

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2021030708

PARENTS ON BEHALF OF STUDENT,

v.

OROVILLE CITY ELEMENTARY SCHOOL DISTRICT AND
THERMALITO UNION ELEMENTARY SCHOOL DISTRICT.

DECISION

JULY 12, 2021

On March 19, 2021, the Office of Administrative Hearings, called OAH, received a due process hearing request from Parents on behalf of Student, naming Oroville City Elementary School District and Thermalito Union Elementary School District. Student filed an amended complaint naming the same school districts on April 13, 2021. Administrative Law Judge Alexa Hohensee heard this matter by videoconference and telephone on June 8, 9, 10 and 14, 2021.

Molly A. Watson, Attorney at Law, represented Student. Mother, Grandmother and Great Aunt attended the hearing at various times on behalf of Student. Heather M. Edwards and Anisa Z. Pillai, Attorneys at Law, represented both Oroville and Thermalito. Kimberly Tyler, Director of Special Education and Dr. Spencer Holtom, Superintendent, attended the hearing at various times on behalf of Oroville. Katie Todd, Director of Special Education appeared on behalf of Thermalito.

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

ISSUES

At hearing, before the testimony of the witnesses, Student withdrew the issues in the June 2, 2021 prehearing conference order which were numbered 11 and 13 and clarified the issues in prehearing conference order numbered 12, 15 and 16. Accordingly, the issues for hearing have been modified and renumbered below as stated on the record.

1. During the 2019-2020 school year, including the extended school year, did Oroville deny Student a free appropriate public education, known as a FAPE, by failing to implement his February 10, 2020 individualized education program, known as an IEP, following COVID-19 school site closures?
2. During the 2019-2020 school year, including the extended school year, did Oroville deny Student a FAPE by significantly impeding Parents from meaningfully participating in the decision-making process by failing to provide Parents with a notice of parental rights and procedural safeguards, referred to as procedural safeguards, in the 2019-2020 school year?

3. During the 2019-2020 school year, including the extended school year, did Oroville deny Student a FAPE by impeding Parents from meaningfully participating in the decision-making process by having Grandmother sign a copy of an IEP amendment on June 4, 2020, which had an effective date of March 30, 2020?
4. During the 2019-2020 school year, including the extended school year, did Oroville deny Student a FAPE by impeding Parents from meaningfully participating in the decision-making process by asking Grandmother to sign Student's IEP Amendment that was developed and signed without any parental involvement?
5. During the 2019-2020 school year, including the extended school year, did Oroville deny Student a FAPE by impeding Parents from meaningfully participating in the decision-making process by failing to make a clear written offer of a FAPE in the March 2020 IEP amendment?
6. During the 2019-2020 school year, including the extended school year, did Oroville deny Student a FAPE by offering him only 30 minutes of weekly specialized academic instruction and only 20 minutes of weekly speech and language therapy online or via work packets or through consultations and collaborations?
7. During the 2019-2020 school year, including the extended school year, did Oroville deny Student a FAPE by failing to offer or provide Student with an extended school year program and services?
8. Did Oroville deny Student a FAPE by failing to provide Student with an occupational therapy assessment in the 2019-2020 school year?

9. During the 2020-2021 school year, including the extended school year, did Oroville deny Student a FAPE by failing to implement Student's February 10, 2020 or March 30, 2020 IEPs during the 2020-2021 school year?
10. Did Oroville deny Student a FAPE by failing to timely offer Student an occupational therapy assessment in the 2020-2021 school year?
11. Did Oroville and Thermalito deny Student a FAPE by offering Student no speech and language therapy during the 2020-2021 extended school year?
12. Did Oroville and Thermalito deny Student a FAPE by impeding Parents from meaningfully participating in the decision-making process regarding the provision of a FAPE by failing to provide a clear offer of a FAPE at the February 5, 2021 IEP team meeting?
13. Did Oroville and Thermalito deny Student a FAPE during the 2020-2021 school year by impeding Parents from meaningfully participating in the decision-making process by failing to provide them with a copy of the procedural safeguards prior to the February 5, 2021, IEP team meeting?
14. During the 2020-2021 school year, including the extended school year, did Oroville and Thermalito deny Student a FAPE by impeding Parents from meaningfully participating in the decision-making process by failing to provide prior written notice before removing instructional services by a teacher?

