

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

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CASE NO. 2021030859

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PARENT ON BEHALF OF STUDENT,

v.

SAN BENITO HIGH SCHOOL DISTRICT.

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DECISION

August 4, 2021

On March 24, 2021, the Office of Administrative Hearings, called OAH, received a due process hearing request from Student, naming San Benito High School District. San Benito High School District is called San Benito. On May 17, 2021, OAH continued the hearing. Administrative Law Judge Sabrina Kong heard this matter in Los Angeles, by videoconference on June 8, 9, 10, and 14, 2021.

Attorneys Coleman Alguire and Jaleceia Shayla White represented Student. Parent attended all hearing days on Student's behalf. Attorney Jennifer Choi represented San Benito. San Benito's Director of Special Education Dr. Paulette Cobb attended all hearing days on San Benito's behalf.

At the parties' request the matter was continued to July 21, 2021 for written closing briefs. The record was closed, and the matter was submitted on July 21, 2021.

A free appropriate public education is called a FAPE. An individualized education program is called an IEP.

## ISSUES

1. Did San Benito deny Student a FAPE from the beginning of the 2020-2021 school year through March 24, 2021, by assigning Student to distance learning without providing in-person services, in person?
2. Did San Benito deny Student a FAPE from the beginning of the 2020-2021 school year through March 24, 2021, by assigning Student to distance learning without offering, or evaluating the need for, all necessary accommodations?
3. Did San Benito deny Student a FAPE from the beginning of the 2020-2021 school year through November 2020, by assigning only one-hour a day of virtual distance learning?
4. Did San Benito deny Student a FAPE by failing to develop appropriate academic goals in the 2020-2021 school year through March 24, 2021?
5. Did San Benito deny Student a FAPE from the beginning of the 2020-2021 school year through March 24, 2021, by failing to offer sufficient intensive individual services in the form of a one-to-one aide?

## 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 FAPE 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 has the burden of proof. The factual statements in this Decision constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

Student was 14-years old and finished the ninth grade at the time of the hearing. Student resided within the San Benito's geographic boundaries at all relevant times, and attended San Benito High School. San Benito High School was the only high school within San Benito, and will be referred to as San Benito without differentiation. Student had reading decoding and fluency, math calculation, and written language difficulties. Student was eligible for special education under the category of specific learning disorder.

Student transitioned to San Benito as a high school freshman in the 2020-2021 school year. Student's operative IEP was her April 30, 2020 IEP from middle school, from a different school district. The April 30, 2020 IEP offered Student 56 percent of general education, and 44 percent of special education from May 1, 2020 to May 1, 2021. Student also had accommodations. Special education consisted of 810 minutes weekly of group specialized academic instruction with a resource specialist/learning center support.

ISSUE 1: DID SAN BENITO DENY STUDENT A FAPE FROM THE BEGINNING OF THE 2020-2021 SCHOOL YEAR THROUGH MARCH 24, 2021, BY ASSIGNING STUDENT TO DISTANCE LEARNING WITHOUT PROVIDING IN-PERSON SERVICES, IN PERSON?

Student contends that she required in-person instruction, with her teachers physically in the same room, to receive a FAPE. San Benito contends that Student did not require her teachers to be physically in the same room to access her education. San Benito also contends it offered Student a FAPE at all times. San Benito also contends it implemented Student's April 30, 2020 IEP initially with home online learning,

and in September 2020, a mix of home online learning, and on-campus online learning through the cohort program with special education students.

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] (*Endrew F.*).

Where a student alleges the denial of a FAPE based on the failure to implement an IEP, the student must prove that any failure to implement the IEP was "material," which means that the services provided to a disabled child fall "significantly short of the services required by the child's IEP." (*Van Duyn v. Baker School Dist.* 5J (9th Cir. 2007) 502 F.3d 811, 822 (*Van Duyn*)). No statutory requirement of perfect adherence to the

IEP exists, nor is there any reason rooted in the statutory text to view minor implementation failures as denials of a FAPE. (*Id.* at p. 821.) “A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child’s IEP.” (*Id.* at p. 815.)

## FEDERAL AND STATE SCHOOL CLOSURE ORDERS AFTER MARCH 2020

The United States Department of Education initially issued guidance on the issue of the school shutdowns in March 2020 in response to the universal 2020 COVID-19 pandemic. A local education authority which offers “distance learning” opportunities for its general education students has a concomitant duty to “make every effort to provide special education and related services to the child in accordance with the child’s individualized education program.” (*U.S. Dept. of Educ., Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak* (March 12, 2020) at p. 2.) School districts must “ensure that students with disabilities also have equal access to the same opportunities [as general education students], including the provision of FAPE,” and, “to the greatest extent possible, each student with a disability can be provided the special education and related services identified in the student’s IEP developed under IDEA.” (*Id.*)

California’s Governor Gavin Newsome issued an executive order on March 22, 2020, granting local educational agencies the authority to close schools, accompanied by a directive to the California Department of Education to develop guidance that included “ensuring students with disabilities” receive a FAPE consistent with their IEP, and for local educational agencies to meet other procedural requirements under the IDEA.

