

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

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CASE NO. 2021030360

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PARENT ON BEHALF OF STUDENT,

v.

CHULA VISTA ELEMENTARY SCHOOL DISTRICT

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DECISION

August 6, 2021

On March 8, 2021, the Office of Administrative Hearings, called OAH, received a due process hearing request from Student, naming Chula Vista Elementary School District, known as Chula Vista, as respondent. Administrative Law Judge Deborah Myers-Cregar heard this matter via videoconference on May 5, 6, 11, 12, 13, June 4, and 14, 2021.

Deborah Reisdorph represented Student. Parent attended all hearing days on Student's behalf. Meagan Kinsey represented Chula Vista. Sharon Casey, Director of Special Education, attended all hearing days on Chula Vista's behalf.

At the parties' request the matter was continued to July 14, 2021 for simultaneous written closing briefs, and July 28, 2021 for written reply briefs. The record was closed, and the matter was submitted on July 28, 2021.

On July 28, 2021, Chula Vista submitted a motion to strike Student's reply brief for not complying with the instructions of the ALJ. Chula Vista's motion is denied as Student's failure to comply with the ALJ's instructions had no impact on the final decision in this matter.

## ISSUES

1. Did Chula Vista deny Student a free and appropriate public education, a FAPE, beginning March 16, 2020, through the regression recovery intersession, by assigning Student to distance learning and failing to:
  - a. Continue to provide in-person services;
  - b. Evaluate Student and provide necessary accommodations;
  - c. Offer a sufficient amount of related service hours delivered through appropriate service models;
  - d. Develop appropriate academic goals;
  - e. Offer a one-to-one aide; and
  - f. Address Student's regression from distance learning?
2. Did District deny Student a FAPE during the 2020-2021 school year, through March 8, 2021, by assigning Student to distance learning and failing to:
  - a. Offer to continue to provide in-person services;
  - b. Evaluate Student and provide necessary accommodations;

- c. Offer a sufficient amount of related service hours delivered through appropriate service models;
- d. Develop appropriate academic goals;
- e. Offer a one-to-one aide; and
- f. Address Student's regression from distance learning?

During the hearing, the issues were clarified consistent with *J.W. v. Fresno Unified v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443, and *Ford v. Long Beach Unified School Dist.* (9th Cir. 2002) 291 F.3d 1086, 1090. (But see *M.C. v. Antelope Valley Union High School Dist.* (9th Cir. 2017) 858 F.3d 1189, 1196, fn. 2 [dictum].)

## 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).)

Student was nine years old and in fourth grade at the time of hearing. Student resided within the Chula Vista's geographic boundaries at all relevant times. Student was eligible for special education under speech and language impairment and autism. He had difficulty with reading, writing, social language, articulation, math, expressive language, coping skills, focusing on a task, and writing fine motor skills. Student's characteristics of autism were mild. He did not exhibit unusual sensory interests, stereotyped motor mannerisms, or self-injurious behavior. Student had no disruptive classroom behavior, other than being distracted from lessons during prolonged sitting.

## GENERAL LEGAL FRAMEWORK

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

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

The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, assessment, or educational placement of the child, or the provision of a free appropriate public education, referred to as FAPE, to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, and 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing has the burden of proof by a preponderance of the evidence and is limited to the issues alleged in the complaint, unless the other party consents, and (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.]) Student has the burden of proof. The factual statements in this Decision constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

## STUDENT'S OPERATIVE MAY 16, 2019 IEP

During the 2019-2020 school year, Student attended third grade at Muraoka Elementary in a special day class. Student's operative IEP was dated May 16, 2019. The IEP team discussed his present levels of performance and his progress on previous goals. Student was working significantly below his general education peers.

The May 16, 2019 IEP offered Student placement in a mild/moderate special day class at Muraoka Elementary. It provided for 1540 minutes per week of specialized academic instruction in a special education classroom.

The IEP also offered 90 minutes per week of group speech and language therapy divided into three 30-minute sessions, 30 minutes per month of group occupational therapy, and twenty minutes per week of group or individual counseling. It also offered the 2019 extended school year session for 600 minutes per week.

The May 16, 2019 IEP team developed new goals in the areas of reading foundational skills, social language, writing, articulation, mathematics, expressive language, coping skills, time on task, and writing and fine motor.

The IEP included accommodations, specifically a human reader, monitoring test responses, extended time, multiple or frequent breaks, visual cues, giving one direction at a time and repeating directions, shortening assignments, adaptive seating such as a TheraBand or seat cushion, adaptive writing utensils, access to noise reduction headphones, and a scribe for assessments only. The IEP also determined Student needed modification including grade spelling separately from content, providing partial grade based on individual progress or effort, shortening assignments to focus on mastery of key concepts, shortening spelling tests to focus on mastering the most functional words, permitting Student to rework missed problems for a better grade, and using a variety of modalities to assess him. Parent agreed to the IEP and signed it on June 3, 2019. He raised no objection to the May 16, 2019 IEP, or its implementation in the classroom setting.

ISSUE 1: DID CHULA VISTA DENY STUDENT A FAPE, BEGINNING MARCH 2020, THROUGH THE RECOVERY INTERSESSION, BY ASSIGNING STUDENT TO DISTANT LEARNING AND FAILING TO, A) CONTINUE TO PROVIDE IN-PERSON SERVICES; B) EVALUATE STUDENT AND PROVIDE NECESSARY ACCOMMODATIONS; C) OFFER A SUFFICIENT AMOUNT OF RELATED SERVICE HOURS WITH APPROPRIATE SERVICE MODELS; D) DEVELOP APPROPRIATE ACADEMIC GOALS; E) OFFER A ONE-TO-ONE AIDE; AND F) ADDRESS STUDENT'S REGRESSION FROM DISTANCE LEARNING?

ISSUE 1A AND 1E: DENIAL OF FAPE DUE TO FAILURE TO CONTINUE TO PROVIDE IN-PERSON SERVICES, OR OFFER A ONE-TO-ONE AIDE, FROM APRIL 6, 2020 THROUGH THE AUGUST 30, 2020 RECOVERY INTERSESSION

Student alleges Chula Vista denied Student a FAPE by not implementing his IEP in the classroom setting due to COVID-19 closures, asserting he was entitled to in-person services under his IEP.

Chula Vista asserts it complied with all health and safety orders. It alleges Student's IEP did not expressly require in-person services, nor did not require in-person services.

EMERGENCY CLOSURES MARCH 16, 2020 TO APRIL 13, 2020

When a school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have materially failed to

implement the child's IEP. (*Van Duyn v. Baker School Dist.* 5J (9th Cir. 2007) 502 F.3d 811, 815 (*Van Duyn*)). The Ninth Circuit held that state contract law does not apply to the interpretation of an IEP and that only material failures to implement constitute violations of the IDEA. (*Ibid.*) The *Van Duyn* court also noted that a child's educational progress, or lack of it, might be one indicator of whether a discrepancy in services material was. (*Ibid.*) Presenting the example of a child not provided the reading instruction called for in their IEP, the court noted,

*"a shortfall in the child's reading achievement would certainly tend to show that the failure to implement the IEP was material. 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.*, emphasis added.)

In *N.D. v. Hawaii Dept. of Education* (9th Cir. 2010) 600 F.3d 1104, where the court held that a one day per week shutdown of public schools statewide to address a fiscal crisis did not constitute a change of placement for special education students, it suggested in dicta that the student's claim was "more properly characterized as a 'material failure to implement the IEP.'" (*Id.* at p. 1117, citing *Van Duyn, supra*, 502 F.3d at p. 822.) The court explained, "A school district's failure to provide the number of minutes and type of instruction guaranteed in an IEP could support a claim of material failure to implement an IEP." (*Ibid.*)

On March 4, 2020, Governor Gavin Newsom declared a state of emergency in the State of California due to the rapid spread of a highly contagious airborne coronavirus that caused respiratory distress and could lead to death, designated COVID-19.



On March 12, 2020, the U.S. Department of Education, called the US DOE, which is the agency responsible for developing regulations for and enforcement of the IDEA, outlined the States' responsibility under the IDEA to children with disabilities during the COVID-19 outbreak. (Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak (U.S. Dept. of Education, March 2020).) When an agency interprets its own regulations, a very deferential standard applies, and such an interpretation is controlling unless plainly erroneous or inconsistent with the regulation. (*Federal Express Corp. v. Holowecki* (2008) 552 U.S. 389, 397; *Auer v. Robbins* (1977) 519 U.S. 452, 461 [agency commentary explaining final rule and published with the rule in the Federal Register is entitled to deference].)