JURISDICTION

This hearing was held under the Individuals with Disabilities Education Act, referred to as the 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 and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, assessment, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, and 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents, and has the burden of proof by a preponderance of the evidence. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 57-58, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) Here, Student had the burden of proof. The factual statements in this Decision constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

Student was four years old and in preschool at the time of hearing. Student resided with Parents within Oroville's geographic boundaries at all relevant times. Student was eligible for special education under the category of autism.

ISSUE 1: DID OROVILLE DENY STUDENT A FAPE BY FAILING TO IMPLEMENT STUDENT’S FEBRUARY 10, 2020 IEP AFTER THE COVID-19 SCHOOL CLOSURE?

Student contends that Oroville failed to implement his February 10, 2020 IEP after it closed its schools due to the COVID-19 pandemic by failing to provide Student with special education and related services. Student contends that after school closures, Oroville staff failed to contact Parents to provide the specialized academic instruction or speech services required by his IEP. Oroville contends that it fully implemented Student’s IEP through distance learning in accordance with federal and State guidance and continued to provide Student with a FAPE in accordance with his IEP.

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

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

When a school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the child's IEP. (*Van Duyn v. Baker School Dist.* 5J (9th Cir. 2007) 502 F.3d 811, 815 (*Van Duyn*)). Implementation failures are not procedural errors. (*Id.*, at p. 819.) The Ninth Circuit held that state contract law does not apply to the interpretation of an IEP and that only material failures to implement constitute violations of the IDEA. (*Ibid.*)

STUDENT'S FEBRUARY 10, 2020 IEP

Student's first IEP, developed by Oroville on February 10, 2020 before his third birthday, identified Student as a child with autism. Student had receptive and expressive language delays, communication deficits, attention deficits, and poor finger manipulation skills. The IEP included annual pre-academic goals for Student in the areas of following classroom routines, improving fine motor skills, and attending to table-top activities for two minutes with prompting. Student was nonverbal, and goals specific to language and functional communication included learning to imitate common sounds and to request objects or activities by using picture icons, words or signs.

The February 10, 2020 IEP offered Student 180 minutes per day of specialized academic instruction five times per week, or the equivalent of a three-hour preschool day, in a special education program. Oroville had morning and afternoon three-hour preschool sessions five days per week. The IEP also offered 120 minutes, or six 20-minute sessions, per month of individual and group speech therapy to support his language and communication goals. Student was to receive curb-to-curb transportation to and from school. Mother consented to the IEP on March 5, 2020.

GRANDMOTHER SHARED EDUCATIONAL RIGHTS

Grandmother, not Mother, attended the February 10, 2020 IEP team meeting. Mother did not attend IEP team meetings and represented to Oroville staff in verbal and written communications that Parents and Grandmother shared Student's educational rights. When contacted by email, text or telephone, Mother routinely directed Oroville staff to speak with Grandmother about educational matters regarding Student. Grandmother also represented to Oroville that she held educational rights with Parents, at IEP team meetings and in communications with Oroville staff.

Prior to hearing, Oroville reasonably relied on these express representations and directives, and addressed communications and documents for signature to Mother, Grandmother, or both. However, Mother and Grandmother testified at hearing that Grandmother did not share educational rights with Parents. Whenever a party has, by their own statement or conduct, intentionally and deliberately led another to believe that a particular thing is true and act upon that belief, they are not, in a litigation arising out of the statement or conduct, permitted to contradict it. (Evid. Code, § 623). Accordingly, in this due process hearing, where Student contends that Grandmother did not have educational rights and that Oroville denied Parents an opportunity to participate in the decision making process by communicating with Grandmother and permitting Grandmother to sign an IEP amendment, Student will not be permitted to contradict Mother and Grandmother's representations. For purposes of this due process hearing, Parents and Grandmother shared Student's educational rights, and any communication or document directed to Grandmother was enough to meet Oroville's obligation to communicate or provide documents to Parents.

THE BEGINNING OF THE 2019-2020 SCHOOL YEAR

Student began attending the morning sessions of teacher Joseph Hernandez's preschool classroom in late February 2020, after Student turned three years old. Hernandez's class was part of Oroville's regional preschool program, which served severely handicapped children ages three to four from school districts throughout Butte County. Hernandez had been an educator for 25 years, with a Master's degree in special education, multiple teaching credentials including in early childhood special education, and extensive education, training and experience with preschoolers with autism. He had been a teacher in Oroville's regional preschool program for 14 years. At hearing, Hernandez had a calm demeanor, answered questions thoroughly, had good recall of Student's classroom performance, and testified persuasively about Student's educational needs and the special education and related services to meet those needs.