The California Department of Education, called the CDE, issued guidance on March 20, 2020, and April 9, 2020. (*Cal. Dept. of Educ., Special Education Guidance for COVID-19* (March 20, 2020); *Cal. Dept. of Educ., Special Education Guidance for COVID-19, COVID-19 School Closures and Services to Students with Disabilities* (April 9, 2020)). The CDE advised that, if a local educational agency can continue providing special education and related services as outlined in the IEP, or an agreed upon amendment to the existing IEP, through a distance learning model, it should do so. (*CDE Guidance* (March 20, 2020), *supra*, at Point 1.) The local educational agency could also consider alternative service delivery options such as in-home service delivery, meeting with individual students at school sites, or other appropriate locations to deliver services. The CDE also encouraged local educational agencies to work collaboratively with nonpublic schools and agencies to ensure continuity of services, including moving to virtual platforms for service delivery to the extent feasible and appropriate. (*Ibid.*)

On April 27, 2020, U.S. Secretary of Education Betsy DeVos announced through a Department of Education press release that she was “not recommending Congress pass any additional waiver authority” concerning the FAPE and least restrictive environment requirements of the IDEA, noting again that “learning must continue for all students during the COVID-19 national emergency.” (*U.S. Dept. of Educ., Secretary DeVos Reiterates Learning Must Continue for All Students, Declines to Seek Congressional Waivers to FAPE, LRE Requirements of IDEA*, April 27, 2020 Press Release). Finally, the California legislature did not require local education agencies to describe in IEPs how the IEPs will be implemented in emergency situations until June 29, 2020. (Ed. Code,

§ 56345, subd. (a)(9), as add Stats. 2020, Ch. 24 (S.B. 98), § 66.) Local education agencies must include how the IEPs will be implemented in emergency situations in the development of each student's initial IEP, or during the next regularly scheduled revision of students' IEPs, such as at the annual IEP. (*Id.*)

The Office of Special Education and Resource services, known as OSERS, recognized that educational institutions are "straining to address the challenges of this national emergency." (OSERS, *Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities*, (March 21, 2020) at p. 1.) OSERS assured school districts that "ensuring compliance with the IDEA should not prevent any school from offering educational programs through distance instruction." (*Ibid.*) OSERS noted the provision of FAPE may include, as appropriate, special education and related services provided through distance instruction provided virtually, online, or telephonically." (*Id.* at p. 1-2.) OSERS reiterated its March 12, 2020 guidance on compensatory education. "Where, due to the global pandemic and resulting closures of schools, there has been an inevitable delay in providing services" IEP teams must make an individualized determination "whether and to what extent compensatory services may be needed when schools resume normal operations." (*Id.* at p. 2.) Local educational agencies may consider the use of accessible distance technology, instructional phone calls, and other curriculum-based activities that have been "scaffolded" based on student need. (*Id.*)

California Senate Bill 98, Chapter 24, Section 34, defined distance learning in the 2020-2021 school year under Education Code section 43500, subdivision (a). "Distance learning" means instruction in which the pupil and instructor are in different locations



and pupils are under the general supervision of a certificated employee of the local educational agency. Distance learning may include, but is not limited to, all of the following:

- (1) Interaction, instruction, and check-ins between teachers and pupils through the use of a computer or communications technology.
- (2) Video or audio instruction in which the primary mode of communication between the pupil and certificated employee is online interaction, instructional television, video, telecourses, or other instruction that relies on computer or communications technology.
- (3) The use of print materials incorporating assignments that are the subject of written or oral feedback.

(Ed. Code, § 43500, subd. (a), as added Stats. 2020, Ch. 24 (S.B. 98), § 34.)

California Senate Bill 98, Chapter 24, Section 34, defines in-person instruction in the 2020-2021 school year under Education Code section 43500, subdivision (b) as “instruction under the immediate physical supervision and control of a certificated employee of the local educational agency while engaged in educational activities required of the pupil.” (Ed. Code, § 43500, subd. (b), as added Stats. 2020, Ch. 24 (S.B. 98), § 34.)

Student did not prove that she needed each of her teachers to be in-person and physically in the same room as Student, or any other in-person services, to access her education in the 2020-2021 school year. The April 30, 2020 IEP considered Student’s educational needs after the COVID-19 pandemic commenced in March 2020, and did not specify that Student required any of her education to be delivered “in-person”.

Therefore, San Benito was not required to implement the April 30, 2020 IEP, as written, with all in-person instruction, as they were not material to Student's IEP under *Van Duyn*. (*Van Duyn, supra*, 502 F. 3d at 821.)

San Benito offered and delivered Student a combination of online distance learning, and in-person instruction in accordance with how those terms were defined under Education Code section 43500 throughout the 2020-2021 school year. (*See*, Ed. Code, § 43500, subds. (a) and (b).) All of Student's teachers were credentialed teachers. Although Student and teachers were in different locations, all her teachers supervised Student's learning with instruction, interaction, and check-ins online every day. Student was enrolled in two classes every six-week period. Student had all general education classes except for three special education classes.