The US DOE advised that if a school district closed its schools to slow or stop the spread of COVID-19 and did not provide educational services to the general student population, it was not required to provide services to students with disabilities during that same period of time. (*Id.*, at p. 2, Answer A-1.) If educational opportunities were provided to the general population during a school closure, then the school district would need to ensure that students with disabilities received a FAPE at that time. (*Ibid.*) The US DOE instructed school districts to determine if each child with disabilities could benefit from online or virtual instruction, instructional telephone calls, and other curriculum-based instructional activities. However, it cautioned that in doing so, school personnel should follow appropriate health guidelines to assess and address the risk of COVID-19 transmission in the provision of services. (*Id.*, at pp. 3-4, Answer A-3.)

On March 4, 2020, Governor Gavin Newsome declared a State of Emergency in California due to the COVID-19 global health and safety risk. On March 13, 2020, California Governor Gavin Newsom issued Executive Order N-26-20, which allowed continued funding to schools which closed their school buildings in response to

COVID-19. It directed the California Department of Education, also called CDE, to issue guidance on how to ensure that students with disabilities received a FAPE consistent with their IEP and how to meet other procedural requirements under the IDEA and California law. On March 19, 2020, Governor Newsom issued Executive Order N-33-20, directing all Californians to stay home except to go to an essential job or to shop for essential needs, and to practice social distancing from others.

On March 21, 2020, the US DOE issued supplemental guidance, that stated school districts must provide a FAPE to students with disabilities during the COVID-19 pandemic, but expressly recognized that education and related services and supports might need to be different in a time of unprecedented national emergency. (Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities (March 21, 2020, Office of Civil Rights and OSEP) at p. 2.) It stated that FAPE may include, as appropriate, services provided through distance instruction provided virtually, online, or telephonically. (*Id.*, at pp. 1-2.) The US DOE emphasized that the IDEA allowed for flexibility in determining how to meet the individual needs of students with disabilities. (*Id.*, at p. 2.) If there were inevitable delays in providing services, it directed IEP teams to make individualized determinations of whether and to what extent compensatory services were due when schools resumed normal operation. (*Ibid.*)

On March 20, 2020, CDE published guidance on school closures and the provision of special education during the COVID-19 pandemic. (CDE, Special Education Guidance for COVID-19, COVID-19 School Closures and Services to Students with Disabilities (March 20, 2020) (CDE March 20, 2020 Guidance).) Noting the federal government had not waived any existing IDEA requirements, CDE advised local educational agencies to “do their best in adhering to IDEA requirements ... to the

maximum extent possible,” “[u]ntil and unless [the U.S. Department of Education] ultimately provides flexibilities under federal law.” CDE encouraged local educational agencies to “consider ways to use distance technology to meet these obligations.” (*Ibid.*)

The County of San Diego Health issued an amended order of the Health Officer and Emergency Regulations, dated March 12 through 17, 2020; June 16, 2020; and July 21, 2020, which regulated the stay-at-home orders and granted exceptions for essential workers. It ordered schools to not hold class and to conduct distance learning only, due to the COVID-19 public health emergency.

#### ISSUE 1A: CAMPUS CLOSURES AND IMPLEMENTATION OF DISTANCE LEARNING

Student alleges Chula Vista denied Student a FAPE by not implementing his IEP in the classroom setting due to COVID-19 closures, asserting he was entitled to in-person services under his IEP.

Chula Vista asserts it complied with all health and safety orders. It alleges Student’s IEP did not expressly require in-person services, nor did not require in-person services.

On April 9, 2020, the California Department of Education, referred to as CDE, issued guidance for requiring in-person services during distance learning only when an individual determination was made that a student needed services or supports in-person to maintain mental and physical health and safety. (Special Education Guidance for COVID-19, posted March 20, 2020, updated April 9, 2020, September 30, 2020.)

To provide a student a FAPE, a school district must deliver special education and related services "in conformity with" the student's IEP. (20 U.S.C. § 1401(9)(D).)

"IEPs 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 decide on its own no longer to implement part or all of the IEP." (*Van Duyn, supra* )

Student's IEP could not be safely and fully implemented in the classroom setting with his teacher and service providers due to the global pandemic and COVID-19 emergency health and safety closures. Chula Vista provided virtual services instead of in-person services during the pandemic and provided access to specialized academic instruction and related services which were 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. (*Rowley, supra* at 201-204; *Endrew, supra*, at 580 U.S. \_\_\_\_ [137 S.Ct. 988, 1000].)

Student did not establish Chula Vista denied FAPE by not materially implementing his IEP by providing virtual services instead of in-person services.

MARCH 16, 2020 TO APRIL 13, 2020

On March 13, 2020, Chula Vista sent all parents prior written and email notice that it was closing schools and would not deliver services from March 16, 2020 through April 3, 2020, due to emergency COVID-19 health and safety orders. Chula Vista closed for one week of instruction, March 16 through 20, 2020, due to the emergency health and safety orders. Chula Vista's regularly scheduled Spring break took place from March 23, through Friday, April 3, 2020. For the week of April 6 through 13, 2020, Chula

Vista provided Special Education Learning Resources links for Student to complete as enrichment activities at home. It trained its staff April 6 through 10, 2020, and reopened for instruction April 13, 2020. The resources provided substantial enrichment activities for students and parents at home.

Based on the guidance provided by the US DOE, Chula Vista was not required to provide Student a FAPE while its schools were closed to all students, from March 16 through April 10, 2020. (Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak, *supra*, p. 2, Answer A-1.) On March 13, 2020, Chula Vista sent all parents prior written and email notice that it was closing schools and would not deliver services from March 16, 2020 through April 10, 2020, due to emergency COVID-19 health and safety orders. Moreover, the loss of five minimum days, and five full days with enrichment activities and special education resources, is not a material loss of instruction. Student did not establish Chula Vista was required to provide him in-person services during emergency school closures.

#### APRIL 16, 2020 TO JUNE 3, 2020

Vanessa Montez-Jurado taught Student's eight-week virtual program, between April 16 and June 3, 2020. Student completed all eight weekly distance learning packets, in reading, math and science. Beginning April 28, 2020, Montez-Jurado held seven weekly live Teams class sessions to teach the materials and packets. Montez-Jurado held seven weekly individual Teams sessions with Parent and Student ranging from 20 to 40 minutes to check on his social emotional state, as she did with all her students. The school year ended on June 3, 2020.

Student's allegations were not corroborated by the evidence. Student provided no expert testimony he required in-person specialized academic instruction and related services. Student did not demonstrate he did not make progress on his goals.

Student did not establish Chula Vista failed to materially implement his May 2019 IEP by not providing in-person services between April 16, 2020 and June 3, 2020. Student did not establish his IEP required his services to be in-person. Student's operative May 2019 IEP did not specific he required in-person services. Student did not establish his mental and physical health and safety required in-person services, as established by CDE guidance. Student did not meet his burden of proof Student provided no expert testimony that he required in-person specialized academic instruction and related services. Chula Vista was limited in what it could provide to Student during the COVID-19 pandemic. Student did not establish Chula Vista denied him a FAPE by not providing in-person services between April 16, 2020 and June 3, 2020.

#### IMPLEMENTATION OF DISTANCE LEARNING 2020 REGRESSION RECOVERY INTERSESSION

In June 2020, Chula Vista held a three-week, full-day extended school year session using distance learning. Student's May 2019 IEP offered extended school year services. Student did not attend it because Parent did not sign him up. Student failed to meet his burden of proof that he required in-person services because he failed to prove he enrolled.

From August 10 through 21, 2020, Chula Vista provided a regression recovery intersession, an additional 35 hours of specialized academic instruction and services to address missed school days and anticipated regression learning loss from the week of

school closures and nine weeks of distance learning the previous spring. The recovery intersession was provided three and half hour per day, five days per week. Student virtually attended eight out of the 10 days of the recovery intersession distance learning camp.

Misty Moore taught Student's mild/moderate special day class for third and fourth grade recovery intersession. Student virtually attended eight out of the 10 days of the recovery intersession distance learning camp. Moore taught her recovery intersession class on Microsoft Teams a from 8:00 a.m. to 11:30 a.m. Moore reviewed Student's goals and his report cards and persuasively testified that she implemented Student's IEP goals via video instruction. Moore provided small group and one-to-one instruction to recoup skills lost during school closures.

Student did not establish Chula Vista failed to materially implement his May 2019 IEP by not providing in-person services. Student did not establish his IEP required his services to be in-person. Student's operative May 2019 IEP did not specific he required in-person services. Additionally, as with the enrichment and regular instruction sessions, Student did not establish he required in-person services for the regression recovery session. Student did not establish his mental and physical health and safety required in-person services, as established by CDE guidance. Student did not meet his burden of proof as Student provided no expert testimony that he required in-person specialized academic instruction and related services. Chula Vista was limited in what it could provide to Student during the COVID-19 pandemic. Student did not establish Chula Vista denied him a FAPE by not providing in-person services in-person during the recovery intersession.