Hernandez's class had many supports for preschoolers with autism, who typically had language and communication delays, poor social skills, and sensory issues because of their disability. Examples included class schedules for visual support, communication devices that said words at the press of a key, picture cards, and materials and toys that encouraged fine motor development and interactive play. He and his two classroom aides were adept at addressing sensory needs, and respected and provided alternative items to children with tactile sensitivities, such as an aversion to stickiness, a particular texture, or smell. A speech pathologist regularly visited the classroom to provide language and speech lessons to the class.

Throughout the 2019-2020 school year, Parents dropped Student off at Grandmother's house in Oroville on their way to work in the morning, and Grandmother cared for Student in the afternoons after school. Student was picked up by Oroville's

bus at Grandmother's house in the morning and dropped off at Grandmother's house after the morning preschool session.

SCHOOL CLOSURES AND IMPLEMENTATION OF DISTANCE LEARNING

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).) Oroville schools closed that same day.

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.*)

Oroville began offering distance learning on March 30, 2020. Hernandez called the parents of each student in his classroom and provided them with notice of distance learning. He requested that each parent pick up a packet of materials at school.

Hernandez prepared a large packet for each of his students that contained copies of the same paper activities that students would otherwise be performing in his classroom, as well as materials that would be needed to complete preschool activities, such as safety scissors, crayons and glue. Grandmother received Hernandez's call, and picked up Student's packet.

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 3/30/20* (March 30, 2020).)

Oroville instructed Hernandez to draft an IEP amendment for each of his students describing how services would be provided during distance learning. In the chaos of creating a distance learning program for severely handicapped preschoolers, Hernandez did not complete the task.

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.*)

For distance learning between March and June 2020, Hernandez filmed videos of himself conducting Circle Time. He researched materials, arranged for his son to videotape him reading and speaking to his students on camera, and edited the videos. Each 30-minute video required three or more hours to produce and post to the Oroville website for his class. Hernandez also emailed parents, including Grandmother, a link to play his videos and links to other videos he found appropriate for preschool instruction. Hernandez prepared additional packets of materials periodically and notified parents, including Grandmother, to pick them up.

During this same period, Hernandez also established resources for his students on the online platform Padlet, which included a menu of instructional activities that worked on areas of need for his students, such as social skills, fine motor skills, and listening skills. The videos he posted on Padlet included preschool appropriate topics, such as working with letters, counting, and colors. They were not for entertainment but encouraged educational development for his students when they were not physically in school. The participation of his students in the lessons and activities online provided them with the same type of instruction they would have had in the classroom, although the format did not allow for Hernandez and his staff to provide hands on assistance, teach classroom routines, or facilitate interaction among peers. Hernandez was not able to monitor who accessed Padlet. Hernandez opined that the services and activities he provided from March 30, 2020 through June 5, 2020, the last day of the school year, were appropriate under the circumstances.

Alissa Nutt was a licensed language and speech pathologist with training and over 12 years of experience working with children with autism. She provided Student with individual and group speech therapy, and observed him in the classroom, prior to the March 2020 school closures. After Oroville schools closed, Nutt sent materials for Student to work on his imitation goal in the initial packet. She posted ideas and activities that parents could access on Padlet and emailed a link to the website to parents. Nutt had been directed by Student's IEP team to contact Grandmother about speech services, and likely emailed the Padlet access information to Grandmother. Nutt's only contact with the parents of the students in Hernandez's class during distance learning, unless they called her, was through the initial packet and materials uploaded on Padlet. She did not provide individual online services unless requested by the parent, and there was no evidence that Parents or Grandmother were informed that this individualized online service was available.

Grandmother testified that neither Hernandez nor Nutt contacted her after she picked up the initial packet until June 2020. Grandmother claimed that she was unaware of how distance learning was being offered as educational services under Student's IEP, and even how to turn in the first packet. However, Grandmother's testimony was not credible for several reasons. First, it was contrary to documentary evidence. Hernandez's service log documented a telephone call regarding Student on April 20, 2020 that lasted for seven minutes. That log entry indicated a discussion about how Student was doing, an acknowledgement that Grandmother had a different email address, and that Hernandez would ensure that another would be sent. Grandmother received Hernandez's June 2020 emails, because she responded to them. A log entry on April 21, 2021 indicates that another email was sent. It is difficult to fathom given that Grandmother received links to educational materials, and spoke to Hernandez for seven

minutes, that she did not discuss and receive information on how Student's specialized academic instruction was being implemented through distance learning.

