

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2021050118

PARENT ON BEHALF OF STUDENT,

v.

SAN DIEGO UNIFIED SCHOOL DISTRICT.

DECISION

AUGUST 24, 2021

On, May 4, 2021, the Office of Administrative Hearings, called OAH, received a due process hearing request from Student, naming San Diego Unified School District, as respondent. Administrative Law Judge, Rita Defilippis, heard this matter via videoconference on June 29, 30, July 1, 2, 6, 7, 13, and 14, 2021.

Thomas Nelson, Attorney at Law, represented Student. Parents attended all hearing days on Student's behalf. Sarah Sutherland, Attorney at Law, represented San Diego. Hoaihuong Orletta Nguyen, Program Specialist, attended all hearing days on San Diego's behalf.

At the parties' request OAH continued the matter until August 11, 2021, for written closing briefs. The record was closed, and the matter was submitted on August 11, 2021.

ISSUES

Student's issues were discussed and clarified on the first day of hearing and an amended order following prehearing conference was issued. The hearing reconvened the following day. On July 2, 2021, a Second Amended Order Following Prehearing Conference was issued, adding Student's Issue 2(p) which was inadvertently omitted from the Amended Order Following Prehearing Conference. The Issues set forth below reference a document called an individualized school healthcare plan, the accurate title. This document was referred to by various names and acronyms before and during hearing. In this decision this document is referred to a "health plan".

The issues as set forth in the second amended order following prehearing conference, and agreed to by the parties, are as follows:

1. Did San Diego deny Student a free appropriate public education, called a FAPE, in the 2019-2020 school year by:
 - a. failing to assess Student in all areas of suspected disability, specifically by failing to conduct a music therapy assessment, following Parents' April 23, 2020 request;
 - b. failing to timely respond to Parents' concerns regarding the ineffectiveness of Student's distance learning plan; the failure to implement Student's speech and language, occupational therapy,

- physical therapy, and adapted physical education related services;
and Student's lack of exposure to Student's nondisabled peers;
 - c. failing to implement Student's February 19, 2020 individualized education program, called an IEP, specifically, Student's speech and language, occupational therapy, physical therapy, and adapted physical education related services; the provision of a working communication device; and Student's exposure to Student's nondisabled peers;
 - d. failing to consider a continuum of placement options at Student's June 8, 2020 IEP team meeting;
 - e. failing to make a clear and specific offer of a FAPE in Student's February 19, 2020 IEP?
2. Did San Diego deny Student a FAPE during the 2020-2021 school year, up to May 3, 2021, by:
- a. failing to assess Student in all areas of suspected disability, specifically by failing to conduct a music therapy assessment;
 - b. failing to timely respond to Parent's September 8, 2020 expressed concerns regarding the ineffectiveness of Student's distance learning plan; the failure to provide Student's speech and language, occupational therapy, physical therapy, and adapted physical education related services; and Student's defective communication device;
 - c. failing to provide prior written notice in response to Parents' February 17, 2021 requests for applied behavior analysis services, compensatory education services, and changes to Student's health plan;

- d. failing to implement Student's speech and language, occupational therapy, physical therapy, and adapted physical education related services, and provision of a working communication device, pursuant to Student's February 19, 2020, and February 17, 2021 IEP's;
- e. failing to offer applied behavior analysis services, an aide trained in applied behavior analysis, and sufficient instruction by a credentialed teacher;
- f. failing to provide Student with instruction by a credentialed teacher, as required by Student's February 17, 2021 IEP;
- g. failing to provide speech and language services at a time Student was available to participate;
- h. failing to provide appropriate services, specifically by insisting on physical barriers and physical distancing and isolation of Student from his peers upon his return to in-person instruction;
- i. failing to develop pragmatic language IEP goals;
- j. failing to offer appropriate supports and assessments to facilitate Student's goal for wearing a Covid-19 related face mask;
- k. preventing Parents' meaningful participation in the February 17, 2021 IEP team meeting, and addendum IEP team meetings, by refusing to consider and discuss Parents' requested changes to Student's health plan;
- l. failing to include someone with the authority to make changes to Student's health plan on Student's February 17, 2021 IEP team;
- m. making the implementation of Student's IEP contingent upon agreeing to all aspects of the IEP, including Student's health plan;

- n. failing to provide accommodations and modifications to facilitate Student's instruction in a classroom with peers, including those with and without disabilities;
- o. predetermining Student's placement, specifically by predetermining the contents of Student's health plan; and
- p. failing to make a clear and specific offer of a FAPE in Student's February 17, 2021 IEP?

JURISDICTION

This hearing was held under the Individuals with Disabilities Education Act, called IDEA, 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 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, students, 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, 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, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see 20 U.S.C. §1415(i)(2)(C)(iii).) Student requested the hearing in this case and has the burden of proof on all issues. The factual statements below 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 six years old at the time of hearing. Student resided with Parents within San Diego's geographic boundaries at all relevant times. Student was eligible for special education under intellectual disability and other health impairment based on Student's diagnoses of seizure disorder and creatine transporter deficiency. Creatine transporter deficiency is a rare metabolic disorder related to creatine formation in the body which results in global developmental delays and muscle weakness.

ISSUE 1(E): DID SAN DIEGO DENY STUDENT A FAPE DURING THE 2019-2020 SCHOOL YEAR BY FAILING TO MAKE A CLEAR AND SPECIFIC OFFER OF A FAPE IN STUDENT'S FEBRUARY 19, 2020 IEP?

Student's Issue 1 asserts a FAPE denial for the 2019-2020 school year; however, the claim is predicated on specific alleged denials commencing on dates certain. The earliest claim, Issue 1(e), starts February 19, 2020. No claims were made during the 2019-2020 school year occurring earlier. Accordingly, no determination is reached in this decision regarding FAPE claims arising before February 19, 2020.

Student contends that San Diego failed to make a clear and specific offer of a FAPE during the 2019-2020 school year from February 19, 2020. Student asserts that the services described in Student's February 19, 2020 IEP were vague and allowed San Diego discretion to determine whether the services would be provided individually, in group, or through collaboration and consultation. Student contends the IEP offer contained insufficient information to inform Parents' decision regarding the offer of services or to enforce the IEP's implementation. As such, Student contends Parents were denied meaningful participation in the IEP development process, resulting in a denial of a FAPE. San Diego argues that Student's February 19, 2020 IEP offer was clear, as Parents consented to the services, and the services could be implemented as written.

The preponderance of the evidence presented at hearing established that Student's entire February 19, 2020 IEP offer was unclear.

The IEP is the "centerpiece of the [IDEA's] education delivery system for disabled children" and consists of a detailed written statement that must be developed, reviewed, and revised for each child with a disability. (*Honig v. Doe* (1988) 484 U.S. 305, 311; 20 U.S.C. §§ 1401 (14), 1414 (d)(1)(A); Ed. Code, §§ 56032, 56345.) The IDEA requires a school district to make a formal written offer of placement. (*Union School Dist. v. Smith* (9th Cir. 1993) 15 F.3d 1519, 1526.) (*Union*.) The *Union* court stated that this formal requirement had important purposes that were not merely technical, and that it should be enforced rigorously. (*Ibid.*) First, a formal written offer of placement created a clear record that would help to eliminate troublesome factual disputes many years later about when placements were offered, what placements were offered, and what additional educational assistance was offered to supplement a placement, if any. (*Ibid.*) Second,

citing 20 U.S.C. section 1415(b)(1)(E), a formal, specific offer of placement from a school district would greatly assist parents in “present[ing] complaints with respect to any matter relating to the ... educational placement of the child.” (*Ibid.*)

In enacting the IDEA, Congress was as concerned with parental participation in the enforcement of the IEP as it was in its formation. (*M.C. by and through M.N. v. Antelope Valley Union High Sch. Dist.*, (9th Cir. 2017) 858 F.3d. 1189, 1198.) Parents must be able to use the IEP to monitor and enforce the services that their child is to receive. (*Ibid.*) When a parent is unaware of the services offered to the student, and cannot monitor how the services are provided, a FAPE has been denied, whether or not the parent had ample opportunity to participate in the formulation of the IEP. (*Ibid.*)

On February 19, 2020, an IEP team meeting was convened to discuss Student’s transition to kindergarten for the 2020-2021 school year. Student’s February 19, 2020 IEP describes the services for the remainder of Student’s early childhood preschool placement and for Student’s kindergarten placement for the 2020-2021 school year. Student’s February 19, 2020 IEP special education and related services are set forth in the discussion below.

STUDENT’S EARLY CHILDHOOD SERVICES WERE UNCLEAR

The February 19, 2020 IEP offered 12 hours of early childhood specialized academic instruction services for the remainder of the 2019-2020 school year in a separate classroom on public-school site, identified as Alcott Elementary School, starting February 19, 2020 and ending August 30, 2020. The IEP offer required instruction of Student in small and large groups, and individually, and collaboration and consultation with service providers and Parents.

In *Tamalpais Union High School District v. D.W.*, (N.D. California, 2017) 271 F.Supp.3d 1152, 1161-1162, the court found that failing to delineate how much of the 45-minutes of speech services were individual vs. group speech and language services, failed to constitute a clear offer of a FAPE.

The services here were even less clear than in *Tamlapais, supra*. Under this offer, it is possible Student could have received exclusively direct instruction or absolutely none, had San Diego elected to provide only consultation. The early childhood services were unclear as they failed to identify the weekly frequency and duration of services or to identify how many hours would be used for direct services and how many for collaboration and consultation.

STUDENT'S KINDERGARTEN SPECIALIZED ACADEMIC INSTRUCTION WAS UNCLEAR

The February 19, 2020 IEP offer for Kindergarten specialized academic services, starting August 31, 2020, and ending February 17, 2021, included 20 hours per week in a separate classroom, and 10 hours per week in a regular classroom, each on a public-school site, identified as Hawthorne Elementary School. The 20 hours of specialized academic instruction in a separate classroom required the education specialist/paraeducator to work with Student in small groups or individually. These services are unclear as the offer contained insufficient information for Parents to determine whether Student would be instructed by himself in a separate classroom with no other children, or in a classroom with peers, instructed either in a group or individually, two very different placements.

At the May 19, 2020 addendum IEP team meeting, the IEP team changed Student's kindergarten services offer from small group direct services to small groups or individually. The action notes of the May 19, 2020 IEP establish that the IEP team decided that Student would be in a separate classroom for the majority of the school day at the beginning of the year and have minimal access to the general education classroom. The team decided that after 60 days, the IEP team would reconvene to determine what activities Student could join in the general education setting and separate setting and restructure the specialized academic instruction hours accordingly. These notes underscore the lack of clarity of the IEP offer. The service hours listed in the IEP are inconsistent with the decision to keep Student in the classroom with minimal access to the general education setting.

The 10 hours per week of kindergarten specialized academic instruction in the regular classroom required the education specialist/paraeducator to work with Student, consult with the general education teacher, and prepare materials for Student. These services were unclear as Parents had insufficient information to determine whether Student would get any direct services or merely prepared materials, or just consultation, or any combination of the three.

STUDENT'S FEBRUARY 19, 2020 OFFER OF RELATED SERVICES WAS UNCLEAR

Student's February 19, 2020 IEP offer of occupational therapy services included 16 hours per year in a separate classroom on a public-school site starting February 19, 2020 and ending February 17, 2021. The occupational therapist was required to meet with Student on a regular basis, to collaborate with classroom staff, and to monitor the effectiveness of strategies.