ISSUE 1E: FAILURE TO OFFER A ONE-TO-ONE AIDE FROM  
MARCH 16, 2020 THROUGH AUGUST 30, 2020

Student asserts Chula Vista failed to offer a one-to-one aide to help him access online learning from March 16, 2020. He asserts he required a one-to-one aide to help him log on to virtual learning and help him access and complete the material. Student alleges he became easily distracted in front of a computer and wandered during instruction. Student alleges he required an aide because his in-person classroom had several people who helped Student as needed. Student did not specify whether he needed a one-to-one in-person aide in home, or a one-to-one virtual aide.

Chula Vista argues that Student's IEP did not require a one-to-one aide because he was engaged in learning and be easily re-directed. Chula Vista asserts it provided at least two classroom aides for virtual learning.

EMERGENCY CLOSURES MARCH 16, 2020 TO APRIL 13, 2020

As discussed above, Chula Vista did not deny Student a FAPE during emergency school closures.

IMPLEMENTATION OF DISTANCE LEARNING APRIL 16, 2020 TO  
JUNE 3, 2020

At hearing, Parent opined Student needed a one-to-one aide to log on to virtual learning and help him access and complete the material and act as an aide. Student provided no expert testimony to support his claim he required a one-to-one aide. Student's Parent was retired and sat with Student daily during his distance learning academic lessons and related service therapies. Parent opined that because he sat next to Student daily to help him, Student required a one-to-one aide. However, Parent's



testimony was not probative, was not supported by other corroborating evidence or teacher testimony. Hearsay "shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions". (Cal. Code Regs., tit. 5, § 3082, subd. (b).) In this instance, the Student failed to establish Parent's opinion would be admissible over objection in a civil action or that the information in the report met the standard of being "the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs" as is required for evidence consideration in an administrative hearing. (Ca. Govt. Code, §11513, subd. (c).) As a result, Parent's opinion does not substitute for expert testimony.

Montez-Jurado persuasively explained she did not believe Student required a one-to-one aide because his IEP did not require a one-to-one aide, known as special circumstances instructional assistant. She based her opinion on the daily and weekly video meetings with Student, and the successful completion of his eight weekly assignments. From April 6, 2020 to June 3, 2020, Montez-Jurado recalled Student became distracted and lost attention after 10 minutes of instruction in the morning, and five minutes in the afternoon, but he was easily redirected back to the screen and stayed engaged with his learning. Montez-Jurado opined Student did not require a one-to-one aide because she saw no evidence, he needed the extra support. Student could independently maintain attention for five to 10 minutes and was easily redirected. Montez-Jurado had two classroom aides, and two one-to-one aides assigned to another pupil. Student was virtually assisted by the classroom aides as needed, but he did not require one to access online instruction. Montez-Jurado communicated with Parent nine times on Class DoJo, and Teams chats, and was never informed or observed Student having any difficulties.

Student did not establish Chula Vista denied him a FAPE by not offering a one-to-one aide. Student provided no expert testimony establishing he required a one-to-one aide. Student did not meet his burden of proof that his IEP required him to have a one-to-one aide. Student did not establish he required a one-to-one aide from April 6, 2020 to June 3, 2020.

#### IMPLEMENTATION OF DISTANCE LEARNING 2020 REGRESSION RECOVERY INTERSESSION

Student did not attend the 2020 extended school year session. Student failed to establish he required a one-to-one aide when he did not prove he was enrolled.

Student attended the August 10 through 21, 2020 distance learning recovery intersession. Moore, his special day class teacher, presented on Teams from 8:00 a.m. to 11:30 a.m. She taught in small groups, and in a one-to-one setting. She also met with Student individually once per week for 15-20 minutes. She recalled Student was engaged, responsive, and showed his work. Moore did not recall seeing Student become upset. Rather, he was on task and willing to work. She opined Student did not require a one-to-one aide.

While Parent opined Student needed a one-to-one aide to log on to virtual learning and help him access and complete the material and act as an aide, that was not established by the evidence, or corroborated by his teacher. Parent's assistance logging his child into class did not establish he required a one-to-one aide. Parent sat with Student daily during his distance learning lessons and his therapies. Student would become restless and lose attention frequently. However, Student's teacher believed he

needed redirection every five or 10 minutes, and recalled he was easily redirected to the screen and stayed engaged with his learning. This did not establish he required a one-to-one aide.

Student's May 2019 IEP did not offer him a one-to-one aide. Student had been successfully assisted by classroom aides in the past. Student did not establish Chula Vista failed to materially implement his May 2019 IEP by not providing a one-to-one aide.

Student did not meet his burden of proof that his IEP required him to have a one-to-one aide. Student did not meet his burden of proof that Chula Vista denied him a FAPE by not providing an aide. Student did not establish he required a one-to-one aide from April 6, 2020 to June 3, 2020.

Student provided no expert testimony establishing he required a one-to-one aide. Student did not establish his May 19, 2019 IEP required a one-to-one aide. Student did not establish that Chula Vista denied Student a FAPE when it provided its distance learning program and did not offer a one-to-one aide.

## ISSUE 1B: EVALUATE STUDENT AND PROVIDE NECESSARY ACCOMMODATIONS

Student alleges Chula Vista assigned Student to a distant learning environment without evaluating him to address of how remote services could be delivered to Student to meet his individual needs. Student alleges Chula Vista did not provide necessary accommodations.

Chula Vista alleges it had no obligation to evaluate Student. It asserts accommodations were provide to Student based on his needs.

A reevaluation of Student's needs is required if requested by Parent, or a teacher. The district must also conduct a reassessment if the district "determines that the educational or related service needs, including improved academic achievement and functional performance of the child warrant a reevaluation." (*R.A. v. West Contra Costa Unified School District* (N.D. Cal., Aug. 17, 2015, No. 14-CV-0931-PJH) 2015 WL 4914795, at \*2, aff'd sub nom., *R.A. by and through Habash v. West Contra Costa Unified School District* (9th Cir. 2017) 696 Fed. Appx. 171, citing, 20 U.S.C. § 1414(a)(2)(A); see also Ed. Code, § 56381(a).) A school district's failure to conduct appropriate assessments or reassess in all areas of suspected disability may constitute a procedural denial of FAPE. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2007) 464 F.3d 1025, 1031-1033.)

#### FAILURE TO EVALUATE STUDENT

Student failed to prove that Chula Vista did not provide or needed to provide required assessments. There was no evidence that either Parent or a teacher made a request for an evaluation. Nor did Student establish any specific areas in which a reevaluation was warranted. Student provided no expert testimony that Student required an evaluation. Student's teacher did not have information about him that would warrant an assessment.

Student failed to prove an evaluation was either warranted or requested during the period from March 16, 2020 to June 3, 2020. Montez-Jurado's convincing testimony established Student did not require evaluations to access his distance learning program. Parent did not request any evaluations.

Student failed to prove an evaluation was either warranted or requested during the period from the regression recovery intersession, up to August 30, 2020. Moore's convincing testimony established she saw Student daily and met with him once a week for an individual session. Student was on task, willing to work on the assignments, and participated well. Student did not demonstrate any significant behavior or frustration. Student did not establish Moore had information that warranted an evaluation. Parent did not request any evaluations.

Student failed to prove that Chula Vista denied him a FAPE by not evaluating him and providing required assessments. Nor did Student establish any specific areas in which a reevaluation was warranted. Student provided no expert testimony that Student required an evaluation. There was no evidence that either Parent or a teacher made a request for an evaluation or had information that would warrant an assessment.

#### FAILURE TO ACCOMMODATE STUDENT

Next, Student alleges Chula Vista did not provide required accommodations in his IEP including a human reader, extended time, multiple breaks, visual cues, one direction at a time, repeated direction, shortened assignments, adaptive seating such as a TheraBand, seat cushion, adaptive writing pencil, access to noise reduction headphones, prompting redirection, visual supports, reteaching, small group instruction, opportunities for movement and breaks, and re-reading directions.

Chula Vista alleges it provided Student with necessary accommodations.

Student did not establish Chula Vista failed to implement his May 2019 IEP by not providing necessary accommodations. Student failed to produce any evidence of accommodations Student required but did not receive. Student provided no expert

testimony that necessary accommodations were not provided. Student failed to meet his burden of proof that Chula Vista denied him a FAPE by failing to provide needed accommodations from March 16, 2020 through June 3, 2020. Student failed to meet his burden of proof that Chula Vista denied him a FAPE by failing to provide needed accommodations during the regression recovery intersession through August 30, 2020.