Second, Grandmother testified that she was worried about Student's education after the March 2020 school closures, but it stretches credulity that if this was so, she would not have contacted Hernandez, Nutt, or school administration about whether and when services would be received. Or that she would not have inquired of Hernandez on April 20, 2020 about how to turn in the materials packet he had prepared, and whether other packets or educational services were available. Grandmother had email addresses for both Hernandez and Nutt, and several school administrators.

Third, Grandmother testified that if the registration process for an educational platform asked questions she deemed too personal, she would not register. That statement creates a reasonable inference that Grandmother was aware of at least one distance learning application or website that she intentionally chose to not access. And if she found an application or website's registration process too intrusive, it seems unlikely that Grandmother would not have contacted Hernandez, Nutt, or school administration to ask for alternative educational materials she could access without disclosing personal information.

Fourth, Grandmother throughout her testimony appeared to equate the offer of services in a form she did not agree with as a failure to make services available at all. This was most clearly seen later when Grandmother wrote on the back of a February 5, 2021 IEP that Student did not receive services because she had never agreed for Student to be enrolled in distance learning. Therefore, Grandmother's often conclusory testimony that Oroville did not offer instruction at various periods of time was less than credible.

Lastly, as will be discussed in the analysis of the 2020-2021 school year at Issue 11, Grandmother lied under penalty of perjury at least twice to obtain transportation services for Student after she moved out of Oroville's boundaries. *Falsus in uno, falsus in omnibus* is a common law principle, which means false in one thing, false in everything. The principle, initially codified in California Code of Civil Procedure, section 2061, stands for the proposition that a witness who willfully falsifies one matter is not credible on any matter. (See, *White v. Disher* (1885) 67 Cal. 402, 7 P. 826; California Civil Jury Instructions 2017, section 5003; see Evid. Code § 780.) Grandmother's admitted willingness to be untruthful to obtain the transportation services she wanted for Student undermined the credibility of her testimony throughout the hearing. Her accuracy on the dates of meetings and other minor points was outweighed by her lack of credibility in most other areas.

As of April 20, 2020, Grandmother was, or should have been, aware that Oroville was offering distance learning. Any lack of Student access to the services offered during the 2019-2020 school year after that date was due to Grandmother's intentional decision not to access them.

Based on the guidance provided by the US DOE, Oroville was not required to provide Student a FAPE while Oroville schools were closed to all students, which they were from March 19, 2020 through March 29, 2020. (*Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak, supra*, p. 2, Answer A-1.)

However, the special education and services provided to Student for the remainder of the 2019-2020 school year, once Oroville schools reopened for distance learning, fell far short of that required by Student's February 10, 2020 IEP.

Student's February 10, 2020 IEP called for 180 minutes daily of specialized academic instruction. Student was offered, had Grandmother accessed it, distance learning in the form of four 30-minute videos by Hernandez, one or more packets of educational materials, and links to various websites with videos and other instructional material. Although both Hernandez and Nutt opined that the services offered through distance learning after March 30, 2020, were appropriate under the circumstances, the services provided were not equivalent to 180 minutes per day of instruction, five days per week, or six 20-minute speech sessions per month.

Both the federal and state guidance to Oroville in March and April 2020 were very generous in their recognition that IEP services would look different under COVID-19 health and safety restrictions. Both governments encouraged distance learning and acknowledged that instruction would take the form of virtual interactions, online resources and pencil and paper tasks. However, Student established that he did not receive the services indicated in his IEP, and Oroville made no effort to demonstrate how the videos and packets provided from March 30, 2020 through June 5, 2020 were the equivalent of, or even comparable to, the special education and related services offered in his February 2020 IEP.

Hernandez's service log for that period demonstrated, at most, a few hours of specialized academic instruction during that time period. Nutt did not keep a log and did not provide individualized speech services to Student. The conclusory opinions of Oroville's witnesses that the services provided to Student's in Hernandez's class during that period were appropriate under the circumstances were insufficient to establish that Student was provided access to specialized instruction and related services reasonably calculated to enable Student to make progress in light of his circumstances. In fact,

Nutt opined that Student made no progress in 2019-2020, and Hernandez did not see progress until Student returned to in-person learning in the subsequent school year.