The February 19, 2020 IEP offer for speech and language services included 30 hours per year in a separate classroom on a public-school site starting February 19, 2020 and ending on February 17, 2021. The speech therapist was required to implement the services through small group, direct therapy, and collaboration. An addendum IEP team meeting was held on April 22, 2020. The April 22, 2020 IEP service delivery removed any reference to small group instruction, but again left whether or not there would be direct therapy or collaboration to San Diego's discretion.

The February 19, 2020 IEP offer for physical therapy included 16 hours per year in a separate classroom on a public-school site starting February 19, 2020 and ending February 17, 2021. The physical therapist was required to provide weekly services up to 16 hours for skill building and consultation.

The February 19, 2020 IEP offer for adapted physical education included 16 hours per year in a separate classroom on a public-school site starting February 19, 2020 and ending February 17, 2021. Adapted physical education instructor was required to provide direct instruction while also collaborating and consulting with the IEP team, the general physical education teacher, and support staff regarding progress, strategies for inclusion, and to suggest any necessary modifications.

The February 19, 2020 offers for occupational therapy, speech and language, physical therapy, and adapted physical education were unclear. The IEP offer failed to identify the frequency and duration of the services or to identify how much of the annual or weekly total amount of hours was required to be provided directly to Student, as opposed to collaboration and consultation time.

The preponderance of evidence presented at hearing established that San Diego failed to provide Student with a formal written offer of placement consistent with the requirements of IDEA as rigorously enforced in *Union*. (*Union School Dist. v. Smith*, *supra*, 15 F.3d 1519, 1526.) The entire offer of services in Student's February 19, 2020 IEP, including addendum IEP's denied Student a FAPE as it was too vague to provide enough information for Parents to make an informed decision about whether to accept the IEP offer, monitor Student's services, or enforce the offer in the event of a future dispute. (*M.C. by and through M.N. v. Antelope Valley Union High Sch. Dist.*, *supra*, 858 F.3d 1189, 1198.) Accordingly, Student sustained the burden of proof as to this issue. The denial of a FAPE continued up to February 17, 2021, as the February 19, 2020 IEP services remained unchanged and unclear up to that time.

ISSUE 1(C): DID SAN DIEGO DENY STUDENT A FAPE DURING THE 2019-2020 SCHOOL YEAR BY FAILING TO IMPLEMENT STUDENT'S FEBRUARY 19, 2020 IEP, SPECIFICALLY, STUDENT'S SPEECH AND LANGUAGE, OCCUPATIONAL THERAPY, PHYSICAL THERAPY, AND ADAPTED PHYSICAL EDUCATION RELATED SERVICES; THE PROVISION OF A WORKING COMMUNICATION DEVICE, AND EXPOSURE TO STUDENT'S NONDISABLED PEERS?

This issue is not reached based on the prior legal conclusion that the February 19, 2020 IEP, including addendum IEP's, failed to make a clear written offer of special education and related services. Student's remedy for that denial, as analyzed later in this decision, is comprehensive such that whether the unclear services were implemented is not consequential. Accordingly, no finding is made on this issue.

ISSUES 1(A) AND 2(A): DID SAN DIEGO DENY STUDENT A FAPE DURING THE 2019-2020 AND 2020-2021 SCHOOL YEAR BY FAILING TO CONDUCT A MUSIC THERAPY ASSESSMENT FOLLOWING PARENT'S APRIL 23, 2020 REQUEST?

Student contends that San Diego should have conducted a music therapy assessment following Parent's April 23, 2020 request due to Student's demonstrated response to, and enjoyment of music. Student asserts that San Diego's refusal to conduct a music therapy assessment denied Student a FAPE.

San Diego contends that Parent's request for a music therapy assessment was appropriately considered and declined based on Student's demonstrated progress and ability to access his special education services, without music therapy. San Diego asserts that it properly offered to conduct a music therapy assessment in April 2021, following Parent's second request for the assessment.

Student did not sustain the burden of proof that San Diego should have suspected that Student required a music therapy assessment. Student further did not establish that San Diego's refusal to assess Student was improper.

A school district must ensure that an evaluation is conducted if it determines that the educational or related service needs, including improved academic achievement and functional performance of the child, warrant a reevaluation, or if the child's parents or teacher requests an evaluation. (20 U.S.C. § 1412(a)(2)(A).)

If the school district wishes to deny a parent's request for a special education assessment due to a parent's suspicions that their child has a disability in need of special education, it must provide prior written notice to the parents explaining that it refuses to conduct an evaluation and provide an explanation as to why it does not suspect that the child has a disability and what records or evaluations it used as the basis for its decision. (34 C.F.R. § 300.503(b) (2007); Ed. Code, § 56500.4, subd. (b).) This is known as prior written notice.

On February 17, 2020, Parent requested a music therapy assessment at Student's February 19, 2020 IEP team meeting. By April 2020, Parent had not heard back regarding the request and emailed Student's special education teacher inquiring about the status of the request. Student's teacher emailed back with an attached prior written notice, dated April 22, 2020. The email chain of communication culminated on April 23, 2020.

San Diego established that it considered Parents' request. Student's only evidence of the need for the music therapy assessment, was his apparent enjoyment and positive response to music. Student did not present evidence establishing that such enjoyment triggers an obligation for a school district to assess in that area. The evidence established that at the time of Parent's request, Student was responding to a variety of different teaching approaches, including the music strategies that had been incorporated into Student's program.

Student's other evidence supporting Student's claimed need for music therapy was unpersuasive. Student offered an email from Student's early childhood special education teacher which stated her opinion that Student would benefit from music

therapy, to support Student's claim that San Diego was required to conduct a music therapy assessment. However, Student's teacher's statement did not support a suspicion that Student needed music therapy to receive a FAPE. In the same email, Student's teacher informed Parent that the standard for determining the appropriateness of a music therapy assessment involved stricter considerations, and invited Parent to renew her request, if needed, at a later time. Parent also testified that Student enjoyed and responded to music. Student's evidence that Student enjoys and responds to music similarly fell short of supporting Parent's claim that San Diego should have suspected that Student may need music therapy to receive a FAPE.

Student provided no evidence at hearing to establish what music therapy is, how it may help Student, or why Student's unique needs required music therapy and a music therapy assessment either in the 2019-2020 or 2020-2021 school year to receive a FAPE. Student again requested a music therapy assessment in April 2021, to which San Diego agreed. Student failed to sustain the burden of proof that San Diego denied Student a FAPE during the 2019-2020 and 2020-2021 school years, up to May 3, 2021, by failing to conduct a music therapy assessment.

ISSUE 1(B): DID SAN DIEGO DENY STUDENT A FAPE DURING THE 2019-2020 SCHOOL YEAR BY FAILING TO TIMELY RESPOND TO PARENT'S CONCERNS REGARDING THE INEFFECTIVENESS OF STUDENT'S DISTANCE LEARNING PLAN; THE FAILURE TO IMPLEMENT STUDENT'S SPEECH AND LANGUAGE, OCCUPATIONAL THERAPY, PHYSICAL THERAPY, AND ADAPTED PHYSICAL EDUCATION RELATED SERVICES, AND STUDENT'S LACK OF EXPOSURE TO STUDENT'S NONDISABLED PEERS?

Student contends that San Diego denied Student a FAPE during the 2019-2020 school year, by failing to timely respond to Parents' concerns regarding the ineffectiveness of the distance learning plan, the failure to implement Student's related services, and lack of exposure to Student's nondisabled peers.

San Diego contends it consistently responded to all Parent concerns and provided Student's IEP related services to the greatest extent possible, in alternative ways, during the unprecedented Covid-19 pandemic.

Student failed to sustain the burden of proof on this issue as no evidence was presented at hearing that Parent expressed any of the concerns alleged in this issue during the 2019-2020 school year. Accordingly, Student failed to prove that San Diego denied Student a FAPE during the 2019-2020 school year by failing to timely respond to Parents concerns regarding the ineffectiveness of Student's distance learning plan; the failure to implement Student's speech and language, occupational therapy, physical therapy, and adapted physical education related services, and Student's lack of exposure to Student's nondisabled peers.

ISSUE 1(D): DID SAN DIEGO DENY STUDENT A FAPE DURING THE 2019-2020 SCHOOL YEAR BY FAILING TO CONSIDER A CONTINUUM OF PLACEMENT OPTIONS AT STUDENT'S JUNE 8, 2020 ADDENDUM IEP TEAM MEETING?

Student contends that San Diego was obligated to discuss the continuum of placement options for Student, specifically, alternatives to distance learning for the delivery of services for Student following school closures due to Covid-19. In Student's closing brief, Student suggests that San Diego should have considered, at a minimum, more one-to-one distance learning time.

Generally, San Diego asserts that Parents were dissatisfied with any form of virtual instruction for Student and the only alternative Parents would have accepted, was in-person instruction of Student without any requirement for Student to wear a mask.

The preponderance of the evidence presented at hearing established that San Diego considered the continuum of placement options at Student's June 8, 2020 IEP team meeting. Accordingly, Student did not meet his burden on this issue.

EVENTS NECESSITATING STUDENT'S DISTANCE LEARNING PLAN

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 19, 2020, due to the rapid spread of COVID-19 throughout the State of California, Governor Newsom mandated that all individuals living in California stay home except as needed to maintain continuity of operations of federal critical infrastructure sectors. (Governor's Exec. Order No. N-33-20 (March 19, 2020).)

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 30, 2020, the California Department of Education, called the CDE, issued guidance encouraging school districts to use distance technology to meet its obligations under the IDEA. (*CDE Guidance* (March 30, 2020).)

On April 9, 2020, CDE issued guidance that not all IEPs needed to be amended to change to distance learning. Citing to the US DOE's March 21, 2020 guidance, it stated that under the unique circumstances of the COVID-19 pandemic, it was not necessary for a school district to convene an IEP team meeting, or propose an IEP amendment without a team meeting, for the purpose of discussing the need to provide services away from school, because that change must necessarily occur. CDE stated that it was not necessary for a school district to obtain the parent's written consent to provide previously agreed-upon services away from school. The IEP that was in effect at the

time of physical school closure remained in effect for students, and the CDE directed school districts, to the greatest extent possible, to continue to provide the services called for in the IEPs in alternative ways. (*CDE Guidance*, April 9, 2020.)

Although an IEP amendment was not necessary for every child with an IEP, the CDE noted that there might be instances where amending an IEP to reflect the change to distance learning might be necessary, and urged school districts to communicate and collaborate with parents to transition students to distance learning. (*Ibid.*)

San Diego closed its schools on March 13, 2020, to all students in response to the Covid-19 pandemic and related emergency orders. In late April 2020, virtual instruction was offered to all San Diego Students through the end of the 2019-2020 school year. On April 22, 2020, Parent received San Diego's prior written notice informing Parent that San Diego schools will remain closed for the remainder of the 2019-2020 school year. The notice provided Parents with information about Student's distance learning plan and invited Parents to participate and provide input regarding Student's needs and the provision of FAPE to Student during the Covid-19 crisis. Student's distance learning plan was described in the notice to include education specialist/case manager and related service providers' consultation and collaboration with Parents to provide Student with access to curriculum and instruction, to supplement Student's ongoing learning to the maximum extent possible.

Based on these provisions, Student did not establish that San Diego denied Student a FAPE from March 13, 2020 to April 22, 2020, as no San Diego Students were being provided educational services at that time. After April 22, 2020, and for the remainder of the 2019-2020 school year, Student's distance learning plan consisted only

of collaboration and consultation with Parents. Student's service providers provided online resources for Parents and links to educational activities that Parents could do with Student.