#### ISSUE 1C: OFFER A SUFFICIENT AMOUNT OF RELATED SERVICE HOURS THROUGH APPROPRIATE SERVICE MODELS

Student contends that the related services offered in Student's May 2019 IEP were inadequate for distance learning.

Chula Vista alleges Student consented to the May 2019 IEP, and that IEP's related services are not at issue.

Whether a student was offered or denied a FAPE is determined by looking at what was reasonable at the time the IEP was developed, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Furhman v. East Hanover Board of Educ.* (3rd Cir. 1993) 993 F.2d 1031, 1041.) This is known as the "snapshot rule."

Here, Student's May 2019 IEP provided for 90 minutes per week of speech therapy, 30 minutes per month of occupational therapy, and 20 minutes per week of counseling. The IEP was based upon a classroom model but did not specify the services had to be in-person. Student did not establish that Chula Vista denied Student a FAPE at the May 2019 IEP, for not offering adequate services for distance learning for the COVID-19 global pandemic which occurred nine months later. Chula Vista is only responsible for what the IEP team knew when it held the IEP team meeting and agreed

the amount of related service hours was appropriate at the time. Student failed to establish the related service hours were insufficient, and the service models provided were inappropriate, based upon what the May 2019 IEP team knew at the time it met.

Student alleges his September 2020 IEP should have been applied retroactively to consider his related services between March 2020 through August 30, 2020.

Chula Vista asserts it materially implemented Student's operative May 2019 IEP.

Here, Student cited no legal authority for the proposition that his September 2020 IEP should be used to form the basis of his March to August 2020 related service needs. Student did not meet his burden of establishing Chula Vista denied him a FAPE because the September 2020 IEP was not the operative IEP between March to August 2020. Rather, the May 2019 was the operative IEP. (*Adams, supra* at p. 1149.) Student's September 2020 IEP is addressed in Issue 2 of this decision.

Student alleges Chula Vista failed to implement his May 2019 IEP because it did not provide the related services and did not provide in-person services. However, the issue of providing in-person services has been addressed previously in this decision.

Chula Vista alleges it materially implemented Student's operative May 2019 IEP and provided the amount of related service minutes, which Parent consented to when he signed the May 19, 2019 IEP.

The failure to materially implement a student's IEP is a substantive violation. (*Van Duyn, supra*, at pp. 818-819.) 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." (*Van Duyn, supra*, at p. 815.)

Here, Student did not establish Chula Vista did not materially implement his May 2019 IEP by not providing his required services, because the evidence showed the services were materially provided.

Student's May 2019 IEP provided for 90 minutes per week of speech therapy, 30 minutes per month of occupational therapy, and 20 minutes per week of counseling. The IEP was based upon a classroom model but did not specify the services had to be in-person. Student received his related services through telehealth videoconference. Each service provider was properly credentialed.

From April 16, 2020 to June 3, 2020, Student did not establish that Chula Vista denied Student a FAPE by not providing a sufficient amount of related service hours delivered through appropriate service models. Student did not establish the services were not appropriately provided using videoconference platforms instead of a classroom model.

Rather, the evidence showed Parent joined Student during all his related services sessions. During April through June 2020, Parent acknowledged Student received his counseling sessions and commended the school counselor for greatly helping Student and providing resources to self-regulation techniques that benefitted Student. Additionally, Parent acknowledged Student was accessing the occupational therapy files and activities online. Parent also acknowledged Student accessed his speech therapy online. Student did not establish a material discrepancy or shortfall in related service hours or appropriate service models during this time. (*Van Duyn, supra.*) Student did not establish Chula Vista failed to materially implement his May 2019 IEP because the services were provided to Student.



The evidence established Student did not attend the 2020 extended school year session in June because Parent did not enroll him. Student failed to prove that Chula Vista was required to offer and provide related services when he did not participate in the session. Student did not establish Chula Vista failed to materially implement his IEP during the extended school year when he did not enroll in the session.

During the regression recovery intersession, Student did not establish that Chula Vista denied Student a FAPE when it provided its distance learning program and did not provide a sufficient amount of related service hours delivered through appropriate service models. The evidence showed that Student received his related services during the regression recovery intersession.

Student did not establish the speech and language, occupational therapy, and counseling services were not appropriately provided using videoconference platforms. Student participated in the August 2020 recovery session. Parent acknowledged Student received his services as outlined in the May 2019 IEP. Student provided no expert testimony that the related services hours were not appropriate, were not provided, nor that the delivery of the service models was not appropriate. Student did not establish a material discrepancy or shortfall in related services or the delivery of appropriate service models which otherwise indicate a material failure to implement his IEP.

Therefore, Student did not establish Chula Vista failed to implement his IEP and did not offer a sufficient amount of related service hours and appropriate service models. Student did not establish these virtual related services were not effective and could only be provided in-person. Student did not establish increased service minutes were required. Student failed to demonstrate he did not make progress with the

services provides in the online format. The progress reports and testimony of the Chula Vista IEP team members established Student met most benchmarks of his related services. Student performed at and often above his anticipated level and therefore any shortfall in instruction was not material. Student did not meet his burden. (*Van Duyn, supra.*)

## ISSUE 1D: FAILURE TO DEVELOP APPROPRIATE ACADEMIC GOALS

Student alleges that Chula Vista was required to draft new goals for distance learning between April 16, 2020 and August 30, 2020.

Chula Vista alleges Student consented to the May 2019 IEP goals, and that Student's academic goals were appropriate, and that it had no duty to develop new goals without a new IEP team meeting.

A student's IEP must include a written statement of measurable annual goals, including academic goals, which meet the needs of the student and enable them to be involved in and make progress in the general education curriculum. (Ed. Code § 56345, subd. (a)(2)(A).)

The IEP team shall review the student's IEP periodically, but not less frequently than annually, to determine whether the annual goals for the pupil are being achieved and revise the IEP as appropriate to address a lack of expected progress, results of reassessments conducted, information about the student, and the student's anticipated needs. (Ed. Code § 56341.1, subd. (d).)

Student claims Chula Vista should have changed his prior IEP academic goals. However, goals can only be modified in the IEP process, and Parent did not request a new IEP until the following school year, after Student transferred into his new school.

(Ed. Code § 56341.1, subd. (d).) At hearing, Parent did not explain why he cancelled a previously scheduled March 10, 2020 IEP team meeting and did not respond to the school psychologist's request to reschedule it before the end of the school year, other than his explanation that he moved beyond the boundaries of Muraoka Elementary on March 3, 2020 and did not notify Chula Vista until June 2020. Without a request for a new IEP team meeting, Chula Vista had no obligation to develop new academic goals. Student did not establish that Chula Vista denied Student a FAPE between April 16, 2020 through August 30, 2020, by not developing new appropriate academic goals outside of the IEP process. Student provided no expert testimony that the IEP goals were not appropriate.

Student's May 2019 IEP four academic goals were:

- Reading foundation skills goal requiring Student to blend four phonemes into a word with 80 percent accuracy in three trials, when given visual prompts of up to four phonemes including short vowels and digraphs.
- Reading foundation/comprehension goal requiring Student to read 60 sight words with 80 percent accuracy in three trials.
- Writing goal requiring Student to independently write informative and explanatory texts introducing a topic, using facts and details about the topic, and providing a concluding statement in complete sentences with 80 percent accuracy in three trials.
- Mathematics goal requiring him to independently use addition and subtraction within 100, using drawings and equations to solve one and two step word problems read aloud to him, with 85 percent accuracy in three trials.

Student provided no legal authority to support his assertion that Chula Vista had an obligation to redraft Student's academic goals between March 16, 2020 and August 30, 2020. Parent cancelled the IEP team meeting scheduled for March 10, 2020 but did not respond to the school psychologist's request to reschedule before the end of the school year. Although Parent did request a new IEP team meeting at Student's new school on August 10, the 2020-2021 school year did not begin until August 31, 2020, and Chula Vista held the first 2020 IEP team meeting on September 9, 2020. Student did not establish Chula Vista was not required to develop goals new goals unless it was through the IEP process. Student did not establish Chula Vista denied him a FAPE by failing to develop appropriate academic goals between March 16, 2020 and August 30, 2020.

#### ISSUE 1F: ADDRESS STUDENT'S REGRESSION FROM DISTANCE LEARNING FROM APRIL 16, 2020 THROUGH AUGUST 30, 2020

Student asserts he suffered regression during distance learning from April 16, 2020 through August 30, 2020, and failed to address it. Student alleges his regression was seen by his teachers who failed to prepare a progress report for June 2020 and the regression recovery intersession.

Chula Vista alleges Student did not show regression. Furthermore, Chula Vista alleges it provided a summer recovery intersession to address anticipated regression.