The only attempt Oroville made to quantify the education provided was Hernandez's unsupported opinion that his three hours of research, filming, editing and posting 30-minute videos was the equivalent of three hours of instruction. It was not. A 30-minute video provided 30 minutes of instruction.

Kimberly Tyler, the principal of Student's school, who was also Oroville's director of special education, testified persuasively that a three-hour preschool day had many periods of time when instruction was not given, such as snack time, recess, and nap time. That may be accurate, but after Student proved that he had not received what was called for in his IEP, the burden shifted to Oroville to establish that Student's distance learning program was the equivalent of a three-hour day, taking into account time for snack, play and nap, or was otherwise designed to provide him with a FAPE.

There was no testimony or documentary evidence that the materials sent home or available online, although appropriate for Student and supportive of at least one of his goals, provided Student with the same level of service described in his IEP. Such a showing might have included, for example, that an at-home assignment to trace letters was the equivalent of in-class time allocated for tracing to work on fine motor skills. Or that asking a parent to read a themed book to the child each morning and ask related questions might be the equivalent of Hernandez's daily Circle Time. Parents can give their children one-to-one attention, where much of a preschool class is devoted to group instruction, making one-to-one parental instruction perhaps equivalent to a greater amount of time spent in the classroom. However, no showing along these lines

was made. Egregiously, Nutt provided online individualized speech services during school closure when requested, but these were not offered to Student.

Oroville's distance learning program was not designed to, and did not, meet Student's individualized educational needs. Hernandez's service log shows that although IEP team meetings were scheduled for seven other students in his classroom in early April 2020, no IEP was scheduled or held to review Student's distance learning program to ensure that it was in compliance with Student's IEP.

The IDEA allows flexibility in providing FAPE to a child with disabilities, and both federal and State agencies responsible for enforcement of special education laws acknowledged that FAPE would need to be provided through distance learning in most cases. Here, the services offered and implemented in the 2019-2020 school year after school closure did not provide the amount or frequency of services identified in the February 10, 2020 IEP. This constituted a material failure by Oroville to implement Student's IEP through the end of the 2019-2020 school year.

Student met his burden of proving that Oroville denied him a FAPE by failing to implement the February 10, 2020 IEP from March 30, 2020 through June 5, 2020. Student prevailed on Issue 1.

ISSUE 2: DID OROVILLE DENY STUDENT A FAPE BY FAILING TO PROVIDE A COPY OF PROCEDURAL SAFEGUARDS DURING THE 2019-2020 SCHOOL YEAR?

Student contends that he was denied a FAPE because Parents were not given a copy of procedural safeguards by Oroville during the 2019-2020 school year. Oroville contends that Parents were given multiple copies of procedural safeguards that year.

A copy of procedural safeguards must be given to the parents of a child with a disability only one time each school year. (34 C.F.R. § 300.504.) The IDEA regulations do not specify when during a school year the procedural safeguards must be provided, except that a copy must also be given to parents upon initial referral for evaluation or on parent request, and in other circumstances that do not apply here. (34 C.F.R. § 300.504.) California law requires that parents be informed of federal and state procedural safeguards at each IEP team meeting. (Ed. Code, § 56500.1, subd. (b).)

The preponderance of evidence established that Mother and Grandmother received copies of the notice of parental rights and procedural safeguards during the 2019-2020 school year.

Holly VanDuzer, the Oroville school psychologist who conducted an initial preschool psychoeducational assessment of Student for special education eligibility in January 2020, testified persuasively that it was her usual practice to include a copy of procedural safeguards with every initial assessment plan she mailed. The correspondence mailed to Mother on December 19, 2019, included a cover letter, assessment plan, procedural safeguards, and developmental questionnaire. The cover letter expressly stated that a copy of procedural safeguards was enclosed. The enclosed assessment plan also made express reference to procedural safeguards, and included VanDuzer's telephone number and email address to contact in the event of questions regarding those safeguards. Nobody from Student's family contacted VanDuzer to say that the procedural safeguards had not been enclosed. The questionnaire was completed and returned, creating a reasonable inference that Mother had received the letter and the enclosed documents, including procedural safeguards.

Hernandez, who at that time conducted approximately 20 IEP team meetings per year, attended Student's February 10, 2020 IEP team meeting. Although he did not recall actually handing the procedural safeguards to Grandmother at that meeting, he testified persuasively that it was his usual custom and practice to give parents written copies of the procedural safeguards at the beginning of each IEP team meeting, and he believed he handed a copy to Grandmother at that time.

