. The academic present levels of performance were not based on rates or frequencies of events over ambiguous time periods and therefore did not suffer from the same deficit as the behavioral present levels. They were based on Student's ability to accomplish tasks, which was observable. Their accuracy was confirmed by the observations of McCoy, corroborated by her detailed and credible testimony. No evidence detracted from the appropriateness of the speech therapy, occupational therapy and adapted physical education goals, numbered 1, 2, 3, 14, and

15, drafted by those service providers. The evidence established that for the 2020-2021 school year up until the filing of the complaint, Student attended his related services online for their full durations, thus his progress was observable by those service providers. No evidence detracted from their accuracy. Therefore, Student did not prevail on Issue 5(b).

ISSUE 5(C): OFFER OF AIDE SERVICES

Student contends Rialto denied his rights to a FAPE for the 2019-2020 school year and ESY, and the 2020-2021 school year, by failing to develop an IEP that was reasonably calculated to enable him to receive educational benefit, by failing to offer sufficient intensive individual services in the form of a one-to-one aide.

There is no merit to Student's contentions. Student's operative September 27, 2019 IEP offered a fulltime one-to-one behavioral aide services, plus 60 minutes a week of collaboration between a behaviorist and other members of Student's educational team. If Student's contention is that this offer of full-time aide services was an insufficient offer at the time it was made, Student provided no explanation of how or why.

Student's next annual IEP date was October 2020 and continued in February 2021. At the October 2020 meeting, Mother reported her concerns with whether Student was accessing his distance learning. Mother's concerns persisted, and she raised her concerns again in January 2021. Bliss undertook an investigation. Student's service providers all agreed that Student was able to access remote learning. Nevertheless, at a continued IEP meeting in February 2021, when Mother requested in-home aide services, Bliss and Rialto agreed and offered that support. The offer was

subject only to a COVID-19 liability waiver, required by the behavioral services provider. The waiver reasonably asked for acknowledgment of the risks of in-person contact, sought assurances of compliance with COVID-19 guidelines when the service provider was physically present in the household, and sought a waiver of liability should transmission of the virus occur. Mother did not sign the waiver, as was her right. But the offer was in no way deficient as to the sufficiency of intensive individual services in the form of a one-to-one aide. Student did not prevail on Issue 5(c).

ISSUE 6: DID RIALTO DENY STUDENT'S RIGHTS BY FAILING TO ADDRESS THE REGRESSION STUDENT SUFFERED AS A RESULT OF BEING ASSIGNED TO DISTANCE LEARNING FROM MARCH 2020 UNTIL THE END OF THE 2019-2020 SCHOOL YEAR AND THROUGH THE 2020-2021 SCHOOL YEAR TO THE FILING OF THE COMPLAINT?

Student contends that, pursuant to SB 98, his "learning loss," or regression, should have been addressed. Rialto contends Student did not regress, and even if he did, the law provides for a process to address it, which does not include a due process hearing before an IEP team has convened to consider regression and the means to address it.

In its March 12, 2020, guidance, OSERS stated that an IEP team would be required to make an individualized determination as to whether compensatory services were needed to make up for any skills that may have been lost during school closure due to the COVID-19 pandemic. (OSERS, March 12, 2020, *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak*, Answer to Questions A-1, A-2, and A-3.) OSERS reiterated this in additional guidance

dated March 16, 2020. (OSERS, March 16, 2020, *Fact Sheet Addressing the Risk of COVID-19 in Schools While Protecting the Civil Rights of Students*.) In its subsequent March 21, 2020 guidance, OSERS stated: "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." (OSERS, March 21, 2020, *Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities*, pp. 2-3.) California Department of Education, in its March 20, 2020 guidance, stated: "[O]nce the regular school session resumes, [districts] should plan to make individualized determinations, in collaboration with the IEP team, regarding whether or not compensatory services may be needed for a student." (Calif. Dep't. of Ed., March 20, 2020, *Special Education Guidance for COVID-19, COVID-19 School Closures and Services to Students with Disabilities*.)

As part of SB 98, enacted on June 29, 2020, Education Code section 43509, subdivision (a)(1)(A) required the governing board of a school district to adopt a learning continuity and attendance plan, called an LCAP. Education Code section 43509, subdivision (f) required the California Department of Education to develop a template for the LCAP, which would include what additional supports will be provided for pupils with exceptional needs served across the full continuum of placements during the period in which distance learning was provided. The LCAP must include how the school district will address learning loss that resulted from COVID-19 during the 2019-2020 and 2020-2021 school years. The LCAP should also state how learning status should be assessed and measured.