The curriculum consisted of synchronous and asynchronous learning. Synchronous learning was online learning with the teacher of a specific class or subject either lecturing, or after lectures, when the teacher was present online during class to answer questions while students completed work. Asynchronous learning consisted of self-study, and time spent working on assigned work/projects, including watching assigned videos. Like all San Benito students, Student's curriculum included both synchronous and asynchronous learning during the 2020-2021 school year. On August 8, 2020, San Benito sent written notice to all its students that it would begin the 2020-2021 school year with all remote instruction, or home online distance learning.

#### AUGUST 13, 2020 TO SEPTEMBER 25, 2020

Student attended school through online distance learning, at home, from August 13, 2020 to September 25, 2020, from 9:00 am to 3:00 pm. Student was enrolled in agricultural biology and Academy from August 13, 2020 to September 25, 2020, the

first six-week period of the 2020-2021 school year. Student, Parent, case manager Ann Vasquez, agricultural biology teacher Emily Herzog, and Academy teacher Elizabeth Pulcheon met informally shortly after the school year started to discuss Student's progress and challenges with home online distance learning. During this meeting, Parent expressed her preference for a longer school day with in-person interactions. Parent also expressed concerns with Student's social emotional needs and anxieties related to her transition into online high school, and technology access difficulties.

Vasquez resolved Student's technology and connectivity challenges by delivering a hotspot to Student's home within a day after Parent notified Vasquez of the issue. Student also had difficulties with the interactive digital notebook platform Herzog used in class in the beginning of the 2020-2021 school year. In response, San Benito provided Student with, and Student accessed, extra online support from an Academy class instructional aide to access the interactive digital notebook platform. Student's teachers, and Vasquez persuasively opined that Student's struggles with online distance learning resolved within a few weeks after school started.

Student did not show that she had online distance learning struggles other than the connectivity and platform issues which San Benito resolved. San Benito's offer of a hotspot, instructional aide support, along with an on-campus, special education cohort program from September 28, 2020, allowed Student to successfully access her education throughout the 2020-2021 school year.

#### SEPTEMBER 28, 2020 TO MARCH 24, 2021

On September 21, 2020, San Benito invited Student to participate in its first cohort program, an on-campus program where students with similar special education needs received small group instruction. Student was enrolled in physical education and

English from September 28, 2020 to November 6, 2020. Student was enrolled in Spanish and pre-algebra from November 9, 2020 to January 7, 2021. Student was enrolled in agricultural biology and Academy from January 11, 2021 to February 26, 2021. Student was enrolled in physical education and English from March 1, 2021 to April 16, 2021. Student was enrolled in Spanish and pre-algebra from April 19, 2021 to June 2, 2021. Student had Academy Haybaler class from September 28, 2020 to January 7, 2021, and from March 1, 2021 to June 2, 2021.

Academy Haybaler was a mandatory special education class period to help Student with academic work in all her classes when she was not enrolled in the special education Academy class. Academy Haybaler was different than the general Haybaler support, which was not mandatory, and akin to teachers' office hours, that each teacher offered to all students in their classes. During Academy Haybaler, Student had the option of getting help from any of her teachers through Haybaler/office hours support and getting help from the teachers within the Academy Haybaler class.

Vasquez recommended Student for San Benito's first special education cohort program in response to parental concerns about home online distance learning. The special education cohort program offered on-campus learning starting September 28, 2020 from 8:30 a.m. to 12:15 p.m. on Mondays, Tuesdays, Thursdays, and Fridays, followed by home self-study from 12:30 pm to 3:00 p.m.; and home online distance learning on Wednesdays from 9:00 a.m. to 3:00 p.m.

Student's cohort program consisted of approximately 15 special education students and had two instructional aides who supervised students while students received online class instruction. The two instructional aides provided in-person, as-needed, help to Student's special education cohort during both synchronous and

asynchronous learning, four days weekly, for four hours and 15 minutes per day. The two instruction aides helped Student contact teachers online for extra support, with academic work, and resolve technological issues.

The in-person instructional aides of the special education cohort program were physically in the same room as Student. Student argued that the in-person services provided by San Benito in the cohort class did not conform with Student's IEP services because the in-person service was not exclusive to Student. Student's April 30, 2020 IEP did not require that San Benito deliver educational services and supports during distance learning exclusively to Student. Instead, the issue is whether the services San Benito delivered to Student constituted a material diversion from what the IEP offered. Student's attorney did not cite to any persuasive authority supporting the argument that San Benito should have delivered educational services exclusively to Student during distance learning to comport with Student's IEP. The evidence established that San Benito did not materially divert from the IEP requirements.

Student's teachers all opined that Student transitioned well to distance learning especially with the on-campus, special education cohort program, and that their physical presence, in the same room, was unnecessary for Student's access to online distance learning. The teachers were all aware and articulated persuasively at hearing their familiarity with Student's IEP, her needs, services, and accommodations. The teachers all opined that Student's disability did not impact her access to the curriculum in the 2020-2021 school year through March 24, 2021. The teachers were persuasive because they shared details at hearing that Student attended class regularly, self-advocated, participated in class, asked questions when she did not understand a topic, and demonstrated understanding by turning in assignments and performed well on tests.

During the 2020-2021 school year, Student progressed towards her academic goals, and earned As and Bs in all her classes, except for a C in English, in one semester.