Hernandez was required to electronically check a yes or no box on the IEP at the end of each IEP team meeting to indicate whether the parent had received a copy of procedural safeguards. The boxes at the end of the February 10, 2020 IEP were left blank because the document was sent home with Grandmother to be reviewed with Mother prior to completing the signature page with the boxes. Mother checked only the box above the signature line consenting to implementation of the IEP. She did not check any of the boxes below the signature line, which asked her to confirm parental involvement, or that she had received copies of the procedural safeguards, the assessment report, and the IEP. There was no dispute that Mother received a copy of Oroville's assessment report and the IEP, and Mother's failure to check any of the multiple boxes below her signature on the February 20, 2020 IEP suggests that she did not read and complete those sections, and not that she did not receive a copy of procedural safeguards.

On June 2, 2020, Hernandez sent an electronic IEP amendment dated March 30, 2020, to Grandmother. The evidence failed to establish a copy of procedural safeguards was sent to Grandmother with the March 30, 2020 IEP. Although Hernandez testified that his usual practice at IEP team meetings was to provide parents with a copy of procedural safeguards, there was no team meeting with Grandmother on June 2,

2020, or any other day. His testimony does not establish that a copy of procedural safeguards was electronically sent to Parents or Grandmother. However, the preponderance of evidence established that Mother and Grandmother had already received copies of procedural safeguards with the initial assessment plan mailed December 19, 2020, and at the February 10, 2020 IEP team meeting.

Student's witnesses were not persuasive on this issue. Mother testified that she did not recall whether she received a copy of procedural safeguards during the 2019-2020 school year. Mother generally did not recall the substance of communications with Oroville staff. When questioned at hearing, Mother often said that Grandmother would need to respond.

Grandmother's testimony did not establish that she did not receive a copy of the procedural safeguards during the 2019-2020 school year. Grandmother testified that she had not received a physical copy of procedural safeguards and could not find any as an attachment to emails. However, Mother, Grandmother and Great Aunt admitted they did not know if they had found all communications. Mother and Grandmother communicated with Oroville primarily by email and received both emails and physical documents from Oroville. Mother forwarded most, but not all the emails and documents received from Oroville to Grandmother, who saved most, but not all those documents. Written documents were forwarded to Great Aunt to maintain. Although Great Aunt testified that there were no procedural safeguards in her archive of written materials, and that she did not find any as attachments when she assisted Mother and Grandmother in searching their emails, such testimony was insufficient to prove that the procedural safeguards were never provided.

Student did not meet his burden of proving that Oroville denied him a FAPE by failing to provide Parents or Grandmother with notice of procedural safeguards during the 2019-2020 school year, including extended school year. Oroville prevailed on Issue 2.

ISSUE 3: DID OROVILLE DENY STUDENT A FAPE BY ENTERING A START DATE OF MARCH 30, 2020 IN THE IEP AMENDMENT GIVEN TO GRANDMOTHER TO SIGN ON JUNE 4, 2020 WITHOUT A MEETING?

Student contends that he was denied a FAPE because the March 30, 2020 IEP amendment given to Grandmother on June 4, 2020 was drafted without a meeting and stated that the services in the amendment would be effective March 30, 2020. Student argues that the March 30, 2020 date on the amendment was an attempt by Oroville to retroactively change the services it was obligated to provide Student from March 30, 2020 through June 2020. Oroville contends there was no denial of FAPE, that the document was merely drafted in March 2020, and that the language only changed the delivery model of services during the pandemic.

A school district may only implement those portions of an IEP to which the parent consents. (Ed. Code, § 56346, subd. (f); *I.R. v. Los Angeles Unified School Dist.* (9th Cir. 2015) 805 F.3d 1164, 1168-1169.) Accordingly, an IEP is not effective until consent is given.

In making changes to a child's IEP after the annual IEP team meeting for a school year, the parent and the school district may agree not to convene an IEP team meeting for the purposes of making such changes, and instead may develop a written amendment to the IEP. (20 U.S.C. § 1414(d)(3)(D) & (F).)

In March 2021, Hernandez began preparing, but did not complete, an IEP amendment to Student's February 20, 2020 IEP. The IEP amendment was dated March 30, 2020, and described how Student's IEP services would be provided when Oroville schools opened for distance learning. In June, a few days before the end of the 2019-2020 school year, Hernandez realized that he had forgotten the amendment, and panicked.