Student did not establish Chula Vista denied him a FAPE by failing to address regression from distance learning. Between April 16, 2020 and June 3, 2020, Montez-Jurado did not believe Student regressed or had difficulty coping with online learning. Student lost instruction for five minimum days between April 16, 2020 and April 20, 2020. School was not in session for the regularly scheduled two-week spring

break. Starting April 6 through 13, 2020, Student received resources and activities for one week of virtual home activities, resources, and assignments. Student attended eight weeks of a virtual program in the spring 2020 and completed eight weeks of classwork.

Student did not participate in the 2020 extended school year session. Student did not meet his burden to show Chula Vista denied him a FAPE when he failed to show he enrolled as attendance, was not compulsory.

Student did not establish Chula Vista denied him a FAPE by failing to address regression from distance learning during the regression recovery intersession. Between August 10, through August 21, 2020, Student attended 8 out of 10 sessions intended to address learning loss from virtual learning. Moore opined she did not see any evidence of regression during the regression recovery intersession.

Student failed to meet his burden of proving that Chula Vista denied him a FAPE by failing to address Student's regression due to distance learning from April 16, 2020, through August 30, 2020. Student failed to offer any evidence of regression in any area of need. No expert testified that Student had regressed and none of Student's teachers thought he had suffered regression during distance learning.

Student did not establish Chula Vista denied Student a FAPE by not continuing to provide in-person services. Student did not establish Chula Vista denied Student a FAPE by not evaluating Student and providing necessary accommodations. Student did not establish Chula Vista denied Student a FAPE by failing to offer a sufficient amount of related service hours delivered through appropriate service models. Student did not establish Chula Vista denied Student a FAPE by not developing appropriate academic

goals. Student did not establish Chula Vista denied Student a FAPE by failing to offer a one-to-one aide. Student did not establish Chula Vista denied Student a FAPE by not addressing Student's regression from distance learning.

ISSUE 2: DID CHULA VISTA DENY STUDENT A FAPE DURING THE 2020-2021 SCHOOL YEAR UP TO THE DATE OF FILING, AT HIS ANNUAL IEP, BY ASSIGNING STUDENT TO DISTANCE LEARNING AND FAILING TO CONTINUE TO PROVIDE IN-PERSON SERVICES, EVALUATE STUDENT AND PROVIDE NECESSARY ACCOMMODATIONS, OFFER A SUFFICIENT AMOUNT OF RELATED SERVICE HOURS WITH APPROPRIATE SERVICE MODELS, DEVELOP APPROPRIATE ACADEMIC GOALS, OFFER A ONE-TO-ONE AIDE, AND ADDRESS STUDENT'S REGRESSION FROM DISTANCE LEARNING?

## US DEPARTMENT OF EDUCATION GUIDELINES

US DOE issued additional guidelines effective September 28, 2020.  
(Implementation of IDEA Part B Provision of Services in the COVID-19 Environment.  
(September 28, 2020).)

"[If] State and local decisions require schools to limit or not provide in-person instruction due to health and safety concerns, {...} IEP teams are not relieved of their obligation to provide FAPE to each child with a disability under the IDEA." (Ibid.)

US DOE also urged that "IEP teams can discuss how a child's IEP will be implemented with traditional in-person instruction and how services could be provided

through remote/distance instruction if circumstances require a change to distance learning or a hybrid model. In making these determinations, IEP teams should consider alternate available instructional methodologies or delivery, such as online instruction, teleconference, direct instruction via telephone or videoconferencing, or consultative services to the parent (if feasible)." (*Id.*)

## SENATE BILL 98

California Senate Bill 98, effective June 29, 2020, created Education Code section 43503, and amended Education Code section 56345, which required schools to add additional language to the IEP and demonstrate their ability to implement the student's special education and related services when it could not be provided in school or in-person due to emergency conditions for more than 10 school days. (Ed. Code, §§ 43503, 56345, subd. (a)(9)(A).)

Because of the Covid-19 pandemic, new standards for distance learning were created to accommodate public health and safety conditions. While the preferred method of instruction was in-person a hybrid or mixed delivery instructional models-with maximum teacher student engagement was also acceptable. School districts were authorized to provide distance learning to students during the 2020-2021 school year on a schoolwide level as a result of state and local public health orders or guidance, and when a student is medically fragile, would be put at risk by in-person instruction, or are self-quarantining due to COVID-19 exposure. School districts that offer distance learning must confirm students had connectivity and devices adequate to participate in the educational program and complete assigned work. The distance learning content is required to align to grade level standards providing a level of quality and intellectually challenge substantially equivalent to in-person instruction. The school

districts must design academic and other supports to address the needs of pupils who are not performing at grade level, or need support in other areas, such as ... pupils with exceptional needs.”

## 2020-2021 SCHOOL YEAR VIRTUAL PROGRAM

Student started Fourth grade with Kellogg Elementary School’s virtual program on August 31, 2020, a new school, because Parent moved outside the geographic boundaries of Muraoka Elementary on March 3, 2020. For the first week of the 2020-2021 school year, Student received two hours of daily live virtual interaction with teachers. Beginning the second week, he received the minimum school schedule for virtual instructional minutes for fourth grade students, four hours, or 240 minutes, per day. Class was held from 8:45 to 1:00 p.m. Friday had a minimum day schedule from 8:45 a.m. to 11:30 a.m. Each day, the class took a 15-minute break from 10:15 a.m. to 10:30 a.m. Parent declined Chula Vista’s distance learning support program offered to Student. On April 12, 2021, Chula Vista provided a hybrid program combining in-person instruction with online instruction.

ISSUES 2A AND 2E: DENIAL OF FAPE DUE TO FAILURE TO CONTINUE TO PROVIDE IN-PERSON SERVICES, OR OFFER A ONE-TO-ONE AIDE, CONTINUE TO PROVIDE IN-PERSON SERVICES, FROM AUGUST 31, 2020 THROUGH MARCH 8, 2021.

Student alleges both that Chula Vista denied him a FAPE by denying him access to in-person services and by failing to provide a one-to-one aide at home for his distance learning. Student alleges he had access to classroom aides on campus and was



entitled to a one-to-one aide. Student asserts Parent acted as an aide by helping him log on to Zoom, stay focused during class instruction and stay on task with assignments and functioned as an unpaid aide.

Chula Vista alleges Student did not require in-person services. It alleges the COVID-19 pandemic prevented Chula Vista from offering in-person services in a classroom it provided an in-person learning support program for all eligible students on campus. Chula Vista alleges the pandemic prevented them from providing live in-person instruction until after March 8, 2021, the date of filing of the complaint. Chula Vista alleges Student did not require a one-to-one aide, and that it offered an assessment plan for a special circumstance instructional assistant which Parent did not sign.

#### ISSUE 2A: FAILURE TO CONTINUE TO PROVIDE IN-PERSON SERVICES

Education Code section 56341, subdivision (a)(9)(A), did not require students to have in-person learning when a school district follows a public health order and other conditions are met.

Student's May 2019 IEP was written for classroom-based instruction and did not require in-person services. However, beginning September 2020, Chula Vista offered its students with IEP's the option of attending the distance learning support program, held at several school sites with a cohort of other students. It was designed to assist Chula Vista's most vulnerable students who could benefit from extra support, including those with IEPs, children of essential workers who did not have childcare, and homeless students. The students came onto campus with laptops, and YMCA staff helped log them on. The YMCA staff were licensed as childcare providers and helped with

synchronist live instruction, and the asynchronistic groups which were not live. The students remained on campus all day, but the teacher was online. The program was offered to Parent during June 2020. Parent spoke to principal Chris Houck about the program on September 10, 2020, but Parent declined this service because he believed they did not have special training with children with autism. Parent's testimony was not persuasive. Student did not establish the program was not appropriate for his needs. Student did not establish his mild autism could not be addressed by the YMCA staff on campus.

Student did not establish he required an individual determination that he needed services or supports in-person to maintain his mental and physical health and safety. Chula Vista held IEP team meetings for Student on September 9, 2020, November 19, 2020, December 9, 2020, and January 21, 2021. Each IEP lasted 90 minutes, and the team discussed Student's progress. Chula Vista included a statement describing how they would provide virtual learning during the COVID-10 pandemic. (Ed. Code, §§ 56345, 56321.) Student provided no expert testimony that he required in-person services.

While Student alleged that once in October 2020, December 2020, and February 2021, Parent reported to Chula Vista that Student was depressed because he was not on a physical campus with in-person instruction, there was no expert testimony to support his claim. However, Soto did not observe Student become upset as Parent reported. Soto recalled only three to four times Student logged out this year. The evidenced established Student was emotionally upset only a few times that year because he could not answer his teacher's question when he joined the middle of a class

session after a therapy session. Student did not establish he suffered emotionally and socially by staying at home in a distance learning program. Student provided no expert testimony that he required in-person services.