The teachers were persuasive because they provided the details of Student's performance in each class to support their opinions and establish their recollection and knowledge of Student's performance in each of the classes as discussed below.

## AGRICULTURAL BIOLOGY

Herzog opined that Student, like all the general education students in the agricultural biology class, had difficulty accessing the interactive digital notebook platform Herzog used at the beginning of the school year. In response, San Benito offered Student extra instructional aide support because she was a special education student. An Academy instructional aide taught and helped Student access the platform successfully within a few weeks after the school year started. Herzog opined that Student learned and understood the materials and did very well. Student turned her camera on during synchronous learning, self-advocated, actively participated, asked questions, and emailed Herzog for help when necessary. Student turned in work performed during asynchronous learning, and demonstrated subject comprehension. Student earned an A in the fall, and a B in the spring semesters of the agricultural biology class.

## ACADEMY

San Benito offered Academy to Student, and to all students with IEPs, to provide extra support in all classes. Within the Academy class, Pulcheon had two instructional aides/assistants online to help students. Each class started with an online check-in, then a break-out session for students enrolled in the same academic classes. Pulcheon and

the two assistants each led a break-out session of approximately five students. Pulcheon usually led the break-out session for students needing help with math. One of the Spanish speaking assistants usually led the break-out session for students needing help with Spanish. The third assistant led the break-out session for students needing help with other classes. Student joined the break-out session with which she needed help.

Additionally, Pulcheon assigned one of her assistants to sign in online to teach and help Student access the agricultural biology interactive digital notebook platform at the beginning of the school year. The additional support from the Academy class assistant allowed Student to successfully access her agricultural biology class. The Academy assistant also helped Student with organization, and reading assignments comprehension and completion. There were few assignments in the Academy class because its purpose was to support Student in her other classes. Nonetheless, Student completed all the Academy class assignments.

Pulcheon opined that Student self-advocated and excelled in the Academy class. For example, in addition to asking questions, Student also emailed Pulcheon asking if Student could list Pulcheon as a reference on Student's resume. Student participated, understood expectations, and earned A's in both semesters.

## ENGLISH

Matthew Hagmann opined that Student did well with online distance learning, performing better than some general education students. Student attended Hagmann's general Haybaler office hours to go over work and asked questions. Student opened worksheets on-line, typing, and answering questions during synchronous learning time.

Student demonstrated understanding of the materials by submitting work completed during asynchronous learning and applied the skills learned from lectures during synchronous learning. Student earned a B in the fall, and a C in the spring semesters.

Hagmann also successfully rebutted Parent's opinions. Parent opined that Student received a C in English because Student could not access online learning. Parent concluded that Student was embarrassed to ask questions in her peers' presence when she did not understand material such as *Of Mice and Men*. Hagmann explained that Student, like all the students in his class, had difficulty comprehending *Of Mice and Men* because it was a difficult book. However, Student received a C in the spring semester not because she could not understand the material, but because she did not complete three assignments even though she received extended time to do so. Hagmann opined that online distance learning allowed Student to email questions privately during both synchronous and asynchronous learning, thus alleviated parental concerns of Student's embarrassment. Hagmann opined that Student participated in class, and exhibited competency and progressive growth throughout the school year.

## PHYSICAL EDUCATION

Bryan Smith's physical education class required submitting written work and participating in physical workouts. Written work consisted of learning about nutrition. Physical workouts consisted of learning boxing patterns. Smith opined that Student participated in both written work and physical workouts virtually, understood the materials taught, and demonstrated her understanding by completing and turning in written work completed during asynchronous learning. Student had the camera on, and actively participated and learned boxing patterns during the online class. Student earned Bs in both semesters of the physical education class.



## SPANISH

Spanish teacher Vanessa Kirchner opined that Student did well compared to her general education peers and had no difficulty with online distance learning. Kirchner helped Student individually when Student had difficulty understanding, or was behind turning in assignments. Student turned in work which reflected her understanding. Student responded positively to the Voces Spanish program which required her to watch videos and answer comprehension questions during asynchronous learning. Kirchner opined that Student answered questions, and completed assignments with increasing confidence throughout the school year. Student earned a B in the fall, and an A in the spring semesters of her Spanish class.

## PRE-ALGEBRA

Miguel Soto taught Student's special education pre-algebra class of approximately eight students. The special education pre-algebra class curriculum was the same as that of the general education pre-algebra curriculum, except that it was taught at a slower pace, and had fewer students. Student had the camera on during online learning in Soto's class. Soto opined that Student adjusted well to online learning, participated, self-advocated and was unafraid to ask questions. Student was a top performer, earning a B in the fall, and an A in the spring semesters of the pre-algebra class.