Hernandez telephoned Grandmother on June 2, 2020, and explained that Student's IEP needed to be changed to reflect distance learning. Hernandez told her she needed to sign right away. Hernandez finished and signed the amendment on June 2, 2020, but did not change the start date of services. VanDuzer signed the amendment on June 3, 2020. Hernandez emailed the document to Grandmother for signature on June 4, 2020. Grandmother electronically signed the March 30, 2020 IEP amendment on June 4, 2020 and returned it to Oroville.

Student failed to prove that parental participation in the decision-making process was significantly impeded by having Grandmother sign a copy of the IEP Amendment on June 4, 2020. There was no showing at hearing that Grandmother did not have sufficient time to review the March 30, 2020 IEP amendment before signing it. In addition, Grandmother did not request an IEP team meeting, and by her signature, agreed to the amendment of the February 10, 2020 IEP without an IEP team meeting.

Student's claim that Oroville was trying to take services away retroactively is without merit. An IEP cannot be implemented until consent is given. Until the amendment was signed on June 4, 2020, Oroville was required to implement the February 10, 2020 IEP. Grandmother's signature on an amendment to the February 10, 2020 IEP, regardless of the date designated for services to begin, did not in any way

change Oroville's obligation to implement the February 10, 2020 IEP from Mother's consent on March 5, 2020 through Grandmother's consent to the amendment on June 4, 2020.

Student did not meet his burden of proving that Oroville impeded Parents from meaningfully participating in the decision-making process by having Grandmother sign a copy of the March 30, 2020 IEP on June 4, 2020 without an IEP team meeting. Oroville prevailed on Issue 3.

ISSUE 4: DID OROVILLE DENY STUDENT A FAPE BY ASKING GRANDMOTHER TO SIGN THE MARCH 30, 2020 IEP AMENDMENT WITHOUT PARENTAL INVOLEMENT IN ITS DEVELOPMENT?

Student contends that he was denied a FAPE by Oroville when it allowed Grandmother to sign the March 30, 2020 IEP Amendment because Parents were the sole holders of Student's educational rights. Student asserts that by having Grandmother sign the amendment, Oroville denied Parents' participation in the decision-making process. Oroville contends that it relied on representations by Mother that Grandmother shared educational rights with Parents when it obtained Grandmother's consent to the March 30, 2020 IEP amendment.

As explained in Issue 1, Mother and Grandmother deliberately led Oroville to believe that Grandmother shared Student's educational rights through their repeated statements and conduct, and they cannot now be heard to contradict that statement. (See Evid. Code, § 623.) A person is presumed to intend the ordinary consequences of their voluntary act. (Evid. Code, § 665). Therefore, for purposes of this Decision, Parents and Grandmother are deemed to have shared educational rights, and it can be

presumed that Mother intended Grandmother to sign the March 30, 2020 IEP amendment on her behalf without the need for an IEP team meeting with Parents.

The evidence established that Mother routinely directed Oroville to contact Grandmother regarding Student's educational matters and deferred to Grandmother in making educational decisions concerning Student. Moreover, Grandmother saw Parents daily, and they commonly held family meetings to discuss Student's education and communications to and from Oroville. Grandmother drafted the emails Mother sent to Oroville. Grandmother's signature on the March 30, 2020 IEP amendment did not establish that Parents were denied an opportunity to review the document, or to call an IEP team meeting if they disagreed with the amendment.

Student failed to meet his burden of providing that he was denied a FAPE because Grandmother signed the March 30, 2020 IEP amendment, or that her consent to the IEP denied Parents of a meaningful opportunity to participate in the decision-making process. Oroville prevailed on Issue 4.

ISSUE 5: DID OROVILLE DENY STUDENT A FAPE BY FAILING TO MAKE A CLEAR OFFER IN THE MARCH 30, 2020 IEP AMENDMENT?

Student contends that the offer of FAPE in the March 30, 2020 IEP amendment was unclear, because it contained misstatements about its development, and it offered a confusing menu of options without a clearly identifiable offer of special education and related services. Oroville contends that it made a clear offer of FAPE.

A school district is required by the IDEA to make a clear written IEP offer that parents can understand. (*Union School Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526, cert. denied, 513 U.S. 965 (*Union*)). A formal, specific offer from a school district alerts

the parents of the need to consider seriously whether the proposed placement is appropriate under the IDEA, and helps them determine whether to reject or accept the placement with supplemental services. It also allows the district to be more prepared to introduce relevant evidence at hearing regarding the appropriateness of the IEP offer. (*Ibid.*) The procedural requirement of a formal written offer creates a clear record that may eliminate troublesome factual disputes many years later about what was offered. (*Id.* at p. 1525.)