At the February 2021 IEP team meeting, Student through his advocate stated that services had been negatively affected by distance learning and Student had been regressing. Parent requested compensatory education for various services in amounts totaling almost 1,000 hours, plus a home applied behavioral analysis program for 30 hours per week, and other services including 80 sessions of adapted physical education. Rialto responded that once school resumes to an in-person brick-and-mortar setting, schools will determine, on an individualized basis for all its students, how much, if any, compensatory services are owed for the period of distance learning. Therefore, Rialto stated that the request for compensatory services could not be determined or calculated at that time.

Rialto's response was legally correct. Student's Issue 6 is not ripe for adjudication, and except for the specific remedies adduced for the particular denials of FAPE found, this Decision does not reach any conclusions as to whether Student is owed compensatory education, or in what amounts. The California Department of Education and OSERS guidance is clear that compensatory education is to be addressed by an IEP team once school resumes. Here, Student only returned to an in-person program at Bliss on a part-time basis on May 6, 2021. Education Code section 43509 sets forth a process for districts to assess and address learning loss. Therefore, Student's Issue 6 is premature.

At the time of hearing, Student's triennial assessments were underway. Mother's testimony established that Student has recouped at least some of the skills she contends he lost during distance learning. For example, Mother contended that Student's abilities to write his own name, and to match and sort objects had worsened during distance learning, but conceded these have now improved. The evidence as to other skills, for example his ability to count, his toileting skills, and the number of words

Student is currently able to utter in a sentence, was in conflict, with Mother and the Bliss educators in complete disagreement. Other than the triennial assessment currently underway, no professional assessment of Student's current functioning has occurred. Moreover, much of Student's argument concerned alleged learning loss during the 2019-2020 school year when there was no online instruction, without distinguishing the 2020-2021 school year, when there was.

Given that the law and guidance set forth a specific process for determining learning loss that may have occurred as a result of the "inevitable delay[s]" caused by the pandemic, this issue is premature for adjudication in accordance with the California Department of Education and OSERS guidance cited above. Katelyn Enriquez, Rialto's Behavior Programs Manager, was at the time of hearing conducting a functional behavioral analysis for Student's triennial assessments. Enriquez oversaw Rialto's behavioral services department and supervised nine applied behavioral analysis specialists at nine different school sites. Enriquez was a knowledgeable witness concerning Student's behaviors, held a managerial position of responsibility within Rialto, and presented as a composed, direct, and thoughtful witness. In pertinent part, when testifying concerning regression, Enriquez recalled that it had never been reported to her that Student had lost any of his skills, but, even if he had, it was "only significant depending on how long it takes to recoup." Neither learning loss nor recoupment has yet to be addressed by an IEP team. Once Rialto schools resume normal operations, Student's IEP team should address compensatory education in light of Student's then-current functioning.

The question of learning loss and recoupment presented in Issue 6 is distinct from the remedy of compensatory education ordered below for the specific denials of FAPE found here. As discussed below, an award to compensate for past violations must

be fact-specific and reasonably calculated to provide the educational benefits that likely would have accrued from those special education services the school district should have supplied in the first place. (*Reid ex rel. Reid v. Dist. of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 524.) The remedy afforded below is solely for those periods of time when Rialto has been found to have denied Student a FAPE. According to the OSERS and California Department of Education guidance cited above, and Education Code section 43509, the IEP team should conduct a learning loss analysis for every student for the entire period of distance learning, even in the absence of specifically-adjudicated issues in due process, and even had Student failed to prevail on any of them.

CONCLUSIONS AND PREVAILING PARTY

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

Issue 1: Rialto did not deny Student's rights to a FAPE by assigning Student to distance learning from March 2020 until the end of the 2019-2020 school year without continuing to provide in-person services in-person. Rialto prevailed on Issue 1.

Issue 2, subsection a: Rialto did not deny Student's rights to a FAPE by assigning Student to distance learning from March 2020 until the end of the 2019-2020 school year without evaluating Student. Rialto prevailed on Issue 2(a).

Issue 2, subsection b: Rialto denied Student's rights to a FAPE by assigning Student to distance learning from March 2020 until the end of the 2019-2020 school year without providing necessary accommodations to ensure Student could obtain a FAPE through distance learning. Student prevailed on Issue 2(b).