SAN DIEGO CONSIDERED THE CONTINUUM OF STUDENT'S PLACEMENT OPTIONS

In determining the educational placement of a special education student, the IEP team must consider placements along the continuum of alternative placements. (34 C.F.R. §§ 300.114-300.118; Ed. Code, § 56342.) Each special education local plan area shall ensure that a continuum of program options is available for special education students. The continuum of program options shall include all, or any combination, of the following, in descending order of restrictiveness:

- a. regular education programs;
- b. a resource specialist program;
- c. related services;
- d. special day classes;
- e. nonpublic, nonsectarian school services;
- f. state special schools;
- g. instruction in non-classroom settings;
- h. itinerant instruction;
- i. instruction using telecommunication, and instruction in the home, in hospitals, and in other institutions.

(34 C.F.R. § 300.115; Ed. Code §§ 56360, 56361.)

San Diego held addendum IEP team meetings for Student on April 22, May 19, and June 6, 2020, to complete the development of Student's annual February 17, 2020 IEP. Student's related services were discussed and agreed to at the February 19, 2020 IEP team meeting. On May 19, 2020 the IEP team discussed the continuum of placement options and offered that Student would start the 2020-2021 school year spending the majority of the school day in a separate classroom setting so that Student could adjust to the new school environment, with minimal access to the general education setting. The May 19, addendum IEP contained a statement that the IEP team considered Student's placement in general education class, a separate classroom with specialized academic instruction for the majority of the day, and a separate classroom for the majority of the day and related services. The concerns regarding these considered placement options were listed, including reduced opportunity for interactions with typically developing peers, resulting in fewer opportunities to hear age-appropriate language and to see or be a part of typical social interactions and play.

On June 8, 2020, the IEP team met to discuss Student's assistive technology assessment. Student's February 19, 2020 IEP as amended June 8, 2020, contained the same statement as the May 19, 2020 addendum IEP regarding the IEP team's consideration of alternative placements for Student. The preponderance of the evidence presented at hearing established that San Diego considered the continuum of placement options for Student.

Although there was no evidence presented at hearing that the June 8, 2020 IEP team again discussed the continuum of placement options, Student failed to prove that such a discussion was necessary. Student's argument that San Diego was obligated to provide Student with an alternative to distance learning at the June 8, 2020 IEP team meeting is unpersuasive. There was no evidence presented at hearing that Student was

experiencing difficulty with distance learning, or that Parent reported any difficulty at the time of the June 8, 2020 IEP team meeting. Student's distance learning plan, at the time of the June 8, 2020 addendum IEP team meeting, consisted of consultation and collaboration between San Diego and Parent to provide Parent with online resources for educational activities that Parent could do with Student. There was no evidence presented at hearing that San Diego had begun any direct virtual instruction of Students in the early childhood class, group or individual, or that any other alternatives to distance learning were available for the IEP team to consider at that particular time in the Covid-19 pandemic. Accordingly, Student failed to sustain the burden of proof that San Diego denied Student a FAPE by failing to consider the continuum of placement options at the June 8, 2020 addendum IEP team meeting.

ISSUE 2(B): DID SAN DIEGO DENY STUDENT A FREE APPROPRIATE PUBLIC EDUCATION DURING THE 2020-2021 SCHOOL YEAR, BY FAILING TO TIMELY RESPOND TO PARENTS' SEPTEMBER 8, 2020 EXPRESSED CONCERNS REGARDING THE INEFFECTIVENESS OF STUDENT'S DISTANCE LEARNING PLAN; THE FAILURE TO PROVIDE STUDENT'S SPEECH AND LANGUAGE, OCCUPATIONAL THERAPY, PHYSICAL THERAPY, AND ADAPTED PHYSICAL EDUCATION RELATED SERVICES; AND STUDENT'S DEFECTIVE COMMUNICATION DEVICE?

Student's issue alleges that once Parent expressed concerns regarding the ineffectiveness of Student's distance learning plan, lack of related services, and defective communication device, San Diego failed to timely respond the Parent's concerns. In Student's closing brief, Student did not address his claim that San Diego failed to timely

respond to Parent's concerns and instead, argues that San Diego's October 20, 2020 IEP team response to Parents concerns was insufficient. The sufficiency of San Diego's response at the October 20, 2020 IEP team meeting was not pled and exceeds the scope of this case, and is therefore, not addressed.

San Diego contends that it timely responded to Parent's September 8, 2020 concerns. San Diego contends that it responded to Parent's concerns that Student's distance learning plan was ineffective, by providing one-to-one virtual instruction, starting in September 2020, and offering in-person services in October, which San Diego asserts Parent declined after Parent was informed that Student had to wear a Covid-19 related protective face mask. San Diego asserts in its closing brief that Student could learn to wear a mask, but Parents did not wish for Student to wear a mask at school. San Diego contends that it provided Student with related services to the greatest extent possible, through virtual instruction and teacher provided resources for Parents. Lastly, San Diego asserts that it timely repaired Student's communication device, and that Student was not denied a FAPE from briefly not having one because alternative low-tech options were provided to Student and use of a communication device was not Student's primary mode of communication.

On September 8, 2020, Parent sent an email to Student's special education teacher and case manager, Serena Martin with the subject line, "distance learning and next steps". The email gave a detailed accounting of Parent's concerns about the ineffectiveness of Student's distance learning plan, since it began in the spring. Parent informed Martin that Parents were seeking private educational services and would sign a release for the provider of the services. Parent informed Martin that Student had not received any individual occupational, speech, or physical therapy services since March 2020. Parent complained that Student had received only emailed activities and ideas

from the therapists for Parent's interventions, as well as a few virtual group speech and occupational therapy sessions. Parent requested speech, occupational, and physical therapy logs since March 2020. Parent informed Martin that Student's communication device was not working over the summer, and it took several weeks of email communications to get it fixed. Lastly, Parent requested an IEP team meeting.

An IEP team shall meet whenever any of the following occurs: the student has received an initial formal assessment; the student demonstrates a lack of anticipated progress; the parent or teacher requests a meeting to develop, review, or revise the IEP; at least annually, to review the student's progress, the IEP, the appropriateness of placement, and to make any necessary revisions. (Ed. Code, § 56345.) When a parent requests an IEP team meeting, the meeting shall be held within 30 days, not counting days between the pupil's regular school sessions, terms, or days of school vacation in excess of five schooldays, from the date of receipt of the parent's written request. (Ed. Code, § 56345.5)

Parent's September 8, 2020 email to Martin was a written request for an IEP team meeting and also put San Diego on notice of Parent's concerns that Student was not making anticipated progress. San Diego was required to hold an IEP team meeting to discuss Student's progress and to hold the meeting by October 8, 2020, based on Parents meeting request.

San Diego failed to timely convene an IEP team meeting, as an addendum IEP team meeting was not held until October 20, 2020. The October 20, 2020 IEP team, including Parent, discussed Parent's concerns that Student did not access distance learning and had not had appropriate services. The team noted Student's difficulty attending and interacting during virtual distance learning instruction. The team also

acknowledged that Student had not had speech and language services since March 2020 due to the school not having a speech and language therapist, and that Student was without a working communication device over the summer. 30-minute one-to-one Zoom specialized academic instruction and occupational therapy sessions per week were offered by San Diego in response to Student's difficulty accessing group virtual instruction.

The failure to convene a timely IEP team meeting is a procedural violation of the IDEA. Not every procedural violation is sufficient to support a finding that the child in question was denied a FAPE. *J.W. ex rel. J.E.W. v. Fresno Unified School District* (9th Cir. 2010) 626 F. 3d 431, 432-433.) Technical deviations from the IEP, for example, will not render an IEP invalid. *Amanda J. v. Clark County School District*, (9th Cir. 2001) 267 F. 3d 877, 892; 34 C.F.R. 300.510.(a)(2).) On the other hand, procedural inadequacies that result in the loss of educational opportunity, or seriously infringe the parents' opportunity to participate in the IEP formulation process, or that caused a deprivation of educational benefits, clearly result in the denial of a FAPE. (*Doug C. v. Hawaii Dept. of Education* (9th Cir. 2013) 720 F. 3d. 1038, 1043.)

San Diego violated the timeline requirements of Education Code section 56345.5 by not holding an IEP meeting within 30 days of Parent's September 8, 2020 requests. However, Student failed to establish that the 12-day delay in holding the IEP team meeting resulted in Student's loss of educational opportunity, seriously infringed Parent's opportunity to participate in the IEP formulation process or caused a deprivation of educational benefit to Student. Accordingly, Student failed to sustain the burden of proof on this issue.

ISSUE 2(G): DID SAN DIEGO DENY STUDENT A FREE APPROPRIATE PUBLIC EDUCATION DURING THE 2020-2021 SCHOOL YEAR, UP TO MAY 3, 2021, BY FAILING TO PROVIDE SPEECH AND LANGUAGE SERVICES AT A TIME STUDENT WAS AVAILABLE TO PARTICIPATE?

Student contends that San Diego was required to schedule speech and language services in a way that accommodated Student's private preschool schedule because Parents secured the private services due to San Diego's alleged failure to meet Student's disability-related need for in-person instruction. San Diego contends that it properly offered speech and language services during San Diego's school day and was not obligated to accommodate Student's unavailability to participate in those services for reasons outside of San Diego's control, namely, Parents' choice to enroll Student in a private education program.

Beginning October 17, 2020, Student as enrolled in a private preschool for 12 hours per week on Monday, Wednesday, and Friday mornings. Parents unilaterally enrolled Student in the preschool program because they believed Student was not accessing San Diego's virtual instruction, due to his disabilities. The private preschool permitted Student to attend the preschool program in-person without a mask, due to his disability related inability to wear one. At the same time, Student continued his enrollment in San Diego's kindergarten program pursuant to Student's IEP. Student missed San Diego's instruction on days he attended the preschool, as Parents prioritized Student's need for in-person instruction.

San Diego's speech therapist, Ana Creed, reached out to Parent to schedule speech and language services for Student in November 2020. Creed informed Parent that speech services could only be scheduled on Wednesday or Friday mornings. Parent informed Creed that Student was unavailable due to his enrollment in a private preschool. On December 3, 2020, Creed emailed Parent regarding Student's inability to attend her speech therapy sessions and advised parent that another speech therapist could serve Student on Thursday mornings. Parent agreed to try to schedule speech therapy on Thursday mornings for the month of December. However, Student did not access any of San Diego's offered speech and language sessions during the 2020-2021 school year up to May 3, 2021, due to his participation in the private preschool.

The IDEA requires that 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. (20 U.S.C. §1400(d)(1); See Ed. Code, § 56000, subd. (a).) Creed offered to schedule speech and language services during the San Diego kindergarten school day in which student was enrolled. Student provided no legal authority to support the claim that San Diego was required, in addition to making services available, to schedule speech services in a way that accommodated Student's participation in the unilaterally chosen private preschool. Accordingly, Student failed to establish that San Diego denied Student a FAPE by failing to offer speech services on days Student was attending private preschool.

ISSUE 2(I): DID SAN DIEGO DENY STUDENT A FAPE DURING THE 2020-2021 SCHOOL YEAR UP TO MAY 3, 2021, BY FAILING TO DEVELOP PRAGMATIC LANGUAGE IEP GOALS?

Student asserts that Student's independent educational evaluation conducted before the February 17, 2021 triennial IEP team meeting made clear that Student needed pragmatic language instruction. Student contends that San Diego's failure to develop pragmatic language goals denied Student a FAPE.

San Diego contends that Student did not require pragmatic language goals, based on Baber's assessment. San Diego asserts that sufficient communication goals were provided to meet Student's communication needs, Parents consented to the goals, and did not request pragmatic language goals when the IEP was developed.