## STUDENT RECEIVED A FAPE

Student did not show that she required in-person services to receive a FAPE. Student also did not show that San Benito denied her a FAPE by not materially implementing her April 30, 2020 IEP with in-person instruction. Although Student had

technological difficulties in the first few weeks of the 2020-2021 school year with home online learning, Student did not show such difficulties resulted from her disability. Student acclimated well after the two technological issues were resolved. Further, Student did not show that her difficulties during the beginning of the school year caused her any educational loss, regression, or in any way impacted her ability to progress meaningfully academically during any part of the 2020-2021 school year. By the end of the first six-week period of the 2020-2021 school year, Student received A's in both of her online distance learning agricultural biology and Academy classes. From September 28, 2020 on, Student was on-campus, in a special education cohort with two in-person instructional aides, helping her successfully access her curriculum for four hours and 15 minutes a day, four days weekly. No witness opined that Student suffered any learning loss that required recoupment or compensation. Parent did not offer any facts supporting that Student's early home online distance learning difficulties resulted in any educational loss that required recoupment.

Student did not offer any evidence, expert or otherwise, that Student needed all her teachers to be in-person, physically in the same room as Student, during instruction other than attorney's argument and parental preference. Attorney's argument was not evidence. Parent was the only witness who opined that Student required in-person services. Parent opined at hearing that Student needed more work, and more in-school and on-campus time. Parent concluded that Student required someone to read and explain all text and work to Student, in-person, because during the spring semester Student did not understand *Of Mice and Men*, and received a C in English. Parent did not observe Student's online learning and had no personal knowledge of Student's online education in the 2020-2021 school year. Without any factual support, Parent's opinion on this issue was no more than a preference. Parental preference was not as

persuasive as the overwhelming evidence from all of Student's teachers who taught, and observed Student throughout the 2020-2021 school year. San Benito successfully rebutted Parent's opinion that Student required "in-person services, in person" with evidence that Student accessed online distance learning successfully throughout the 2020-2021 school year, in every class, with the services San Benito offered.

Student did not prove that San Benito denied her a FAPE from the beginning of the 2020-2021 school year through March 24, 2021 by not providing in-person services, in person.

ISSUE 2: DID SAN BENITO DENY STUDENT A FAPE FROM THE BEGINNING OF THE 2020-2021 SCHOOL YEAR THROUGH MARCH 24, 2021, BY ASSIGNING STUDENT TO DISTANCE LEARNING WITHOUT OFFERING, OR EVALUATING THE NEED FOR, ALL NECESSARY ACCOMMODATIONS?

Student contends that San Benito did not evaluate Student, or offer, the needed accommodations for distance learning to receive a FAPE. San Benito contends it did not need to evaluate Student because it was aware of Student's accommodation needs and offered all the accommodations she needed for distance learning.

## EVALUATION FOR ACCOMMODATIONS

A school district's failure to conduct appropriate assessments or to assess in all areas of suspected disability may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2007) 464 F.3d 1025, 1031-1033 (*Park*).) A disability is "suspected," and a child must be assessed, when the district is on notice that the child has displayed symptoms of that particular disability or disorder. (*Timothy O. v.*

*Paso Robles Unified School Dist.* (9th Cir. 2016) 822 F.3d 1105, 1119.) A procedural violation only constitutes a denial of FAPE if the violation:

1. impeded the child's right to a FAPE;
2. significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the child; or
3. caused a deprivation of educational benefits.

(20 U.S.C. § 1415 (f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2); See, *W.G., et al. v. Board of Trustees of Target Range School Dist., etc.* (9th Cir. 1992) 960 F.2d 1479, 1483, superseded by statute on other grounds, as stated in *R.B. v. Napa Valley Unified Sch. Dist.* (9th Cir. 2007), 496 F.3d 932, 939.)

The IDEA provides for periodic reevaluations to be conducted not more frequently than once a year unless the parents and district agree otherwise, but at least once every three years unless the parent and district agree that a reevaluation is not necessary. (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).) A reassessment may also be performed if warranted by the child's educational or related service needs. (20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).)

When a local educational agency offers distance learning for instructional delivery in lieu of regular classroom instruction during a school site closure for students, it must also provide equitable access to those services for students with disabilities. A local educational agency must create access to the instruction, including "planning for appropriate modifications or accommodations based on the individualized needs of each student and the differences created by the change in modality such as a virtual

classroom.” (*CDE Guidance*, (April 9, 2020), *supra*, at Point 2). Educational and support services provided should be commensurate with those identified in the IEP for each student to ensure educational benefit. (*Ibid.*)

Student did not present any evidence proving that San Benito needed to evaluate her need for unique accommodations related to online distance learning. Neither Parent, nor any witness, opined at hearing that San Benito had to evaluate Student to determine her online distance learning accommodation needs. Further, Student’s successful access to distance learning, as reported by her teachers, did not trigger the need to evaluate Student’s need for additional accommodations. Therefore, in the absence of any evidence, Student did not prove that San Benito committed a procedural violation which resulted in a FAPE denial, by not evaluating her distance learning accommodation needs.

## SAN BENITO OFFERED APPROPRIATE ACCOMMODATIONS

Student did not prove that she needed an accommodation that San Benito did not offer, or was not already offered in the April 30, 2020 IEP. San Benito offered Student extra supports for distance learning including the on-campus, special education cohort program, and Academy and Academy Haybaler classes. Case manager Vasquez, and Student’s teachers Herzog, Pulcheon, Hagmann, Kirchner, Soto, and Smith offered all the accommodations in Student’s April 30, 2020 IEP that were applicable to their classes. Student accessed her education and did well throughout the 2020-2021 school year with all the accommodations she received. The accommodations for setting and schedule, directions and instructions, and organization/study skills in the April 30, 2020 IEP were available to Student in all her classes as discussed below.