Student did not establish he required in-person services to access his educational program. Student provided no expert testimony that he required in-person services. He participated in the online educational program and completed his work. Chula Vista developed a detailed learning continuity and attendance plan which provided Student with content that aligned to his grade level standards. Chula Vista provided daily online interaction with his specialized academic instruction teacher Soto, weekly online individual interaction with Soto, and weekly online interaction with his service providers for counseling, speech, and occupation therapy. Soto provided Student with instruction and materials suitable for his academic levels with multiple levels of difficulty. She tracked his progress on his goals and reported to Parent and the IEP team. Student was assisted by two classroom aides as needed. Student did not establish he required any additional accommodations to ensure his IEP could be implemented through distance learning. Instead, Student performed at and often above his anticipated level and therefore any shortfall in instruction was not material. Student did not meet his burden under *Van Duyn, supra*, to establish Chula Vista failed to materially implement his IEP.

Additionally, Student did not establish he required his related services to be in-person. Student's speech and language pathologist, Nicolas Cerney, persuasively explained that his three, 30-minute weekly virtual group sessions were effective. Student was actively engaged and made steady progress on his goals, and the virtual speech sessions and the service model did not have to be in-person for him to benefit. Cerney observed Parent helping Student but did not believe Student needed him next

to him. Cerney never saw Student become frustrated or cry. Student made progress on his harder goals and therefore did not regress. Student made progress with the current service model. Student greatly benefitted from their sessions and worked well with Cerney. Student provided no expert testimony that he required in-person speech therapy services.

Similarly, Student did not establish he needed in-person occupational therapy services. Janine Casale, his credentialed occupational therapist, provided her two 15-minute weekly sessions through telehealth, and delivered a direct screen time service and was live at the same time. She worked on his handwriting goal and his focusing on a task goal. Parent was present during the sessions and moved the camera so she could observe Student's hands on the table working on a task. She shared her screen so he could copy the materials needed, usually six to eight sentences long. She watched his hands when he wrote. His line placement was always adequate. He completed craft activities. Student did not struggle with dexterity. Although Parent was present and involved, Casale opined Student did not need Parent with him the entire session. Student could access the virtual sessions. Student needed a minimal amount of help from Parent. Student met his goals, benchmarks, and objectives on time. Casale did not observe any fine motor regression from not having in-person occupational therapy, as all of his work samples showed improvement. Student provided no expert testimony that he required in-person services. Student did not establish he required in-person occupational therapy services.

Finally, Student did not establish he required in-person counseling services. Student received his 20-minute weekly counseling sessions through telehealth and did not present evidence the telehealth sessions were not effective. Student provided no expert testimony that he required in-person counseling services.

Student did not establish Chula Vista Denied him a FAPE for the 2020-2021 school year by not providing in-person services. Instead, Student performed at and often above his anticipated level and therefore any shortfall in instruction was not material. Student did not meet his burden under *Van Duyn, supra*.

ISSUE 2E: OFFER A ONE-TO-ONE AIDE DURING THE 2020-2021 SCHOOL YEAR, FROM AUGUST 31, 2020 TO MARCH 8, 2021

Student alleges Chula Vista failed to offer a one-to-one aide for Student during distance learning to help him participate with online learning. Student alleges he was easily distracted and needed a one-to-one aide to sit next to him and re-direct him as needed.

Chula Vista alleges Student's request for an aide was discussed during the 2020-2021 IEP process. Chula Vista alleges they offered the YMCA program to all Student's with IEPs to provide adult assistance with online learning, but Parent declined.

Student did not establish Chula Vista denied him a FAPE by failing to offer a one-to-one aide. Parent's opinion testimony was not corroborated by the evidence. Student provided no expert testimony that he required a one-to-one aide. Soto, his teacher, credibly testified Student was easily redirected. Student could access the curriculum without an assigned aide during distance learning. Soto had two classroom aides available to help Student as needed. The aides acted as human readers and at times helped him read passages. Soto opined that although Parent helped Student every day, as most of the parents of her students did, she did not believe Parent needed to be present the whole time. Cerney, his speech and language pathologist, and Casale, his occupational therapist, also persuasively opined Student did not need a one-to-one

aide and he made progress without one. Although Parent sat next to Student, they each did not believe Parent needed to be present the whole time. The evidence did not establish Student required a one-to-one aide.

Student did not establish he required a one-to-one aide during the four IEP team meetings during the 2020-2021 school year. On January 21, 2021, Chula Vista offered Parent an assessment plan for a special circumstance instructional aide evaluation. Parent did not sign it. At hearing, Parent claimed he did not understand his consent was needed for an evaluation. That explanation is not credible. Parent received the assessment plan, and clearly understood that his consent was needed. Parent's explanation was not persuasive.

Student failed to establish he needed a one-to-one aide to access his distance learning program. Chula Vista developed a distance learning support program on campus in partnership the local YMCA staff, licensed childcare providers, assisting students with the most difficulty accessing distance learning. Parent declined because he claimed he did not know if the YMCA staff had training in autism. However, Student provided no evidence that the program was not appropriate for his moderate level of disability without behavioral concerns, and that the YMCA staff were not sufficiently trained to assist with online learning.

Student did not establish Chula Vista denied Student a FAPE for the 2020-2021 school year, between August 31, 2020 and March 8, 2021, by providing a distance learning program and failing to offer a one-to-one aide. Student provided no expert testimony that he required a one-to-one aide. Student did not demonstrate he had behavioral or pronounced attentional issues which required a special circumstance instructional aide assigned to him. The evidence did not establish Student required a

one-to-one aide, or that Chula Vista denied Student a FAPE by not offering a one-to-one aide. Chula Vista provided access to specialized instruction and related services which are individually designed to provide educational benefit through an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. (*Rowley, supra; Endrew, supra.*)

## ISSUE 2B: EVALUATE STUDENT AND PROVIDE NECESSARY ACCOMMODATIONS FROM AUGUST 31, 2020 TO MARCH 8, 2021

Student alleges Chula Vista did not offer to evaluate him and provide him with the accommodations of adaptive seating and headphones. Student claims he was distracted and needed those two items at home to access his distance learning. Student asserts he needed a one-to-one aide, and that issue is addressed in the prior issue.

Chula Vista alleges Student did not ask for any other assessments.

A reevaluation of Student's needs is required if requested by Parent, or a teacher. The district must also conduct a reassessment if the district "determines that the educational or related service needs, including improved academic achievement and functional performance of the child warrant a reevaluation." (*R.A. v. West Contra Costa Unified School District, supra*, see also Ed. Code, § 56381(a).) A school district's failure to conduct appropriate assessments or reassess in all areas of suspected disability may constitute a procedural denial of FAPE. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2007) 464 F.3d 1025, 1031-1033)

Student failed to prove that Chula Vista did not provide required assessments. There was no evidence that either Parent or a teacher made a request for an evaluation. Nor did Student establish any specific areas in which a reevaluation was warranted.

Student provided no expert testimony that Student required an evaluation. Student's teacher did not have information about him that would warrant an assessment.

Student's accommodations from his operative May 2019 IEP included a human reader, monitoring test responses, extended time, multiple or frequent breaks, visual cues, giving one direction at a time and repeating directions, shortening assignments, adaptive seating such as a TheraBand or seat cushion, adaptive writing utensils, access to noise reduction headphones, and a scribe for assessments only. Chula Vista held IEP team meetings for Student on September 9, 2020, November 19, 2020, December 9, 2020, and January 21, 2021, reviewed his present levels of performance, his classroom assessments, his progress on benchmarks and goals, and developed new goals and noted he made progress in all areas, except coping skills. Chula Vista offered the same accommodations in his prior IEP. Parent did not request new assessments for accommodations. Student did not establish Chula Vista failed to conduct appropriate assessments or reassess in all areas of suspected disability between August 31, 2020 and March 8, 2021. (*Park, supra.*) Student did not establish Chula Vista denied Student a FAPE for the 2020-2021 school year by failing to evaluate him and provide necessary accommodations. Student provided no expert testimony that he required assessments or accommodations for his virtual learning in the home setting. Student did not prove an evaluation was warranted or requested by Parent.

Student alleges he required the accommodations of a seat cushion or headphones recommended in the classroom setting, which should have been provided in the home setting.

Chula Vista alleges it provided all necessary accommodations.



Student did not establish he needed that accommodation of adapted seating or the headphones in the home setting. Parent did not establish the chair Student used at home was not appropriate for his needs. Parent did not establish that the home setting was noisy and distracted Student during his online sessions. Parent asked the occupational therapist to give him referrals to a low-cost seat cushion, and she emailed several sources. Parent did not establish he purchased it and is not seeking reimbursement. Student did not establish the cost or show receipts for purchases.