An IEP must include a statement of measurable goals, including academic and functional goals, developed to meet a student's needs that result from the student's disability, to enable the student to be involved in and make progress in the general education curriculum. (20 U.S.C. § 14214(d)(1)(A)(II), 34 C.F.R. § 300.320(a)(2); Ed. Code § 56345, subd. (a)(2).)

Student's February 19, 2020 IEP was admitted as evidence at hearing. The February 19, 2020 IEP included an annual communication goal to engage in reciprocal interaction, within a structured motivating activity, using aided and unaided communication techniques, with two or more partners, given minimal adult support, on four out of five sampled occasions, as measured by the speech therapist teacher observations. At the time the goal was developed, Student took turns and engaged in

reciprocal interactions with peers when fully prompted. Student's February 17, 2021 annual IEP established that, by February 17, 2021, the goal was not met, as Student no longer demonstrated taking conversational turns.

Speech Pathologist, Makenzie Baber, testified at hearing. Baber received a bachelor's degree in psychological and brain sciences with a specialization in cognitive neuroscience, from University of California, Santa Barbara. Baber earned a master's degree in communication disorders from the University of Texas, Dallas. Baber currently works as the lead speech therapist and clinical manager at San Diego Occupational Therapy, where she has worked for the past year. Before that, Baber was a San Diego Unified School District speech therapist for three years. Baber has experience in the diagnosis and treatment of children of all ages with a variety of speech and language difficulties including articulation, language impairments, literacy and learning disorders, and pragmatic language and social difficulties.

Baber conducted a two-hour, in-person, speech and language independent educational evaluation of Student on January 28, and February 4, 2021. Following her assessment of Student, she became Student's private speech and language therapist and provided two 30-minute sessions of in-person, individual therapy per week from February 8, 2021 to present. Baber's testimony was clear and responsive. Baber's testimony detailed Student's communication needs as well as Student's progress in response to Baber's direct therapy. Based on Baber's training, experience, assessment of Student, and direct experience with Student as his private speech therapist, Baber's opinion as to Student's communication needs was given great weight.

Baber's assessment focused on four areas: expressive language, receptive language, augmentative and alternative communication functioning, and pragmatic language. Student demonstrated severe expressive and receptive communication deficits, an inability to use an augmentative and alternative communication device without significant support, and limited eye contact and joint attention skills. Baber recommended direct speech and language therapy in all four areas. Baber attended Student's February 17, 2021 IEP team meeting where she presented and discussed her assessment and recommendations for Student.

Baber found Student's February 17, 2021 speech and language IEP goals to be insufficient. Baber identified the two communication goals in Student's February 17, 2021 IEP, as expressive language goals. Baber opined that Student had needs requiring pragmatic language goals, given Student's social language deficits, which were unexpectedly low, given Student's February 19, 2020 IEP documentation of Student's higher social language functioning.

The preponderance of evidence presented at hearing established that San Diego knew that Student had needs requiring pragmatic language goals since February 17, 2020. The February 17, 2021 IEP team was aware that Student had not met his pragmatic language goal, and that Student had regressed in his pragmatic language skills since February 2020. Baber's assessment established that Student's need for pragmatic language instruction and related IEP goals continued. Once San Diego was aware of Student's continued need for pragmatic language instruction, it was obligated to develop goals to meet Student's pragmatic language needs. (20 U.S.C.

§ 1414(d)(1)(A)(II), 34 C.F.R. § 300.320(a)(2); Ed. Code § 56345, subd. (a)(2).) Accordingly, San Diego's failure to develop a pragmatic language goal denied Student a FAPE as it deprived Student of educational benefit.

ISSUE 2(C): DID SAN DIEGO DENY STUDENT A FAPE BY FAILING PROVIDE PRIOR WRITTEN NOTICE IN RESPONSE TO PARENTS' FEBRUARY 17, 2021 REQUESTS FOR APPLIED BEHAVIOR ANALYSIS SERVICES, COMPENSATORY EDUCATION SERVICES, AND CHANGES TO STUDENT'S INDIVIDUALIZED STUDENT HEALTH SAFETY PLAN?

Student asserts that San Diego denied Student a FAPE by failing to provide prior written notice in response to Parents' February 17, 2021 requests for applied behavior analysis services, compensatory education services, and changes to Student's health plan. There was no evidence presented at hearing that Parents made any requests for applied behavior analysis services, compensatory education services, or changes to Student's health plan on February 17, 2021. Accordingly, Student failed to sustain the burden of proof on this issue.

ISSUE 2(E): DID SAN DIEGO DENY STUDENT A FAPE DURING THE 2020-2021 SCHOOL YEAR BY FAILING TO OFFER APPLIED BEHAVIOR ANALYSIS SERVICES, AN AIDE TRAINED IN APPLIED BEHAVIOR ANALYSIS, AND SUFFICIENT INSTRUCTION BY A CREDENTIALLED TEACHER?

Student contends that the evidence presented at hearing established Student's need for applied behavior analysis and an aide trained in behavior analysis. Student contends that Student's February 17, 2021 IEP offer, including the health plan, required

Student to be instructed separate from his peers. Student argues that the placement offer included much less instruction by a credentialed teacher than the services in his February 17, 2021 requires, as Student's teacher would be in another classroom, 30 feet away, instructing his masked peers. Student contends that San Diego's failure to provide these services denied Student a FAPE.

San Diego asserts that Student was offered a FAPE at all times, in light of the Covid-19 pandemic and related health and instructional limitations the pandemic placed on San Diego. San Diego did not directly address Student's need for applied behavior analysis services or for an aide trained in behavior analysis, if any, in its closing brief or at hearing.

A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective or supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).)

In general, an IEP is a written statement that is developed by parents and school personnel using the IDEA's procedures. The IEP describes the child's present levels of performance, needs, and academic and functional goals related to those needs. It also provides a statement of the special education; related services, which include transportation and other supportive services; and program modifications and accommodations that will be provided for the child to work towards the stated goals,

make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14) and (26), 1414(d)(1)(A); Ed. Code, §§ 56031, 56032, 56345, subd. (a) and 56363 subd. (a); 34 C.F.R. §§ 300.17, 300.34, 300.39 Cal. Code Regs., tit. 5, § 3001, subd. (p).)

In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that “the ‘basic floor of opportunity’ provided by the IDEA consists of access to specialized instruction and related services which are individually designed to provide educational benefit to” a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.)

In *Endrew F. v. Douglas County School Dist.* (2017) 580 U.S. ____ [137 S.Ct. 988, 1000] (*Endrew F.*), the Supreme Court held that a child’s “educational program must be appropriately ambitious in light of his circumstances.” “Every child should have a chance to meet challenging objectives.” (*Ibid.*) *Endrew F.* explained that “this standard is markedly more demanding than the ‘merely more than de minimis’ test... The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” (*Id.* at pp. 1000-1001.) The Court noted that “any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal.” (*Id.*

at p.999.) However, the Supreme Court did not define a new FAPE standard in *Endrew F.* The Court acknowledged that Congress had not materially changed the statutory definition of a FAPE since *Rowley* was decided and so declined to change the definition itself. The Ninth Circuit affirmed that its FAPE standard comports with *Endrew F.* (*E.F. v. Newport Mesa Unified School Dist.* (9th Cir. 2018) 726 Fed.Appx. 535.)

SAN DIEGO HAD KNOWLEDGE THAT STUDENT REQUIRED ABA AND AN AIDE TRAINED IN ABA

Student is eligible for special education based on his intellectual disability and significant health conditions. Student has Autism which he was diagnosed with at age two. Student's disabilities significantly impact his academic, social, motor, communication, and self-help skills. Student is nonverbal and communicates using word approximations, an augmentative and alternative communication device, sign language and nonverbal communication, including eye contact and gestures.

Before school closures due to Covid-19, Student struggled in the area of maintaining attention, staying with a self-chosen activity for 1-5 minutes, and with a teacher -led activity for only 30 seconds to one minute. Student required moderate to maximal prompting and redirecting to focus his attention. Therefore, before school closures due to Covid-19, Student's attention interfered with his access to instruction. In addition to Student's special education and related services at school, Student has received private occupational, speech and language, physical therapy, and applied behavior analysis therapy, outside of school, during the timeframe relevant to this matter.

Parent testified at hearing. Parent's testimony was based on Parent's extensive involvement both in Student's care at home and in the provision of Student's distance learning instruction. Parent was thoughtful and sincere when responding to questions about Student's academic and functional skills. Parent was forthcoming, and her testimony evidenced a collaborative and transparent relationship with San Diego, including administrators and Student's service providers. Parent's testimony was corroborated by other witness testimony and documentary evidence. For these reasons, Parent's testimony was credible and was given great weight.

Following school closures due to Covid-19, San Diego students were instructed virtually, through the computer application, Zoom. Student was provided a distance learning plan with a schedule for virtual instruction for the 2020-2021 school year, scheduling group special education Zoom instruction from 8 am to 11 am. The group instruction was available to Student until all San Diego students returned to in-person instruction on April 12, 2021. However, Student was unable to access the virtual group instruction due to his inattention and distractibility. Parent consistently attempted to assist Student to access the group virtual instruction. Parent's emotional and tearful testimony established that Student was unable to sit and attend to the computer screen. Instead, Student would scream, attempt to elope, throw his communication device, and attempt to close the computer screen. To date, Parent lives with guilt and regret for pushing Student to participate in the virtual instruction and Parent worries about the possible long-term emotional effects this had on Student.

By September 2020, Student's education specialist, Serena Martin, offered one-to-one zoom sessions to Student once a week for 30 minutes. Eventually Student was able to sit and attend to one-to-one virtual instruction with Martin for an average of 15 minutes with the support of Student's private ABA provider, use of a token board by

Martin, use of a white board with hand-over-hand assistance by Student's private ABA provider, and frequent rewards of Student's two-minute-long preferred videos. Student's private applied behavior analysis therapist had already been providing applied behavior analysis in the home, funded through Parent's medical insurance. When schools closed, and Student could not access virtual instruction, Parent requested Student's private therapist to include educationally related behavior therapy, as it was impossible for Student to attend to virtual instruction without this support. The one-to-one virtual sessions continued until February 18, 2021.

In October 2020, Student was offered weekly in-person one-to-one sessions with Martin, along with a select group of other San Diego students having difficulty with distance learning. However, Student was not permitted to attend these in-person sessions due to Student's inability to tolerate a Covid-19 related protective face mask. Student's private ABA provider worked with Student on his tolerance of wearing a face mask. However, through the time-period at issue in this case, Student did not demonstrate the ability to tolerate wearing a face mask.

Martin testified at hearing. Martin's testimony corroborated that of Parent including Student's inability to access virtual instruction, and the need for Student's private ABA therapist to support Student to access one-to-one instruction. Martin was also aware that Student's private applied behavior analysis provider was working with Student to tolerate wearing a mask. Martin's testimony corroborated Parent's reports of Student's struggles, attempted elopement, and significant resistance to attend to a computer screen for instruction. Martin had to get Student's present levels from Parent for Student's February 17, 2021 IEP even after four months of one-to-one virtual sessions.

San Diego's speech and language February 2021 triennial assessment was admitted at hearing and corroborated Student's behavior interfering with his access to virtual instruction. The assessor's interview with Martin documents Martin's reports of Student's escape behaviors, protest vocalizations, and lack of responses during Zoom sessions. Sessions consisted of Martin presenting content on the computer screen while the in-person support adult provided hand-over-hand prompting to elicit a response from Student.