## SETTING AND SCHEDULE ACCOMMODATIONS

Student's accommodations in her IEP for setting and schedule included seating near the teacher, and away from noise and distractions; extended time to complete assignments and tests; and test in a separate setting. The seated near teacher, and test in a separate setting accommodation were not applicable to any online class. However, Student sat near the instructional aides in her small cohort program. Further, the teachers observed Student online during class and persuasively opined that she was not distracted, and participated in online learning both at home, and in the on-campus, cohort program.

Hagmann, Kirchner, and Herzog specifically recalled giving Student extra time to complete assignments. On one occasion, Hagmann also offered Student time beyond the six-week period when Student was enrolled in his class, during the spring semester, to turn in work, which Student did not use. Kirchner worked with Student individually to help Student understand and complete late assignments. All of the applicable accommodations for setting and schedule were offered and available to Student in all her classes; Student did not prove otherwise.

## DIRECTIONS AND INSTRUCTIONS ACCOMMODATIONS

Student's directions and instructions accommodations included directions given in a variety of ways; questions or items presented orally; answer choices read aloud; open book tests; allowance for increased verbal response time; and Bookshare (a text to speech program). San Benito allowed Student to use a calculator. Student would not be penalized for grammar errors in her work unless grammar was specifically being tested.

The accommodation of using a calculator was not applicable to any class except for Soto's pre-algebra class. Student took tests in Hagmann's class during asynchronous learning and did not use the reading the answer choices out loud accommodation even though it was available to her.

Assistive technology specialist Casandra Guerrero installed a text to speech program onto Student's Chromebook at the beginning of the school year. Guerrero informed Student of the installation and that Guerrero was available if Student needed help. Despite having had the text to speech program available since the beginning of the 2020-2021 school year, Student did not use the accommodation. Student did not offer any evidence that proved that she could not access the accommodation because of her disability, or for any other credible reason. Student's choice to not use the accommodation did not establish that San Benito denied her a FAPE.

The text to speech program and reading aloud accommodations were inapplicable to the Spanish class because Kirchner read aloud to all her students as part of teaching Spanish. Kirchner did not use a book in her class, so open book tests were inapplicable. However, Kirchner accommodated Student with the "open notes" test accommodation by allowing Student to use her notes. All applicable directions and instructions accommodations were offered and available to Student in all her classes; Student did not prove otherwise.

## ORGANIZATION/STUDY SKILLS ACCOMMODATIONS

Student's organization/study skills accommodations included note taking assistance, the ability to turn in late assignments, and using notes on tests and quizzes. Hagmann, Herzog, and Smith used graphic organizers to present and organize materials in their classes. Hagmann, Kirchner, and Herzog specifically recalled giving Student

extra time to complete assignments. All applicable organization/study skills accommodations were offered and available to Student in all her classes; Student did not prove otherwise.

Parent was the only witness who opined at hearing that the accommodations San Benito offered for distance learning was inadequate. Parent opined specifically that the text to speech program accommodation San Benito offered to Student was unhelpful. Parent also opined that having someone read and explain all text and work to Student in-person, one-on-one, was better. However, Parent did not observe Student's online learning and had no personal knowledge of Student's online education, or the special education cohort program. Without any factual support, Parent's opinion on this issue was no more than a preference. Absent factual support, parental preference for additional accommodations alone was insufficient to satisfy Student's burden of proving she required an in-person, one-on-one reading accommodation to access her education.

Student did not prove that San Benito denied her a FAPE from the beginning of the school year to March 24, 2021 by not offering the accommodations she needed for distance learning.

### ISSUE 3: DID SAN BENITO DENY STUDENT A FAPE FROM THE BEGINNING OF THE 2020-2021 SCHOOLYEAR THROUGH NOVEMBER 2020, BY ASSIGNING ONLY ONE HOUR A DAY OF VIRTUAL DISTANCE LEARNING?

Student contends that only teachers' active lecture time should be counted towards virtual distance learning. Student also contends that teacher's active lecture time amounted to one-hour daily of virtual distance learning. As a result, Student



argued that San Benito denied her a FAPE by offering insufficient instruction. San Benito contends it offered Student a FAPE which included six-hours a day of synchronous and asynchronous learning throughout the 2020-2021 school year.

The educational and support services San Benito offered to Student in the 2020-2021 school year were commensurate with those identified in Student's IEP, including consideration for Student's specialized academic instruction needs; and Student received educational benefit. Student did not show that San Benito did not materially implement any portion of Student's April 30, 2020 IEP under *Van Duyn*. (*Van Duyn*, *supra*, 502 F. 3d at 822.) All the synchronous and asynchronous services San Benito offered to Student could be properly counted as virtual distance learning time. (*See*, Ed. Code, § 43500, subd. (a) and (b); *CDE Guidance (March 20, 2020) supra*, at Point 1; and *U.S. Dept. of Educ., Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak* (March 12, 2020), *supra*, at p. 2.) Student's arguments that only teachers' active lecture time should be included in virtual distance learning time contradicted CDE guidelines which allowed San Benito to use accessible distance technology, and other curriculum-based activities that have been "scaffolded" to deliver learning based on a student's need. (*See, CDE Guidance (March 20, 2020) supra*, at Point 1.) In compliance with CDE guidelines, San Benito offered and provided Student with alternative service delivery options with synchronous and asynchronous learning in the home online program, and the on-campus, special education cohort program to Student. Student had equal access to the same opportunities in the home online program as her general education peers. Additionally, because of Student's special education needs, Student participated in a special education cohort program where two in-person instructional aides helped Student with academic work.