Issue 2, subsection c: Rialto denied Student's rights to a FAPE by assigning Student to distance learning from March 2020 until the end of the 2019-2020 school year without implementing his IEP. Student prevailed on Issue 2(c).

Issue 3: Up until the filing of the complaint, Rialto did not deny Student's rights to a FAPE by assigning Student to distance learning for the 2020-2021 school year without providing required in-person services in-person. Rialto prevailed on Issue 3.

Issue 4, subsection a: Rialto did not deny Student's rights to a FAPE by assigning Student to distance learning for the 2020-2021 school year to the filing of the complaint without evaluating Student. Rialto prevailed on Issue 4(a).

Issue 4, subsection b: Rialto did not deny Student's rights to a FAPE by assigning Student to distance learning for the 2020-2021 school year to the filing of the complaint without providing all necessary accommodations needed to ensure Student could obtain a FAPE through distance learning. Rialto prevailed on Issue 4(b).

Issue 4, subsection c: Rialto denied Student's rights to a FAPE by assigning Student to distance learning for the 2020-2021 school year to the filing of the complaint without implementing his IEP. Student prevailed on Issue 4(c).

Issue 5, subsection a: Beginning in March 2020, for the 2019-2020 school year and ESY, and the 2020-2021 school year up until the filing of the complaint, Rialto did not deny Student's rights to a FAPE by failing to adequately assess Student's suspected disabilities. Rialto prevailed on Issue 5(a).

Issue 5, subsection b: Beginning in March 2020, for the 2019-2020 school year and ESY, and the 2020-2021 school year up until the filing of the complaint, Rialto did not deny Student's rights to a FAPE by failing to develop an IEP that was reasonably

calculated to enable Student to receive educational benefit by failing to address his needs for proper academic goals. Rialto prevailed on Issue 5(b).

Issue 5, subsection c: Beginning in March 2020, for the 2019-2020 school year and ESY, and the 2020-2021 school year up until the filing of the complaint, Rialto did not deny Student's rights to a FAPE by failing to offer sufficient intensive individual services in the form of a one-to-one aide. Rialto prevailed on Issue 5(c).

Issue 6: The issue of whether Rialto denied Student's rights by failing to address the regression Student suffered as a result of being assigned to distance learning from March 2020 until the end of the 2019-2020 school year and through the 2020-2021 school year to the filing of the complaint is premature and not ripe for adjudication. Neither party prevailed on Issue 6.

REMEDIES

Under federal and state law, courts have broad equitable powers to remedy the failure of a school district to provide FAPE to a disabled child. (20 U.S.C. § 1415(i)(1)(C)(iii); Ed. Code, § 56505, subd. (g); see *School Committee of the Town of Burlington, Massachusetts v. Dept. of Education* (1985) 471 U.S. 359.) 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 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.) An award to compensate for past violations must be fact-specific and reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. (*Reid ex rel. Reid v. Dist. of Columbia, supra*, 401 F.3d 516, 524.)

Student prevailed on Issues 2(b) and 2(c) for the time period from April 16, 2020, through the end of the 2019-2020 school year and ESY for the summer of 2020. For purposes of calculating remedies, the ALJ relied on the school calendars for the 2019-2020 and 2020-2021 regular school years.

From April 16 to June 4, 2020, the last day of the regular school year, according to the Bliss school calendar there were approximately seven weeks. Student was denied a FAPE because he was not provided appropriate accommodations to permit him to access distance education during that time frame, and because his IEP's number of SAI and accompanying behavioral minutes were not implemented. Student's operative IEP dated September 27, 2019 offered SAI in a group setting for 1,450 minutes a week, therefore the seven weeks totals 10,150 minutes or approximately 169 hours, along with a full-time one-to-one behavioral aide. For seven weeks, the individual speech services offered for 30 minutes a week total approximately 3.5 hours. For seven weeks, the adapted physical education offered for 60 minutes a week totals seven hours. For seven weeks, the individual occupational therapy offered for 30 minutes a week totals 3.5 hours.

ESY during the summer of 2020 was approximately 19 days, or four weeks. For ESY the IEP offered 19 total days of SAI for 240 minutes per day, therefore the 19 days totals 24,560 minutes or 76 hours, along with a full-time one-to-one behavioral aide. Individual speech services for 30 minutes a week for the four weeks of ESY totals two hours. Adapted physical education for 30 minutes a week for the four weeks of ESY totals two hours. Individual occupational therapy for 30 minutes a week totals two hours.