The evidence established that Chula Vista provided the accommodations Student required. It provided him with a human reader, as Soto and the two classroom aides read passages to Student. Student was provided the opportunity to re-read stories and have them read aloud. Student was provided the accommodation of monitoring test responses. Student was provided additional time on assignments in his virtual program, and he was allowed to submit assignments throughout the week, at his pace. Student was provided multiple breaks. He was provided visual cues. Student was given one direction at a time, and repeated directions if necessary. Student was provided shortened assignments. Student did not establish he required the adaptive seating or headphones in the home setting. Student did not establish he needed adaptive writing utensils, or a scribe for assessments only.

Student did not establish Chula Vista denied Student a FAPE for the 2020-2021 school year by failing to evaluate him and provide necessary accommodations. Student provided no expert testimony that he required accommodations for his virtual learning in the home setting. Student did not establish he required the seat cushion or the headphones to access his curriculum between August 31, 2020 and March 8, 2021.

## ISSUE 2C: OFFER A SUFFICIENT AMOUNT OF RELATED SERVICE HOURS DELIVERED THROUGH APPROPRIATE SERVICE MODELS DURING THE 2020-2021 SCHOOL YEAR THROUGH MARCH 8, 2021

Student Chula Vista failed to develop an IEP in 2020 which offered a sufficient amount of related service hours delivered through appropriate service models. Student alleges he was provided less occupational therapy, speech and language therapy, and counseling than required by his IEP.

Chula Vista alleges Student did not establish the service hours and delivery model weren't appropriate.

A student's IEP must include a statement of special education and related services and based on peer-reviewed research to the extent possible, to be provided to the student. (Ed. Code, § 56325.) Related services may be provided to individuals or small groups in a specialized area of educational need and throughout the full continuum of educational settings. (Cal. Code Regs., tit. 5, § 3051, sub. (a)(1).) Related services, when needed, are determined by the IEP team. (Cal. Code Regs., tit. 5, § 3051, sub. (a)(2).)

### DEVELOPMENT OF SEPTEMBER 2020 IEP

Student did not establish Chula Vista denied Student a FAPE for the 2020-2021 school year at his annual September 2020 IEP by providing a distance learning program and failing to offer a sufficient amount of related service hours delivered through appropriate service models. The related service hours were sufficient, and the service

models provided were appropriate. Whether a student was offered or denied a FAPE is determined by looking at what was reasonable at the time the IEP was developed, not in hindsight. (*Adams, supra*)

Here, Student's September 2020 through January 2021 IEP provided for 90 minutes per week of speech therapy, an increase to 30 minutes per week of occupational therapy, and 20 minutes per week of counseling. The IEP was based upon a classroom model but did not specify the services had to be in-person. Student did not establish that Chula Vista denied Student a FAPE at the four 2020-2021 IEPs for not offering adequate services and delivery models for distance learning.

Chula Vista held IEP team meetings for Student on September 9, 2020, November 19, 2020, December 9, 2020, and January 21, 2021. At the September 9, 2020, IEP team meeting, the team reviewed Student's present levels of performance since he came to their school at the beginning of the regular school year. Soto reviewed his May 2019 IEP and used it to create his most recent goals and to implement it. She used his foundational goals to recreate more challenging goals than the previous goals. He did not meet his coping skills goal, so she continued the dates and worked on it. Chula Vista reviewed Student's Emergency Service Options page, which was required for all IEPs providing virtual learning by the newly amended Education Code section 56345, subdivision (a)(9)(A). It noted that services would be provided virtually to the greatest extent possible when emergency conditions caused by an epidemic or other safety hazard prevented live in-person instruction for more than 10 consecutive days. It explained how public health orders would be followed when implementing the emergency conditions provision of the IEP. It clarified that the IEP would be provided in

an alternative means as necessitated only during the period of emergency conditions. Parent was concerned with a perceived lack of Student's progress and was concerned the new class only had two aides.

At the November 19, 2021, IEP team meeting, the team continued reviewing Student's present levels of performance. Soto, his teacher, shared the classroom assessment results. The occupational therapist, and speech therapist shared Student's present levels of performance. Parent wanted Student retained but the rest of the team did not agree. Parent asked for a seat cushion and the occupational therapist provided referrals, but they did not provide one for home use. Parent asked for an aide and they agreed to discuss it at the next IEP meeting. The IEP team gave parent the draft goals they drafted to allow Parent time to review them at the following IEP team meeting.

At the December 9, 2020 IEP team meeting, Student's present levels of performance were reviewed, clarified, and updated for Parent. Student made progress on all his goals. The IEP team provided Parent with the draft updated goals.

At the January 21, 2021 IEP team meeting, the team reviewed the draft goals. Parent again asked to retain Student, but the rest of the team did not agree. Chula Vista agreed to assess Student for a special circumstances instructional aide when the schools opened back up for in-person instruction. Chula Vista gave Parent an assessment plan, but Parent did not sign it and Chula Vista could not assess Student without Parent's consent. The IEP team developed new goals in the areas of reading foundational skills, social language, writing, articulation, mathematics, expressive language, coping skills, time on task, and writing and fine motor. Parent agreed to the goals. Chula Vista

offered related services which included 90 minutes weekly speech and language services, 20 minutes weekly counseling, and an increase in occupational therapy services from half an hour per month to half an hour weekly.

Student did not establish that Chula Vista's 2020-2021 IEP offer of 90 minutes per week of speech and language services was not sufficient. Student provided no expert testimony supporting his claim. Cerney persuasively explained that Student's 90 minute, three, 30-minute, weekly group sessions were effective. Student connected with Cerney and really enjoyed working with him. Cerney persuasively explained how Student was making progress. Student was actively engaged and loved to talk in the small group sessions and loved to engage in the social stories. Cerney often had to prompt him to let others talk. Student made strong progress on his goals and the virtual speech sessions and the service model did not have to be in-person for him to benefit. Student made progress on harder goals with the current service model. Student met his speech, language, and social emotional benchmarks and was on track by April 2021. Cerney persuasively opined Student did not require more than 90 minutes per week of speech therapy because the current service model was working. At hearing, Parent praised Cerney and expressed how much Student enjoyed working with him.

Student did not establish that Chula Vista's 2020-2021 IEP increased offer of 30 minutes per week of occupational therapy was not sufficient. Casale wrote two of Student's goals and suggested an increase in his services from 30 minutes per month, to 30 minutes per week divided into two 15-minute individual sessions. Parent opined that Student required more service minutes, but that was not supported by scientific data.

Student provided no expert testimony supporting his claim that the amount of his occupational therapy services was not sufficient, and the service delivery model was not sufficient.

Student did not establish that Chula Vista's 2020-2021 IEP offer of 20 minutes per week of counseling was not sufficient. Parent's opinion testimony was not supported by data. Student provided no expert testimony supporting his claim. Student received his 20-minute weekly counseling sessions through telehealth and did not present evidence the telehealth sessions were not effective, or the number of minutes was insufficient.

Additionally, the evidence established that for the 2020-2021 school year, Student received the amount of related services required by his May 19, 2019 IEP. Cerney started speech therapy services on the fifth day of school. Casale started occupational therapy services the third week, so Student did not miss his 30-minute session for the month. Significantly, Casale increased his service minutes for the rest of the year to 30 minutes weekly through the IEP process, which further negates Student's argument he was not provided sufficient occupational therapy services. Finally, Student's school counselor began Student's counseling services the last week of September and added compensatory time of 10 additional minutes to two sessions. Student received the full length of his sessions. Student made progress with the current service model. Student performed at and often above his anticipated level and therefore any shortfall in instruction was not material. Student did not meet his burden under *Van Duyn, supra*.

Student did not establish Chula Vista denied Student a FAPE for the 2020-2021 school year at his four 2020-2021 IEP team meetings by providing a distance learning

program and failing to offer a sufficient amount of related service hours delivered through appropriate service models. Student did not meet his burden of proof.

## ISSUE 2D: DEVELOP APPROPRIATE ACADEMIC GOALS

Student alleges Chula Vista did not develop appropriate academic goals at the September 9, 2020, November 19, 2020, December 9, 2020, and January 21, 2021 IEP meetings because he did not make progress on his goals and the prior goals were the same as the new proposed goals.

Chula Vista alleges the IEP team developed Student's academic goals in collaboration with Parent, and he agreed with the goals. Chula Vista alleges Student did not request changes to the proposed goals or challenge them at hearing.