Dr. Rienzi Haytasingh testified at hearing. Dr. Haytasingh received his Doctor of Psychology Degree from Alliant International University in May 2005. He earned a Master of Science Degree in Psychology from National University in June 2001, and his Bachelor of Arts Degree in Psychology from California State University, Chico, in June 1999. Dr. Haytasingh received a Pupil Personnel Service Credential in 2001 and his Board Certification from the American Board of School Neuropsychology in June 2006.

Dr. Haytasingh is currently a neuropsychologist at Brain Learning Psychological Corporation, which he owns, and which provides school neuropsychological and psychoeducational assessments, independent educational evaluations, mental health assessments and consultation to parents and school districts. Prior to that, Dr. Haytasingh worked as a school psychologist for various Southern California school districts for 12 years. His work included consultation, assessment, and intervention services for elementary, middle and high school students. He provided direct and indirect support, conducted needs assessments, and developed applied behavior analysis programs for students with autism.

Dr. Haytasingh conducted an independent psychoeducational in-person assessment of Student on January 21, 2021. The purpose of the assessment was to

determine what services and/or supports Student needs to learn in school; to determine if Student has regressed since school closures in March 2020, and to determine the best learning strategies and methods of instruction for Student to learn. The direct assessment of Student took place over the course of two hours. Dr. Haytasingh conducted interviews of Student's Parent, his private preschool teacher, and private ABA therapist. He observed Student for 30 minutes, via zoom, in Student's private preschool classroom. Dr. Haytasingh also reviewed Student's February 19, 2020 triennial IEP, including Student's June 8, 2020 addendum IEP, and Student's health, developmental, and relevant medical records as part of his assessment. Based on Dr. Haytasingh's professional training, work experience, and direct assessment of Student, his testimony relating to his professional opinion and recommendations regarding Student was given great weight.

Dr. Haytasingh discussed his report and recommendations at Student's IEP team meeting on March 4, 2021. Dr. Haytasingh's assessment of Student found little to no regression of Student's abilities as documented in Student's June 8, 2020 IEP. Student's skill retention was attributed by Dr. Haytasingh to Student's continued in-person private therapeutic services and in-person private preschool services. Dr. Haytasingh opined that Student requires in-person instruction, including applied behavior analysis, to receive educational benefit from his learning environment. Dr. Haytasingh stressed the importance of Student's exposure to same-age peers to enhance his social skills and learning. This conclusion was based on Student's private preschool teacher's reports of Student's significant progress on social skills and his direct observation of Student's successful participation and ability to be a part of Student's private preschool classroom activities with typical peers.

Dr. Haytasingh concluded that the biggest obstacle to Student's learning is Student's inattention and distractibility. Student attends to some tasks for only 30 seconds to a minute. To increase Student's attention and thus his learning, Student requires applied behavior analysis services. Specifically, Student requires a highly structured program that has clear contingencies with increased opportunities to expand Student's verbal repertoire and to increase Student's ability to attend to instruction. Student requires staff highly trained in the principles of applied behavior analysis, including Student's classroom aide, due to the need for specifically designed prompts that reflect applied behavior analysis principles. Student requires positive behavior support throughout the day in a consistent and predictable learning environment, free from unnecessary distractions. Student requires a structured classroom and a visual schedule and other visual supports to facilitate consistency and predictability to optimize Student's ability to learn.

The preponderance of evidence presented at hearing established that San Diego was aware that Student required applied behavior analysis and staff highly trained in the principles of applied behavior analysis to increase Student's attention and cognition to access the curriculum. San Diego was aware that Student had autism and that Student's inattention was a major obstacle to Student's learning since February 2020, as it documented in Student's February 19, 2020 IEP. San Diego had direct knowledge that Student was engaging in behaviors of escape and avoidance when presented with nonpreferred tasks and engaging in distance learning. San Diego knew Student's mask avoidance behavior was also interfering with his access to in-person services and that he required direct in-person private applied behavior analysis instruction to work toward tolerating a mask. San Diego knew that Student's attention was greater when Student's private in-person applied behavior analysis provider was available to support Student

during virtual instruction, using a token board, throughout the 2020-2021 school year. Thus, the overwhelming evidence presented at hearing established that San Diego not only suspected but directly observed that Student benefitted from applied behavior analysis services and was unable to access instruction without applied behavior analysis.

The IDEA requires San Diego to provide Student a free appropriate public education, including specialized academic instruction at no cost to parents, to meet Student's unique educational needs. (20 U.S.C. §§ 1401(9) and (29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) Yet, San Diego consistently relied on Student's private applied behavior analysis therapist, funded by Parent's private medical insurance, to provide Student with the necessary educational instruction that San Diego was obligated to provide to Student at no cost to Parents. Accordingly, San Diego's failure to provide Student with ABA services, a related service proven to be effective, not just generally for Students with autism, but for Student's needs specifically, deprived Student of educational benefit and thus, a FAPE.

SUFFICIENCY OF INSTRUCTION WITH A CREDENTIALLED TEACHER

In this issue, Student also alleged that San Diego's failure to provide sufficient instruction with a credentialed teacher denied Student a FAPE. The determination of sufficiency of instruction by a credentialed teacher requires a determination of how much instruction by a credentialed teacher was required by Student's IEP. The offer of services in Student's February 19, 2020 IEP was unclear, as previously discussed. The offer of services in Student's February 17, 2021 IEP was also unclear as will be set forth below. Accordingly, the question regarding the sufficiency of Student's instruction by a credentialed teacher is not reached.

ISSUES 2(K), 2(M), 2(O) AND 2(P) : DID SAN DIEGO DENY STUDENT A FAPE DURING THE 2020-2021 SCHOOL YEAR, UP TO MAY 3, 2021, BY: DENYING PARENT'S MEANINGFUL PARTICIPATION IN THE FEBRUARY 17, 2021 IEP TEAM MEETING AND ADDENDUM IEP TEAM MEETINGS BY REFUSING TO CONSIDER AND DISCUSS PARENTS' REQUESTED CHANGES TO STUDENT'S HEALTH PLAN; MAKING IMPLEMENTATION OF STUDENT'S IEP CONTINGENT UPON AGREEING TO ALL ASPECTS OF THE IEP, INCLUDING STUDENT'S HEALTH PLAN; PREDETERMINING STUDENT'S PLACEMENT, SPECIFICALLY BY PREDETERMINING THE CONTENTS OF STUDENT'S HEALTH PLAN; AND FAILING TO MAKE A CLEAR AND SPECIFIC OFFER OF A FAPE IN STUDENT'S FEBRUARY 17, 2021 IEP?

Student asserts that Student's health plan, added to Student's February 17, 2021 IEP at the April 7, 2021 addendum IEP team meeting, was predetermined, as San Diego refused to discuss Parent's concerns regarding the health plan at the meeting. Student contends that the predetermined health plan was inconsistent with Student's special education services offered in the same IEP document. Student contends that San Diego's offered IEP placement, when read in conjunction with the predetermined health plan, was unclear. Lastly, Student contends that San Diego made the implementation of Student's IEP special education services contingent on Parents' acceptance of the predetermined health plan. Student maintains that this prevented Parents' from accepting the offered IEP special education services, with the exception of the health plan, so that Student could at least start to receive the services to which Parents agreed.

Student contends that the refusal to consider Parent's concerns, the predetermination, the unclear offer, and the proposed contingent implementation of services, denied Student a FAPE.

San Diego contends that Student's February 17, 2021 IEP offer was clear and was developed with Parents' full participation. San Diego contends that the health plan was not part of Student's IEP, or IEP offer, but was a non-negotiable health and safety plan, which San Diego insisted upon to protect all San Diego students and staff in the unprecedented Covid-19 pandemic. As such, San Diego asserts that Student's IEP team had no authority to change the health plan or to decline to implement the plan. San Diego maintains that Student's February 17, 2021 IEP services could be implemented concurrently with the health plan, consistent with the requirements of IDEA.

Student's IEP dated February 17, 2021 was developed over the course of four IEP team meetings held on February 17, March 4, March 17, and April 7, 2021. The evidence presented at hearing established that an IEP offer of special education and related services was not presented to Parent until the April 7, 2021 IEP team meeting. Accordingly, the prior finding of a denial of a FAPE, resulting from Student's February 19, 2020 IEP's unclear offer, continued to April 7, 2021.

STUDENT'S HEALTH PLAN

At the time of the April 7, 2021 addendum IEP team meeting, San Diego was preparing for the return of all students to in-person instruction on April 12, 2021. On April 5, 2021, San Diego's nurse emailed Parent a copy of Student's health plan. The plan was developed by San Diego's nurse in conjunction with guidance from San Diego's Health and Safety team, prior to the IEP team meeting. Parent informed the

nurse that she was not ready to sign the health plan until it was discussed at Student's April 7, 2021 addendum IEP team meeting. The health plan was provided to the IEP team on April 7, 2021, the day of the meeting. It is undisputed that Principal Robinson informed Parents at the meeting that they had to agree to the plan, as written, or Student could not enter the Hawthorne Elementary School Campus.

The health plan is referred to as, "Covid-19 Mask Accommodation ISHP", within the health plan document. The IEP team action notes pertaining to the April 7, 2021 IEP addendum meeting refer to the health plan as "ISHP Mask Accommodation, provided for in-person learning to accommodate for mask requirements." The health plan was then attached to the IEP dated February 17, 2021 IEP.

The health plan required the following conditions which were entitled, "Educational and Health Plan for On-Site Learning":

1. Continue efforts to encourage, and attempt, mask wearing at school and home. Every effort should be made to exhaust all resources including options with variety of tie-back masks.
2. Teacher/provider has easily available enhanced Personal Protective Equipment: mask, face shield, and gloves.
3. Interactions with other students will occur outdoors and with a minimum of six-foot distancing.
4. If indoors, Student is one-to-one with adult. No other students indoors at the same time.
5. Second air filter is in the classroom and the windows are open.
6. Where practical, educational services will be provided outdoors.

7. Classroom is cleaned by staff (custodial or teacher) after Student and before other students or staff use/enter the classroom.
8. Enter to and exit from campus via the kindergarten gate.
9. Mask-wearing goal will be added to Student's IEP.
10. While on the school bus, Student will sit a minimum of six feet from the other students and all windows and vents will remain open for the duration of the bus ride.

The health plan was an integral part of Student's IEP, as amended at the April 7, 2021 addendum IEP team meeting. At the time of the April 7, 2021 meeting, the IEP team was on notice that Student was unable to tolerate wearing a Covid-19 related protective face mask. This was a disability-related need. The team also was on notice that Student was not able to access the curriculum through virtual instruction and that Student required in-person instruction to access and benefit from his special education services. San Diego's nurse developed the health plan to facilitate Student's in-person instruction so that his health and other's health would not be compromised due to Student's disability-related inability to wear a mask to prevent infection of the Covid-19 virus.

In California, related services include health and nursing services. (Ed. Code § 56363, subd. (b)(2). Health and nursing related services include managing an individual's health problems on the school site. (Cal. Code Regs., tit. 5, § 3051.12(a)(2).) Related services are services designed to enable a child with a disability to receive a FAPE. (20 U.S.C. § 1401(26).) Related services are required to be specified in an IEP. (20 U.S.C. § 1414 (d)(1)(A)(IV).) An IEP must also contain a statement of program modifications that will be provided for the child to participate in extracurricular and

other nonacademic extracurricular activities, and to be educated and participate with other individuals with exceptional needs and nondisabled students. (20 U.S.C. § 1414(d)(1)(A)(IV); 34 C.F.R. § 300.320(a)(4); Ed. Code, § 56345, subd. (a)(4).)