The SAI hours stated above total 245. The related services hours stated above total 20. As an equitable remedy for the time frame involved in Issues 2(b) and 2(c), Student is awarded 49 hours of SAI, and 49 hours of one-to-one aide services to accompany the SAI hours. This remedy calculates a reasonable amount of one-to-one compensatory services for SAI based upon approximately one hour of one-to-one services for each five hours of SAI services that should have been provided, with the same amount of behavioral services. The intensity of one-to-one academic instruction, as opposed to special day class group instruction, justifies this ratio of one hour of compensatory education for each five hours of group SAI Student should have had access to.

As an equitable remedy for speech therapy, adapted physical education, occupational therapy, Student is awarded a total of 20 hours, to be used at Mother's discretion for any of those services. For these related services that were not provided at all during this time frame, not even via distance learning online, Student is awarded all the hours in full that the IEP offered for the time frame of Issues 2(b) and 2(c).

All compensatory education hours will be provided by a certified nonpublic agency of Parents' choosing. All hours will be available through the end of the 2022-2023 regular school year. If unused, they will expire on the last school day of the regular 2022-2023 school year.

For Issue 4(c), the failure to implement the IEP during the 2020-2021 school year up until the filing of the complaint, while Bliss offered three daily hours of SAI rather than the IEP's required five daily hours of SAI, Student is entitled to a compensatory remedy. Relying on the school calendar, the first day of the 2020-2021 school year was August 24, 2020. From then until the February 24, 2021 date of the filing of the complaint, 95 school days, excluding non-instructional days, elapsed. For the missing two hours each day, and using the same five-to-one calculation ratio as stated above, Student is awarded an additional 38 hours of SAI, and 38 hours of one-to-one aide services to accompany the SAI hours.

For the lack of any group instruction as provided for in the IEP, not even online, for the entire period at issue from March 2020 to the filing of the complaint, Student is awarded 20 compensatory hours to be used for social skills instruction in a group setting by a nonpublic agency of Parents' choosing. Because Student's IEP provided one-to-one aide services during group instruction, 20 additional one-to-one aide hours are awarded to be used in conjunction with the social skills training.

The other remedies Student sought are excessive and without any evidentiary support. Student's expert was particularly unconvincing as to the need for the excessive remedies Student asked for. The expert had no factual basis of Student's functioning other than Mother's reporting. She did not herself observe Student. She did not assess

him. She never met Student. She did not interview Bliss or Rialto teachers or staff. Nevertheless, she opined that Student was “unable to access the learning modality that was offered to him.” There was no stated basis for her opinion that the remedies requested in the complaint were warranted or reasonable, other than conclusory statements she made without expressing why.

Several factors warrant consideration with respect to the award of compensatory education hours. The conduct of both parties must be reviewed and considered to determine equitable relief. Bliss staff made dedicated, good faith attempts to provide Student with an appropriate education during the school closures related to the COVID-19 pandemic. School staff were trying their best in the face of difficult circumstances beyond their control. In addition, compensatory education is meant to catch-up the student to where the student should have been absent the denial of a FAPE. The relief ordered above is compensatory only for those Issues that Student prevailed upon, and not for any “inevitable delays” caused by COVID-19 that are to be addressed by Student’s IEP team once school resumes.

ORDER

1. Student is awarded 87 hours of specialized academic instruction.
2. Student is awarded 87 hours to be used for behavior intervention services.
3. Student is awarded a total of 20 hours to be used for speech therapy, adapted physical education, and/or occupational therapy, at Mother’s discretion for any combination of those services.

4. Student is awarded 20 hours to be used for social skills instruction in a group setting, plus 20 hours to be used for behavior intervention services in conjunction with the social skills instruction.
5. All hours will be provided by a certified nonpublic agency of Parent's choosing. Rialto shall establish direct payment to any certified nonpublic agency selected by Parent. All hours will be available to be used throughout the end of the 2022-2023 regular school year. If unused, they will expire on the last school day of the 2022-2023 regular school year.
6. All other relief sought by Student is denied.

RIGHT TO APPEAL THIS DECISION

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

/s/

June R. Lehrman

Administrative Law Judge

Office of Administrative Hearings