Student did not establish Chula Vista denied Student a FAPE for the 2020-2021 school year at the September 9, 2020, November 19, 2020, December 9, 2020, and January 21, 2021 IEP meetings by providing a distance learning program and failing to develop appropriate academic goals. The evidence established Student made progress, met many to all of his benchmarks from his prior IEP, and that the new proposed academic goals were more advanced and appropriate.

Soto persuasively explained how she reviewed his past IEP, taught him, monitored Student's assignments and progress, developed new proposed goals, and attended the 2020-2021 IEP team meetings. As his special education teacher for his fourth-grade year, she convincingly established Student's new proposed goals were appropriate and enabled him to make progress. Student's 2019 goals were at the second-grade level. Soto wrote goals for Student at the fourth-grade level, and he made progress. (*Adams, supra.*)

While Student alleges that the academic goals were not appropriate because they were identical to his prior IEP goals, that is not supported by the evidence, as detailed below. The weight of the evidence established that the four IEP team meetings reviewed Student's progress, noted that he met most of his benchmarks, and Soto developed more challenging goals that Student would likely be able to achieve in the next year. The evidence did not establish that the new proposed goals were identical to the prior goals.

The audio recording and the IEP notes documented Parent verbally agreed to the proposed goals. Parent initially did not agree to any part of the IEP goals but offered no suggestions or changes. Parent asked Soto whether she thought the goals she wrote were appropriate, and Soto believed they were. After that reassurance, Parent reported he studied every aspect of the IEP document and said he "100 percent agreed." Parent insisted he agreed, and no one could strong arm him. At hearing, Parent insisted he never agreed, and he was strong armed by the IEP team. However, the audio-recording of the IEP meeting played during the hearing was consistent with the documented IEP notes and are a more credible source of information. Parent's testimony was not credible.

Student did not establish Chula Vista denied Student a FAPE for the 2020-2021 school year at his annual IEP by providing a distance learning program and failing to develop appropriate academic goals. The evidence established Student made progress, met many to all of his benchmarks from his prior IEP, and that the new proposed academic goals were more advanced and appropriate. In its development of Student's academic goals, Chula Vista provided access to specialized instruction and related services which were 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. The goals were appropriate. (*Rowley, supra; Endrew, supra.*)

## ISSUE 2F: ADDRESS STUDENT'S REGRESSION FROM DISTANCE LEARNING

Student alleges he was prone to regression as established by his prior 2019 IEP providing him extended school year services. Student alleges he regressed because Chula Vista did not provide in-person learning, and they did not address his regression. Student alleges he regressed and shut down emotionally and refused to join class. Student alleges he did not make progress because his Parent helped him with his tests.

Chula Vista alleges Student showed no evidence of regression. Chula Vista alleges Student met his benchmarks for academics, speech and language, and occupational therapy, and made progress toward his benchmark for counseling.

Student did not establish Chula Vista denied Student a FAPE for the 2020-2021 school year at the September 9, 2020, November 19, 2020, December 9, 2020, and January 21, 2021 IEP meetings by providing a distance learning program and failing to address Students' regression from distance learning. Student provided no evidence he regressed. Rather, Student made substantial progress.

Soto persuasively testified she developed Student's 2020 IEP goals at the fourth-grade level. In September, Student tested in the first-grade level in the iReady and Achieve 3000, but he increased his levels since then. By January 2021 during intermediate testing, he read at a third-grade level, and his math scores improved to a second-grade level. By the end of April 2021, Student performed closer to the

fourth-grade level in reading and math. Soto opined he demonstrated tremendous progress for the 2020-2021 school year, not regression.

Cerney persuasively explained Student made strong progress on his goals and the virtual speech sessions and the service model did not have to be in-person for him to benefit. Student made progress on harder goals with the current service model of telehealth. Student met his speech, language, and social emotional benchmarks and was on track by April 2021.

Casale credibly testified that Student was able to access the virtual sessions. Student needed a minimal amount of help from Parent. Student met his goals, benchmarks, and objectives on time. Casale did not observe any fine motor regression. All of his work samples showed improvement. Student made progress.

While Student claimed he regressed and shut down emotionally and refused to join class, he did not provide credible evidence that this occurred more than three to four times during the school year. Soto did not recall Student acting up but recalled a few e-mails during the course of the year from Parent noting Student was unable to re-join a class session. Student provided no credible evidence that Student regressed, and that Chula Vista did not address Student's regression. Student provided no expert testimony establishing he regressed.

Student claims that he did not make progress because his Parent helped him is also not supported by the evidence. As Student's skills increased and his test scores improved, Parent challenged the results and claimed he helped Student. When Student was reassessed without Parent's help, Student performed even better. Parent disputed the scores again. Parent's testimony was not supported by expert testimony and is not persuasive.

In addition to the credible testimony of his teachers and service providers establishing significant progress, the weight of the evidence also established that Student's made progress on his benchmarks and did not demonstrate regression, as detailed by his progress reports after September 9, 2020 through April 21, 2021.

Student did not establish Chula Vista denied Student a FAPE for the 2020-2021 school year at his annual IEP by providing a distance learning program and failing to address Students' regression from distance learning. Student provided no evidence he regressed.

Student did not establish Chula Vista denied Student a FAPE by not continuing to provide in-person services. Student did not establish Chula Vista denied Student a FAPE by not evaluating Student and providing necessary accommodations. Student did not establish Chula Vista denied Student a FAPE by failing to offer a sufficient amount of related service hours delivered through appropriate service models. Student did not establish Chula Vista denied Student a FAPE by not developing appropriate academic goals. Student did not establish Chula Vista denied Student a FAPE by failing to offer a one-to-one aide. Student did not establish Chula Vista denied Student a FAPE by not addressing Student's regression from distance learning.

## 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, subsection A: Chula Vista did not deny Student a FAPE, beginning March 2020 through the regression recovery intersession, by assigning Student to

distance learning and failing to continue to provide in-person services. Chula Vista prevailed on Issue 1, subsection A.

Issue 1, subsection B: Chula Vista did deny Student a FAPE, beginning March 2020 through the regression recovery intersession, by assigning Student to distance learning and failing to evaluate Student and provide necessary accommodations. Chula Vista prevailed on Issue 1, subsection B.

Issue 1, subsection C: Chula Vista did not deny Student a FAPE, beginning March 2020 through the regression recovery intersession, by assigning Student to distance learning and failing to offer a sufficient amount of related service hours delivered through appropriate service models. Chula Vista prevailed on Issue 1, subsection C.

Issue 1, subsection D: Chula Vista did not deny Student a FAPE, beginning March 2020 through the regression recovery intersession, by assigning Student to distance learning and failing to develop appropriate academic goals. Chula Vista prevailed on Issue 1, subsection D.

Issue 1, subsection E: Chula Vista did not deny Student a FAPE, beginning March 2020 through the regression recovery intersession, by assigning Student to distance learning and failing to offer a one-to-one aide. Chula Vista prevailed on Issue 1, subsection E.

Issue 1, subsection F: Chula Vista did not deny Student a FAPE, beginning March 2020 through the regression recovery intersession, by assigning Student to distance learning and failing to address Student's regression from distance learning. Chula Vista prevailed on Issue 1, subsection F.

Issue 2, subsection A: Chula Vista did not deny Student a FAPE, during the 2020-2021 school year, through March 8, 2021, by assigning Student to distance learning and failing to continue to provide in-person services. Chula Vista prevailed on Issue 2, subsection A.

Issue 2, subsection B: Chula Vista did not deny Student a FAPE, during the 2020-2021 school year, through March 8, 2021, by assigning Student to distance learning and failing to evaluate Student and provide necessary accommodations. Chula Vista prevailed on Issue 2, subsection B.

Issue 2, subsection C: Chula Vista did not deny Student a FAPE, during the 2020-2021 school year, through March 8, 2021, by assigning Student to distance learning and failing to offer a sufficient amount of related service hours delivered through appropriate service models. Chula Vista prevailed on Issue 2, subsection C.

Issue 2, subsection D: Chula Vista did not deny Student a FAPE, during the 2020-2021 school year, through March 8, 2021, by assigning Student to distance learning and failing to develop appropriate academic goals. Chula Vista prevailed on Issue 2, subsection D.

Issue 2, subsection E: Chula Vista did not deny Student a FAPE, during the 2020-2021 school year, through March 8, 2021, by assigning Student to distance learning and failing to offer a one-to-one aide. Chula Vista prevailed on Issue 2, subsection E.

Issue 2, subsection F: Chula Vista did not deny Student a FAPE, during the 2020-2021 school year, through March 8, 2021, by assigning Student to distance

learning and failing to address Student's regression from distance learning. Chula Vista prevailed on Issue 2, subsection F.

## ORDER

1. Chula Vista prevailed on all issues.

## 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/

DEBORAH MYERS-CREGAR

Administrative Law Judge

Office of Administrative Hearings