San Diego offered to implement Student's special education services by way of Student's health plan mask accommodation, to enable Student to participate in in-person instruction, which he required to benefit from his educational instruction. Following the April 7, 2021 IEP team meeting, San Diego offered Parents a visit to the school to view the proposed instructional settings required by the health plan, and provided Parents with a proposed school-day schedule incorporating the requirements of the health plan, to further inform Parents' decision regarding the IEP offer. The health plan was an integral component of Student's IEP services and placement offer. It was an IEP accommodation or modification to manage potential health problems on the elementary school site resulting from Student's inability to wear a face mask. It also was needed to enable Student to access in-person instruction and related services with his peers, which Student required to receive educational benefit. As such, the health plan was properly attached to and included as part of Student's IEP.

San Diego argues that the health plan was not a part of Student's IEP. However, even if that were true, the health plan would necessarily have to be reconciled with the IEP's statement of services, for student to access any special education or related services. Otherwise, the IEP offer, by itself, was substantively devoid of meaning, given that the health plan had to be agreed to before Student could access the school, his instruction, or the educational curriculum, at all.

SAN DIEGO FAILED TO MAKE A CLEAR AND SPECIFIC OFFER OF A FAPE IN STUDENT'S FEBRUARY 17, 2021 IEP

As already discussed, the IDEA requires a school district to make a formal written offer of placement. (*Union School Dist. v. Smith* (9th Cir. 1993) 15 F.3d 1519, 1526.) (*Union*.)

All of Student's services as described on the service and service delivery pages of the February 17, 2021 IEP, as amended on April 7, 2021, are clear. The clarity problems found in Student's prior annual IEP were largely remedied in the February 17, 2021 IEP, pursuant to Parent's requests for more clarity in the service description, at the March 17, 2021 addendum IEP team meeting. Following the requested changes, the service description provides enough specificity for Parents to make an informed decision regarding the acceptance of the services and to enforce the implementation of the services.

Once the April 7, 2021 IEP team offered Student a placement according to the dictates of the health plan, Student's February 17, 2021 IEP offer became unclear. The February 17, 2021 IEP offer became vague, and failed to provide Parents with enough information to make an informed decision as to whether to accept the offer or to enforce the offer. Student's IEP service and delivery description requires Student to interact with other students, with and without disabilities. The IEP on its face offered services to be held in small groups and offered literacy and other activities in the general education Kindergarten class, including circle time. Student's February 17, 2021 IEP services required all specialized academic instruction to be provided by a teacher credentialed to instruct students with moderate to severe disabilities. Yet the health plan required a completely different placement offer, as it required a separate classroom

setting, different service providers, and isolated Student from peers in the special education and general education classrooms. Nothing in the February 17, 2021 IEP explained or reconciled these conflicting IEP components.

The February 17, 2021 IEP offer left Parents without any idea as to whether Student would be instructed in small groups with his peers, either from the special education or general education classroom; who would be instructing Student throughout the day; whether Student's instruction would be provided by a teacher credentialed to instruct students with moderate to severe disabilities, or just by an aide in a classroom a distance away from the credentialed teacher. There was no evidence presented at hearing that any of these obvious conflicts were discussed at the IEP team meeting. Accordingly, the offer of placement denied Student a FAPE as it was unclear under *Union* as it failed to provide Parents with the important information that Parents required to meaningfully participate in the determination of a FAPE for Student or to enforce the implementation of the offered services. (*Union School Dist. v. Smith, supra*, 15 F.3d 1519, 1526.)

SAN DIEGO DENIED STUDENT A FAPE BY PREDETERMINING STUDENT'S PLACEMENT; PREVENTING PARENTS' MEANINGFUL PARTICIPATION IN THE APRIL 7, 2021 ADDENDUM IEP TEAM MEETING BY REFUSING TO CONSIDER OR DISCUSS PARENTS' REQUESTED CHANGES TO STUDENT'S HEALTH PLAN, AND BY MAKING IMPLEMENTATION OF STUDENT'S IEP CONTINGENT ON PARENT'S ACCEPTANCE OF THE HEALTH PLAN

Predetermination is a procedural violation of the IDEA that occurs in connection with an IEP team meeting, when a district has decided on its offer prior to the meeting,

such as when it presents one placement option at the meeting and is unwilling to consider other alternatives. (*H.B. v. Las Virgenes Unified School Dist.* (9th Cir. 2007) 239 Fed.Appx. 342, 344-345) [nonpub. opn.].) A district may not arrive at an IEP team meeting with a "take it or leave it" offer. (*J.G. v. Douglas County School Dist.*, (9th Cir. 2008), 552 F.3d 786, 801, fn. 10.) However, district staff do not have to arrive at an IEP meeting with a blank mind; they "can, and should, have given some thought" to placement before the meeting. (*Doyle v. Arlington County School Board* (E.D.Va. 1992) 806 F.Supp. 1253, 1262.) An IEP is not predetermined simply by meeting to discuss a child's programming in advance of an IEP team meeting. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693, fn. 3.)

District team members also may form opinions prior to IEP meetings. However, if the district goes beyond forming opinions and becomes "impermissibly and deeply wedded to a single course of action," this amounts to predetermination. (*P.C. v. Milford Exempted Village Schools* (S.D. Ohio, Jan. 17, 2013, No. 1:11- CV-398) 2013 WL 209478, p.7.) Staff may bring a draft of the IEP to the meeting as long as parents are provided an opportunity to discuss their questions, concerns, and recommendations, before the IEP is finalized. (*Fuhrmann, supra*, 993 F.2d at p. 1036.) Developing an IEP that does not fully conform to a parent's wishes does not mean the district engaged in predetermination. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.)

Federal and State law require that a district must afford parents of a child with a disability the opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The IEP team must consider the concerns of the parent for enhancing the

student's education, as well as information provided by the parent about student's needs. (20 U.S.C. § 1414(d)(3)(A) and (d)(4)(A)(ii); 34 C.F.R. § 300.324(a)(1)(ii) & (b)(1)(ii)(C); Ed. Code, § 56341.1, subds. (a)(2), (d)(3) & (f).) The United States Supreme Court has recognized that parental participation in the development of an IEP is the cornerstone of the IDEA. (*Winkleman v. Parma City School Dist.* (2007) 550 U.S. 516, 524 [127 S.Ct. 1994, 167 L.Ed.2d 904] ["[T]he informed involvement of parents" is central to the IEP process.]) Parental participation in the IEP process is considered "[a]mong the most important procedural safeguards." (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 882 (*Amanda J.*))

A school district is required to conduct, not just an IEP team meeting, but a meaningful IEP team meeting. (*W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1485, superseded on other grounds by statute (*Target Range*); *Fuhrmann v. East Hanover Board of Education* (3rd Cir. 1993) 993 F.2d 1031, 1036 (*Fuhrmann*).) "Participation must be more than a mere form; it must be *meaningful*." *Deal v. Hamilton County Board of Education* (6th Cir. 2004) 392 F.3d 840, 858 (emphasis in original). A parent who has an opportunity to discuss a proposed IEP and suggest changes, and whose concerns are considered by the IEP team, has participated in the IEP development process in a meaningful way. (*Fuhrmann, supra*, 993 F.2d 1031, 1036.)

It is undisputed that the health plan was developed outside the IEP team process by San Diego's nurse in conjunction with the guidance and policies developed by San Diego's Health and Safety team. Parents disagreed with the terms of the health plan and tried to discuss the terms at the IEP team meeting, including their requests for changes so that Student could be instructed in a classroom with peers. Principal Robinson informed Parents that the health plan represented the minimum requirements

for Student to attend school in-person and that no changes would be approved by Dr. Taras, San Diego's physician, who had to give the final approval of the health plan once Parent signed it. Robinson told Parents at the April 7, 2021 addendum IEP team meeting that if Parents did not agree to the health plan, as written, Student would not be permitted on the school campus, and the only option for Parents would be to file for due process. Parents concerns were documented, but not discussed or considered, at the April 7, 2021 addendum IEP team meeting.

The evidence presented at hearing established that San Diego predetermined Student's placement at the April 7, 2021 addendum IEP team meeting and thereby prevented Parents' participation in the IEP process and the determination of a FAPE for Student. The IEP team offered Student a placement according to the dictates of the health plan. Parents did not participate in the placement decision as the health plan terms were non-negotiable and therefore not discussed at the IEP team meeting. Parents request to discuss changes to the health plan to make it consistent with the services described in Student's IEP, was denied. Accordingly, San Diego predetermined the health plan and thus Student's placement. In-person one-to-one instruction was not offered as an alternative, and Student's disabilities prevented Student from accessing or benefitting from virtual instruction. Parents were thus required to accept the placement as dictated by the predetermined health plan, or Student would not be provided special education services at all.

Predetermination causes a deprivation of educational benefits where, absent the predetermination, there is a strong likelihood that alternative educational possibilities for the student would have been better considered. (*M.S. v. Los Angeles Unified School Dist.* (C.D. Cal. September 12, 2016, Case No. 2:15-cv-05819-CAS-MRW) 2016 WL 4925910 at p.12. (citing *Doug C., supra*, 720 F.3d 1038, 1047).) A student is not required

to prove that his placement or services would have been different but for the predetermination. (*Ibid.*) Predetermination is an automatic violation of a parent's right of participation under the IDEA. Where predetermination has occurred, "regardless of the discussions that may occur at the meeting, the school district's actions would violate the IDEA's procedural requirement that parents have the opportunity 'to participate in meetings with respect to the identification, evaluation, and educational placement of the child.'" (*H.B. v. Las Virgenes, supra*, 239 Fed.Appx. at p. 344, quoting 20 U.S.C. § 1415(b)(1).)

San Diego's predetermination of Student's placement at the April 7, 2021 addendum IEP team meeting prevented Parents' participation in the placement decision, and thus the IEP development process. It prevented a discussion of Parent's concerns regarding the isolation of Student from peers, insufficient instruction by a credentialed teacher, and lack of consideration of less severe placement alternatives to accommodate Student's inability to tolerate wearing a Covid-19 related face mask. Discussion of these concerns would have allowed the IEP team to reconcile any conflict between the health plan, the stated IEP services, and Student's unique educational needs. Had the IEP team considered these parental concerns, the lack of clarity of Student's IEP might have been resolved or other placement options may have been considered. San Diego's predetermination of Student's placement, significant infringement of parental participation in the IEP process, including Student's placement decision, and refusal to implement Student's services unless the placement dictated by Student's health plan was accepted, denied Student a FAPE.

In this issue, Student alleges that San Diego denied Student a FAPE by refusing to consider Parents requested changes to Student's individualized school health care plan, not only at the April 7, 2021 addendum IEP team meeting, but also at Student's prior

February 17, March 4, and March 17, 2021 IEP team meetings. However, as discussed previously, Student already established a global FAPE denial during that time period based on the prior unclear offer. Reaching this issue would not change or alter Student's remedies. Accordingly, no finding is made regarding this issue as it relates to the February 17, March 4, and March 17, 2021 IEP team meetings.

ISSUE 2(N): DID SAN DIEGO DENY STUDENT A FAPE DURING THE 2020-2021 SCHOOL YEAR, UP TO MAY 3, 2021, BY FAILING TO PROVIDE ACCOMMODATIONS AND MODIFICATIONS TO FACILITATE STUDENT'S INSTRUCTION IN A CLASSROOM WITH PEERS, INCLUDING THOSE WITH AND WITHOUT DISABILITIES?

Student contends that Student's April 7, 2021 addendum IEP team was required to develop needed accommodations and modifications to enable Student to access his in-person educational services, including his instruction in a classroom with his peers, upon the return of all San Diego Students to in-person instruction.