Student received and accessed online the agricultural biology, Academy, English, physical education, Spanish, and pre-algebra, and Academy Haybaler classes from the beginning of the 2020-2021 school year through November 2020. Although Student and teachers were in different locations, all her teachers supervised Student's learning with instruction, interaction, and check-ins online every day. All of Student's teachers were credentialed teachers. Further, Herzog, Pulcheon, Smith, and Soto all held credentials to teach special education students. All the teachers observed Student's online participation and reviewed Student's written work for feedback regarding Student's comprehension.

Student did not prove that San Benito assigned her only one-hour a day of virtual distance learning daily. Student argued that only active teacher's lecture time should be counted toward virtual distance learning. Student received 390 minutes weekly of synchronous learning. Some teachers included active lecturing and classwork as part of synchronous learning. Student argued that the inclusion of active lecturing and classwork as part of synchronous learning was inappropriate. Student argued that San Benito's active teacher lecture time, was one-hour daily, and less than 390 minutes weekly. Student also did not consider asynchronous learning or the special education cohort program time as part of her calculation for virtual distance learning, or specialized academic instruction time. Student concluded that San Benito could not have delivered the 810 weekly minutes of group specialized academic instruction when it only offered one-hour daily of virtual distance learning. Therefore, Student argued that San Benito denied Student a FAPE by offering insufficient virtual distance learning.

However, no witness opined that only teachers' active lecture time should be counted towards virtual distance learning. No witness opined that San Benito offered only one-hour daily of virtual distance learning to Student. Student based her argument

on what constitutes virtual distance learning time, and derivatively specialized academic instruction and FAPE, exclusively on Student attorney's argument. Student attorney's argument was not evidence.

Parent was the only witness who opined that San Benito offered insufficient virtual distance learning to Student. Parent opined that San Benito should have offered Student more work, and more time with teachers, in-school/on-campus. Parent did not observe Student's online education and had no personal knowledge of Student's online learning, or the special education cohort program. Student did not show that Parent had the background, education, training, or personal knowledge as a basis for her opinion. Absent factual support, Parent's opinion on this issue was no more than a preference. Parental preference for the "more is better" approach was insufficient to satisfy Student's burden of proving that the six-hours of virtual distance learning San Benito offered was insufficient, or a FAPE denial.

San Benito successfully rebutted Student's argument that it assigned only one-hour of, and/or offered insufficient, virtual distance learning. San Benito offered six-hours of virtual distance learning daily including synchronous and asynchronous learning. Student participated in home online distance learning six-hours per day from 9:00 a.m. to 3:00 p.m., from August 13, 2020 to September 25, 2020. Student participated in the on-campus, cohort program with special education students with similar needs from September 28, 2020 to March 24, 2021 on Mondays, Tuesdays, Thursdays, and Fridays from 8:30 a.m. to 12:15 p.m., followed by home self-study from 12:30 p.m. to 3:00 p.m.; and participated in home online distance learning every Wednesdays from 9:00 a.m. to 3:00 p.m.

Student's argument that she received only one-hour daily of virtual distance was unsupported, arbitrary, and unpersuasive. San Benito's calculation of virtual distance learning was persuasive because it reflected the six-hours of virtual distance learning including specialized academic instruction, and special education classes/supports Student actually received. Absent evidence from any witness, expert or otherwise, Student did not meet her burden of proving that the virtual distance learning San Benito offered was an-hour daily, materially diverted from the April 30, 2020 IEP, or otherwise insufficient, based on Student's special education needs.

Student did not prove that San Benito denied her a FAPE by only assigning one hour daily of virtual distance learning from August 13, 2020 to November 2020.

#### ISSUE 4: DID SAN BENITO DENY STUDENT A FAPE BY FAILING TO DEVELOP APPROPRIATE ACADEMIC GOALS IN THE 2020-2021 SCHOOL YEAR THROUGH MARCH 24, 2021?

Student contends that San Benito did not develop appropriate academic goals. San Benito contends that it developed appropriate goals for Student.

In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel, and which sets forth the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, § 56032.)

For each area in which a special education student has an identified need, the IEP team must develop measurable annual goals that are based upon the child's present levels of academic achievement and functional performance, and which the child has a reasonable chance of attaining within a year. (Ed. Code, § 56345; *Letter to Butler* (OSERS 1988) 213 IDELR 118.) The IEP must also contain a statement of how the child's goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(viii); Ed. Code, § 56345, subd. (a)(3).) The IEP must show a direct relationship between the present levels of performance, the goals, and the educational services to be provided. (Cal. Code Regs., tit. 5, § 3040, subd. (c).)