San Diego asserts that Student's health plan was unrelated to Student's IEP and San Diego had no choice but to accept the health plan. San Diego asserts that Student's IEP team had no authority to develop accommodations that would conflict with the requirements of Student's health plan. Given the requirements of the health plan, San Diego contends that the placement offer was appropriate and allowed Student's IEP to be implemented in a way consistent with Student's IEP requirements, health plan requirements, and the IDEA.

The IEP team is charged with the development of a student's IEP. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. §300.324 (a) and (b); Ed. Code, § 56342.) An IEP is a written

statement for each individual with exceptional needs which must contain many components, including a statement of program modifications that will be provided for the child to participate in extracurricular and other nonacademic extracurricular activities, and to be educated and participate with other individuals with exceptional needs and nondisabled students. (20 U.S.C. § 1414(d)(1)(A)(IV); 34 C.F.R. § 300.320(a)(4); Ed. Code, § 56345, subd. (a)(4).)

The April 7, 2021 addendum IEP team had knowledge of Student's inability to access distance learning and Student's inability to tolerate wearing a mask. The IEP team knew that Student requires in-person services to access instruction and to benefit from educational services. This information was documented in the health plan itself. The IEP team determined, after four IEP team meetings, that Student's educational services were to be provided through individual and small group instruction in a classroom with Student's peers with exceptional needs, as well as in a general education classroom with his nondisabled peers. The IEP team also determined that all of Student's specialized academic instruction must be provided by a teacher credentialed in the instruction of students with moderate to severe disabilities. The April 7, 2021 IEP team had before them, Student's health plan mask accommodation, which required a placement different from the placement the team chose and documented in the service and service delivery section of Student's February 17, 2021 IEP.

The IEP team was required to consider the health plan, developed and recommended by San Diego's health and safety team, and the effects of the health plan on the services the IEP team already determined to be appropriate for Student. It then was required to determine, as an IEP team, what accommodations, modifications, or supports Student required, to enable Student to advance appropriately toward attaining annual goals, be involved in and make progress in the general education curriculum,

participate in extracurricular and other nonacademic extracurricular activities, and to be educated and participate with other individuals with exceptional needs and nondisabled students. Instead, Student's IEP team, with the exception of Parents, adopted Student's health plan mask accommodation, without discussion or team consideration, and offered Student an IEP goal and placement as dictated by the health plan. In so doing, the IEP team violated its responsibilities mandated by the IDEA, and Federal and State regulations and Statutes implementing the IDEA mandates. (20 U.S.C. § 1414(d)(1)(A)(IV); 34 C.F.R. § 300.320(a)(4); Ed. Code, § 56345, subd. (a)(4).)

The adoption of the predetermined health plan mask accommodation and failure of the IEP team to consider and determine Student's necessary accommodations and supplementary supports, infringed Parents' meaningful participation in the development of Student's IEP and deprived Student of educational benefit and a FAPE.

San Diego's position that Student's IEP team was required to develop Student's IEP without regard or consideration of the health plan sitting before them at the IEP team meeting, and which significantly impacted the way in which Student's services could be implemented, is rejected. Such a stance is violative of IDEA's clear and detailed IEP mandates which IEP team members are charged to follow in the development of an IEP. (20 U.S.C. § 1414(d)(1)(A)(IV); 34 C.F.R. § 300.320(a)(4); Ed. Code, § 56345, subd. (a)(4).) In Student's case, such a stance required the April 7, 2021 IEP team to turn a blind eye to fact that Student would not access his IEP services at all, if the health plan was not consented to by Parents.

ISSUE 2(H): DID SAN DIEGO DENY STUDENT A FAPE DURING THE 2020-2021 SCHOOL YEAR BY FAILING TO PROVIDE APPROPRIATE SERVICES, SPECIFICALLY, BY INSISTING ON PHYSICAL BARRIERS, PHYSICAL DISTANCING, AND ISOLATION OF STUDENT FROM HIS PEERS UPON HIS RETURN TO IN-PERSON INSTRUCTION?

As previously discussed in detail, Student's IEP's, in effect during the 2019-2020 and 2020-2021 school years, were unclear and therefore no determination is made regarding the appropriateness of the services provided to Student. Accordingly, the issue regarding the appropriateness of San Diego's services, by insisting on physical barriers, physical distancing, and isolation of Student from his peers upon his return to in-person instruction, is not reached.

ISSUE 2(L): FAILING TO HAVE SOMEONE WITH AUTHORITY TO MAKE CHANGES TO STUDENT'S HEALTH PLAN ON STUDENT'S FEBRUARY 17, 2021 IEP TEAM

Student already established a global FAPE denial based on the prior finding that the February 17, 2021 IEP offer was predetermined and unclear. Reaching this issue would not change or alter Student's remedies. Accordingly, no finding is made regarding this issue.

ISSUE 2(F): DID SAN DIEGO DENY STUDENT A FAPE BY FAILING TO PROVIDE STUDENT WITH INSTRUCTION BY A CREDENTIALLED TEACHER AS REQUIRED BY STUDENT'S FEBRUARY 17, 2021 IEP?

This issue is not reached. The February 17, 2021 IEP was unclear, as already discussed in detail. Accordingly, no determination can be made regarding what services the IEP required.

ISSUE 2(D): DID SAN DIEGO DENY STUDENT A FAPE IN THE 2020-2021 SCHOOL YEAR BY FAILING TO IMPLEMENT STUDENT'S SPEECH AND LANGUAGE, OCCUPATIONAL THERAPY, PHYSICAL THERAPY, AND ADAPTED PHYSICAL EDUCATION RELATED SERVICES AND PROVISION OF A WORKING COMMUNICATION DEVICE, PURSUANT TO STUDENT'S FEBRUARY 19, 2020, AND FEBRUARY 17, 2021 IEP'S?

This issue is not reached. Student's February 19, 2020 and February 17, 2021 IEP services are unclear, as concluded and discussed in detail. Accordingly, no determination can be made regarding the implementation of either the February 19, 2020 IEP or the February 17, 2021 IEP.

ISSUE 2(J): DID SAN DIEGO DENY STUDENT A FAPE DURING THE 2020-2021 SCHOOL YEAR, UP TO MAY 3, 2021, BY FAILING TO OFFER APPROPRIATE SUPPORTS AND ASSESSMENTS TO FACILITATE STUDENT'S GOAL FOR WEARING A COVID-19 RELATED FACE MASK?

Student contends that San Diego was required to assess Student's ability to wear a mask when Parents informed San Diego that Student lacked the ability to tolerate a face mask. Student contends that the provision of an IEP goal was insufficient without assessment and supports to facilitate the goal and the failure to provide either denied Student a FAPE.

San Diego asserts that Student could learn to wear a face covering and a goal was developed to assist Student to wear a face covering. San Diego asserts that Parents were the main obstacle to Student's learning to wear a mask as they refused to comply with the mask requirement or to teach Student to tolerate wearing a face mask.

The health plan added to Student's February 17, 2021 IEP at the April 7, 2021 addendum IEP team meeting, required that a mask-wearing goal be added to Student's IEP. A goal was added to Student's February 17, 2021 IEP at the April 7, 2021 addendum IEP team meeting. The goal was for Student to tolerate wearing a mask, covering his nose and mouth, for a period of 15 minutes over a three-week period, as measured by teacher and staff data. The goal expressly requires teacher and staff collection of data to facilitate the goal.

Martin's specialized academic instruction includes instruction for her students who have trouble wearing a mask in the classroom. San Diego offered the

mask-wearing goal as part of Student's IEP, which Parent consented to on April 19, 2021. Once Parent accepted, San Diego was required to facilitate the goal through the provision of instruction to assist Student to progress on the goal. (Ed. Code § 56344, subd (b). Accordingly, San Diego offered such instruction, including, data collection to facilitate and monitor Student's instruction, when it offered Student's goal. Student therefore failed to sustain the burden to prove otherwise.

CONCLUSIONS AND PREVAILING PARTY

Pursuant to 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(a): San Diego did not deny Student a FAPE during the 2019-2020 school year, by failing to assess Student in all areas of suspected disability, specifically, by conducting a music therapy assessment following Parent's April 23, 2020 request. San Diego prevailed on Issue 1(a).

Issue 1(b): Student did not sustain the burden of proof that San Diego denied Student a FAPE, during the 2019-2020 school year, by failing to timely respond to Parent's concerns regarding the ineffectiveness of Student's distance learning plan, the failure to implement Student's speech and language, occupational therapy, physical therapy, and adapted physical education related services, and Student's lack of exposure to Student's nondisabled peers. San Diego prevailed on Issue 1(b).

Issue 1(c): Issue 1(c) was not reached.

Issue 1(d): Student did not sustain the burden of proof that San Diego denied Student a FAPE, during the 2019-2020 school year, by failing to consider a continuum of placement options at Student's June 8, 2020 IEP team meeting. San Diego prevailed on Issue 1(d).

Issue 1(e): San Diego denied Student a FAPE, during the 2019-2020 school year, up to April 7, 2021, by failing to make a clear and specific offer of a FAPE in Student's February 19, 2020 IEP. Student prevailed on Issue 1(e).

Issue 2(a): Student failed to sustain the burden of proof that San Diego denied Student a FAPE, during the 2020-2021 school year, up to May 3, 2021, by failing to conduct a music therapy assessment. San Diego prevailed on Issue 2(a).

Issue 2(b): Student did not sustain the burden of proof that San Diego denied Student a FAPE during the 2020-2021 school year, up to May 3, 2021, by failing to timely respond to Parent's September 8, 2020 concerns regarding the ineffectiveness of Student's distance learning plan; the failure to provide Student's speech and language, occupational therapy, physical therapy, and adapted physical education related services; and Student's defective communication device. San Diego prevailed on Issue 2(b).

Issue 2(c): Student did not sustain the burden of proof that San Diego denied Student a FAPE, during the 2020-2021 school year, up to May 3, 2021, by failing to provide prior written notice in response to Parent's February 17, 2021 requests for applied behavior analysis services, compensatory education services, and changes to Student's health plan. San Diego prevailed on Issue 2(c).

Issue 2(d): Issue 2(d) was not reached.

Issue 2(e): San Diego denied Student a FAPE, during the 2020-2021 school year, up to May 3, 2021, by failing to offer applied behavior analysis services and an aide trained in applied behavior analysis. The issue as related to the sufficiency of instruction by a credentialed teacher was not reached. Student prevailed on Issue 2(e), in part.

Issue 2(f): Issue 2(f) was not reached.

Issue 2(g): Student did not sustain the burden of proof that San Diego denied Student a FAPE, during the 2020-2021 school year, up to May 3, 2021, by failing to provide speech and language services at a time Student was available to participate. San Diego prevailed on Issue 2(g).

Issue 2(h): Issue 2(h) was not reached.

Issue 2(i): San Diego denied Student a FAPE during the 2020-2021 school year up to May 3, 2021, by failing to develop pragmatic language IEP goals. Student prevailed on Issue 2(i).

Issue 2(j): Student did not sustain the burden of proof that San Diego denied Student a FAPE during the 2020-2021 school year, up to May 3, 2021, by failing to offer appropriate supports and assessments to facilitate Student's goal for wearing a Covid-19 related face mask. San Diego prevailed on Issue 2(j).

Issue 2(k): San Diego denied Student a FAPE, during the 2020-2021 school year, up to May 3, 2021, by preventing Parent's meaningful participation in the April 7, addendum IEP team meeting by refusing to consider and discuss Parents' requested changes to Student's health plan. The issue of whether San Diego denied Parents meaningful participation at the February 17, 2021 IEP team meeting, the March 4, or

March 17, addendum IEP team meetings by refusing to consider and discuss Parents' requested changes to Student's health plan was not reached. Student prevailed on Issue 2(k), in part.

Issue 2(l): Issue 2(l) was not reached.

Issue 2(m): San Diego denied Student a FAPE during the 2020-2021 school year, up to May 3, 2021, by making the implementation of Student's IEP contingent upon agreeing to all aspects of the IEP, including Student's health plan. Student prevailed on Issue 2(m).

Issue 2(n): San Diego denied Student a FAPE, during the 2020-2021 school year, up to May 3, 2021, by failing to provide accommodations and modifications to facilitate Student's instruction in a classroom with peers, including those with and without disabilities. Student prevailed on Issue 2(n).

Issue 2(o): San Diego denied Student a FAPE, during the 2020-2021 school year, up to May 3, 2021, by predetermining Student's placement, specifically, by predetermining the contents of Student's health plan. Student prevailed on Issue 2(o).

Issue 2(p): San Diego denied Student a FAPE, during the 2020-2021 school year, up to May 3, 2021, by failing to make a clear and specific offer of a FAPE in Student's February 17, 2021 IEP. Student prevailed on issue 2(p).

REMEDIES

Student requests as remedies that San Diego provide compensatory education in the areas of academics and speech and language, including 720 hours of specialized

academic instruction and 24 hours of speech and language therapy as compensation for one year of missed instruction, and lack of progress over the past year. Parent also requests San Diego to reimburse Parents for private services and placement obtained by Parent, including the costs of Student's private preschool tuition, and private speech therapy, occupational therapy, physical therapy, and applied behavior analysis services, which total \$11,023.35.

Student requests the additional remedies in the form of OAH orders directing San Diego to: develop a pragmatic speech and language IEP goal; provide appropriate time with a credentialed teacher consistent with Student's February 17, 2021 IEP; implement February 17, 2021 IEP consented to by Parent, without the health plan; provide Student a FAPE by placing Student in the least restrictive environment, with appropriate accommodations, to facilitate Student's instruction on campus in a classroom with peers, and without isolation either indoors or outdoors. If such an order is not provided, Student requests placement at the Children's Workshop, a nonpublic school, as recommended by Dr. Haytasingh. Student also requests ABA services, as recommended by Dr. Haytasingh, to be added to Student's February 17, 2021 IEP, and a music therapy assessment.

ALJs have broad latitude to fashion appropriate equitable remedies for the denial of a FAPE. (*School Comm. of Burlington v. Department of Education* (1985) 471 U.S. 359, 370 [105 S.Ct. 1996, 85 L.Ed.2d 385]; *Parents of Student W. v. Puyallup School District*, No. 3 (9th Cir. 1994) 31 F.3d 1489, 1496.) In remedying a denial of a FAPE, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3); *Burlington, supra*, 471 U.S. at p. 374.)

School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Puyallup, supra*, 31 F.3d at p. 1496.) These are equitable remedies that courts may employ to craft “appropriate relief” for a party. (*Id.* at p. 1497.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student’s needs. (*Reid v. District of Columbia* (D.C.Cir. 2005) 401 F.3d 516, 524.)

Parents may be entitled to reimbursement for placing a student in a private placement without the agreement of the local school district if the parents prove at a due process hearing that the district had not made a FAPE available to the student in a timely manner prior to the placement, and the private placement was appropriate. (20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c); see also *Burlington, supra*, 471 U.S. at pp. 369-370.) The private school placement need not meet the state education standards that apply to public agencies in order to be appropriate. (34 C.F.R. § 300.148(c); *Florence County School District Four v. Carter* (1993) 510 U.S. 7, pp. 11, 14 [114 S.Ct. 361, 126 L.Ed.2d 284].)

Student sustained the burden of proof on multiple substantive and procedural violations resulting in a denial of a FAPE for the entire time-period at issue in this matter. Student sustained his burden of proof that San Diego denied Student a FAPE from February 19, 2020, to May 3, 2021, by failing to make a clear and specific offer of a FAPE. Student proved that San Diego denied Student a FAPE during the 2020-2021 school year by failing to offer Student applied behavior analysis services, an aide trained in behavior analysis, and IEP goals in the area of pragmatic language. Student sustained the burden of proof that San Diego denied Student a FAPE from April 7, 2021 to May 3, 2021, by predetermining Student’s placement, making implementation of Student’s IEP services contingent on accepting his predetermined placement, and by failing to provide

accommodations and modifications to facilitate Student's instruction in a classroom with Student's special education and general education peers. San Diego's failures deprived Student of educational benefit at a crucial time in his early childhood educational development when children are learning core skills, such as attention to tasks, self-direction, functional communication, and social reciprocity, which lay the foundation for future learning.

During the 2020-2021 school year, from October 17, 2020, Parents placed Student in a local private preschool which provided Student in-person instruction in a classroom with peers and a mask exception for Student's inability to wear a covid-19 related protective face mask. Parents secured these private services as Student required in-person instruction to receive educational benefit and San Diego failed to provide such instruction. Student was accompanied at preschool by an aide trained in applied behavior analysis, as part of Student's private applied behavior analysis services. Student was also receiving private therapies funded through Student's medical insurance, including one-hour per week of individual in-person private speech and language therapy, one-hour per week of private individual in-person physical therapy, and one-hour per week of private individual in-person occupational therapy from February 19, 2020, to June 15, 2021. Student also received 12-25 hours per week of private applied behavior analysis therapy. Invoices detailing all private services were admitted at hearing, including Parents' calculation of their out-of-pocket expenses after insurance reimbursement. Parents request San Diego to reimburse their out-of-pocket expenses for Student's private services received from February 19, 2021, as compensatory education, which total \$11, 023.36.

San Diego was aware that Parent intended to obtain private services for Student in Parent's September 8, 2020 email to Martin, informing her of the ineffectiveness of

Student's distance learning plan. San Diego was directly informed that Student was attending a private preschool in Parent's emails with Speech Pathologist Creed in November 2020 to find an agreeable time for speech therapy. Dr. Haytasingh's testimony established that Student benefitted from the preschool placement as well as from his private therapies. The evidence established Student received educational benefit from these services. The evidence further established, that these services prevented Student's regression following school closures related to Covid-19. Student's preschool teacher and ABA provider described Student's social and behavioral progress in Dr. Haytasingh's interviews of them. The preschool placement was therefore appropriate as Student received some educational benefit from the private services.

San Diego is ordered to reimburse Parent's out-of-pocket costs for the preschool tuition as well for the applied behavior analysis aide services. Reimbursement is awarded as compensation for San Diego's failure to make a clear offer of specialized academic services during the time of Student's private preschool attendance, predetermination of Student's placement, making implementation of Student's April 7, 2021 IEP services contingent on Parents agreeing to the predetermined health plan and offer of placement, failure to provide accommodations and modifications facilitate Student's instruction in a classroom with peers, and failure to offer applied behavior analysis and an aide trained in behavior analysis. The preschool placement provided opportunities for Student to socially communicate with peers and to access the preschool curriculum with the applied behavior analysis aide support.

Student's private preschool services were in place for only eight months of the timeframe for San Diego's denial of a FAPE. Reimbursement alone, however, in this case is not a sufficient remedy for Student's global FAPE denial. As an additional equitable remedy, San Diego shall reimburse Parents for any of Parent's documented out-of-

pocket costs for Student's private preschool services, if any, from June 2021 until the beginning of the 2021-2022 school year, limited to the same \$384.10 monthly tuition and cleaning fee costs of preschool services reflected on invoices already submitted.

Reimbursement of Parent's out-of-pocket expenses for private speech therapy, physical therapy, and occupational therapy, and applied behavior analysis services from February 19, 2020 through June 15, 2021, is awarded to compensate for San Diego's failure to make a clear and specific offer of a FAPE for speech therapy, physical therapy, occupational therapy, and adapted physical education; predetermination of Student's placement, making implementation of Student's April 7, 2021 IEP services contingent on Parents agreeing to the predetermined health plan and offer of placement, failure to develop pragmatic language IEP goals, and failure to offer applied behavior analysis services and an aide trained in behavior analysis.

An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid v. District of Columbia* (D.C.Cir. 2005) 401 F.3d 516, 524.) To compensate Student for San Diego's failure to develop pragmatic language IEP goals, within 30 days of this decision, San Diego shall contract with a nonpublic agency of Parent's choice for an independent speech and language assessment to determine Student's pragmatic language needs to inform Student's IEP team in their development of pragmatic language goals. To compensate for San Diego's failure to offer Student applied behavior analysis services and an aide trained in behavior analysis, within 30 days of this decision, San Diego shall contract with a nonpublic agency for an independent behavior assessment, by a board-certified behavior analyst, to determine appropriate applied behavior analysis services for Student, and necessary supports, staff, and training, for the effective implementation of the services. The combined costs of the speech and behavior

independent educational evaluations shall not exceed \$5,000.00. San Diego shall hold an IEP team meeting, for the presentation of the assessments upon their completion, and shall fund the attendance of the assessors at the meeting(s). San Diego shall offer Student pragmatic language goals and applied behavior analysis services consistent with the assessors' recommendations.

Student's requests for 720 hours of compensatory specialized academic instruction and 24 hours of compensatory speech and language therapy, are denied, as unreasonable, as such an order would result in double compensation for Student in light of San Diego's required reimbursement for similar services.

Student's request for a music therapy assessment is denied as Student failed to sustain the burden of proof as to the music therapy assessment issue.

Student's request for relief in the form of an order directing San Diego to implement Student's February 17, 2021 IEP, without regard to Student's health plan, in a classroom with Student's peers, is denied. Student's February 2021 IEP was determined to be an unclear offer of a FAPE and no decisions regarding its implementation were reached, and no implementation remedies can be ordered. As discussed herein, the February 17, 2021 IEP services and Student's health plan, were irreconcilably entwined.

Parent's request for Student's prospective placement at a specific nonpublic school, as recommended by Dr. Haytasingh, as an alternative compensatory education award, is denied. Student failed to introduce any evidence of the cost of such a placement. Student's evidence as to the appropriateness of the requested school was also insufficient to meet Student's required proof by a preponderance of the evidence. Student's evidence consisted only of Dr. Haytasingh's statement that he had direct

knowledge of the placement, and his opinion that the school has the best applied behavior analysis trained staff in the County, and that placement at the school would not harm Student.

To remedy San Diego's failure to provide accommodations and modifications to facilitate Student's instruction in a classroom with peers, including those with and without disabilities, San Diego shall hold an IEP team meeting within 30 days of the date of this decision to develop a clear IEP offer of a FAPE, which includes meaningful IEP team consideration of any known obstacles to Student's exposure to peers required by Student's IEP services, including those identified by Parents.

ORDER

1. Within 30 days of this order, San Diego shall reimburse Student \$11,023.36 and for additional out-of-pocket costs, if any, of Student's private preschool tuition from June to the beginning of the 2021-2022 school year, not to exceed \$384.10 per month, according to Parent proof of payment.
2. Within 30 days of this decision, San Diego shall contract with a nonpublic agency(s) of Parent's choice, for an independent pragmatic speech and language assessment, and an independent behavior assessment by a board-certified behavior analyst, not to exceed a combined cost of \$5,000.00. San Diego shall hold an IEP team meeting upon their completion and fund the cost of the assessors' attendance at an IEP meeting to review their evaluations.

3. San Diego shall convene an IEP team meeting within 30 days of the date of this decision, to develop a clear and specific offer of a FAPE for Student, consistent with the IDEA mandates discussed herein.
4. Student's remaining 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/

Rita Defilippis

Administrative Law Judge

Office of Administrative Hearings