The IEP team need not draft IEP goals in a manner that the parents find optimal, as long as the goals are objectively measurable. (*Bridges v. Spartanburg County School Dist. Two* (D.S.C. Sept 2, 2011, No. 7:10-CV-01873-JMC) 2011 WL 3882850 [the use of percentages tied to the completion of discrete tasks was an appropriate way to measure student progress].) A failure to offer an appropriate goal is a procedural violation of the IDEA. (*Park v. Anaheim Union High School Dist.*, *supra*, 464 F.3d at p. 1031).

Student did not show that San Benito failed to develop appropriate academic goals for her. Student had three IEP goals: an academic reading, an academic writing, and an academic math goal. Other than argument, Student did not present any evidence to support that San Benito did not develop appropriate academic goals during the applicable time period. Student attorney's argument was not evidence. Parent did not dispute that the level of work Student received was appropriate, and was not qualified to opine on the appropriateness of Student's goals. No witness opined at hearing that San Benito developed inappropriate goals for Student at any relevant time.

Student worked on the reading and writing goals in the English class. Hagmann measured the two goals based on work Student performed, and opined that Student

progressed on both goals. Hagmann also opined that the reading and writing goals were appropriate for Student.

Student worked on the math goal in the pre-algebra class. Soto measured the math goal based on work Student performed, and opined that Student progressed well toward the goal. Soto opined that the math goal was appropriate for Student.

Student did not offer any expert testimony or credible evidence that contradicted Hagmann's or Soto's opinions that the three IEP goals were appropriate. Student did not offer any evidence, expert or otherwise, that Student needed any other academic goal than the reading, writing and math goals.

Student did not prove that San Benito did not develop appropriate academic goals for Student from the beginning of the 2020-2021 school year to March 24, 2021.

#### ISSUE 5: DID SAN BENITO DENY STUDENT A FAPE FROM THE BEGINNING OF THE 2020-2021 SCHOOL YEAR THROUGH MARCH 24, 2021, BY FAILING TO OFFER SUFFICIENT INTENSIVE INDIVIDUAL SERVICES IN THE FORM OF A ONE-TO-ONE AIDE?

Student contends she needed an in-person, one-to-one aide to read and explain all text and work. San Benito contends that Student did not need a one-to-one aide to access her curriculum successfully.

Student did not show that she required a one-to-one aide to receive a FAPE. (*See, Endrew F.*, 580 U.S. \_\_\_\_ [137 S.Ct. 988, 1000].) Parent was the only witness who opined at hearing that Student needed an in-person, one-to-one aide. Parent opined that having someone in-person read and explain all text and work would benefit

Student by increasing her reading comprehension and focus resulting in grade improvement. Parent did not observe Student's online education and had no personal knowledge of Student's online learning, or the special education cohort program. Student did not show that Parent had the background, education, training, or personal knowledge as a basis for her opinion. Without any factual support, Parent's opinion on this issue was no more than a preference. Absent factual support, parental preference alone was insufficient to satisfy Student's burden of proving she required an in-person, one-on-one aide to access her education. Student accessed her education and did well throughout the 2020-2021 school year, earning mostly As and Bs. Student did not present any evidence to support that she needed an in-person, one-to-one aide to access her educational program.

San Benito used a criteria rubric to determine if students needed a one-to-one aide. Case manager Vasquez opined that Student did not meet any criteria for a one-to-one aide. Student did not have any maladaptive behaviors, was not severely handicapped, and was capable of learning in all her classes without the intensive services of a one-to-one aide. Vasquez further opined that having a one-to-one aide in high school would hinder Student's independence, social emotional development, and peer interactions. Student's teachers who taught, and observed Student throughout the 2020-2021 school year also persuasively opined that Student did not need a one-to-one aide to successfully access her curriculum. Student did not prove she needed a one-to-one aide from the beginning of the 2020-2021 school year to March 24, 2021.

## 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: San Benito did not deny Student a FAPE from the beginning of the 2020-2021 school year through March 24, 2021, by assigning Student to distance learning without providing in-person services, in person. San Benito prevailed on Issue 1.

Issue 2: San Benito did not deny Student a FAPE from the beginning of the 2020-2021 school year through March 24, 2021, by assigning Student to distance learning without offering, or evaluating the need for, all necessary accommodations. San Benito prevailed on Issue 2.

Issue 3: San Benito did not deny Student a FAPE from the beginning of the 2020-2021 school year through November 2020, by assigning only one-hour a day of virtual distance learning. San Benito prevailed on Issue 3.

Issue 4: San Benito did not deny Student a FAPE by failing to develop appropriate academic goals in the 2020-2021 school year through March 24, 2021. San Benito prevailed on Issue 4.

Issue 5: San Benito did not deny Student a FAPE from the beginning of the 2020-2021 school year through March 24, 2021, by failing to offer sufficient intensive individual services in the form of a one-to-one aide. San Benito prevailed on Issue 5.



## ORDER

1. All Student's requests for relief are 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/

Sabrina Kong

Administrative Law Judge

Office of Administrative Hearings