The IDEA requires an IEP to include a statement of the special education and related services that will be provided to the student. (20 U.S.C. § 1414(d)(1)(A)(i)(IV); Ed. Code, § 56345, subd. (a)(4).) The IDEA also requires that the IEP set forth the anticipated frequency, location, and duration of those services and modifications. (20 U.S.C. § 1414(d)(1)(A)(VII); Ed. Code, § 56345, subd. (a)(7).)

A due process decision must be based upon substantive grounds when determining whether a child has received a FAPE, unless a procedural violation impedes the child's right to a FAPE, significantly impedes the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to their child, or causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E); Ed. Code, § 56505, subd. (j); *Rowley, supra*, 458 U.S. at pp. 206-207.) Procedural violations which do not result in a loss of educational opportunity or which do not constitute a serious infringement of parents' opportunity to participate in the IEP process are insufficient to support a finding that a student has been denied a FAPE. (*W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1482 (*Target Range*).)

The March 30, 2020 IEP was not intended to merely document a transition to a distance learning delivery model. The CDE's April 9, 2020 guidance did not require IEP

amendments or IEP team meetings for school districts to transition to distance learning during the COVID-19 pandemic, and Oroville transitioned Student's services to distance learning in March 2020 without an IEP amendment or team meeting for Student.

Instead, the March 30, 2020 IEP expressly stated that its purpose was to give notice of a change in services. The March 30, 2020 IEP amendment offered the following special education and related services, set forth verbatim:

Specialized Academic Instruction worksheet packets/Consult (phone call or e-mail) and/or direct instruction via online, remote learning platforms (including Padlet) – 30 minutes weekly

Speech and Language – A combination of online support provided through an online platform such as Padlet and/or Google classroom, collaboration and consultation with general education teacher, and/or packet of work – 20 minutes/week

The amount of specialized academic instruction and speech and language services offered during distance learning in the March 2020 IEP Amendment were significantly less than what was required by the in-person services set forth in the February 2020 IEP. To explain this discrepancy, Oroville witnesses unpersuasively testified that the 30-minute and 20-minute offers for specialized academic instruction and speech and language services were a minimum and did not reflect the actual level of services Student would receive during distance learning. However, per *Union*, Parents and Grandmother were entitled to an offer that accurately represented the services that were to be provided to Student. The length of time that an offered service will be delivered must be stated in an IEP in a manner that is clear to all who are involved. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 953.)

By understating the amount of services Student was to receive to make progress on his goals, Oroville made the March 2020 IEP offer incapable of enforcement by Parents beyond 30 minutes of specialized academic instruction and 20 minutes of speech therapy per week. Parents must be able to participate in both the formulation and the enforcement of the IEP, and insufficiently specific drafting renders the IEP useless as a blueprint for enforcement. (*M.C. v. Antelope Valley Union High School Dist.* (9th Cir. 2017) 858 F.3d 1189, 1199; see also *Tamalpais Union High School Dist. v. D.W.* (N.D.Cal. 2017) 271 F.Supp.3d 1152, 1161 (*Tamalpais*.) The failure to specify the entire amount of services that Oroville intended to provide Student was a procedural error.

In addition, the March 30, 2020 IEP was also unclear because it did not clearly identify the nature of the services that Oroville intended to provide. First, the IEP stated that Student could receive specialized academic instruction through packets, consult, direct instruction, or any single delivery method or combination of delivery methods. As written, Student could receive the entirety of his instruction through worksheets sent home without any participation by the special education teacher beyond a telephone call or email to Parent. It is difficult to discern how that would constitute specialized academic instruction. Similarly, Student could receive direct instruction online from a special education teacher or by remote learning platforms videos. Again, it is difficult to discern how watching only online videos would constitute specialized instruction. The reference to an unallocated combination of services is too vague to permit Parents and Grandmother to understand the nature, frequency and duration of those services.

The offer of speech therapy included online support, collaboration and consultation with a general education teacher, work packets, or any single delivery model or combination of models. There was no explanation of what online support meant, and that term is so broad that it could encompass many different and varied

formats. It is unclear whether the offer of online support included direct individual services with a speech pathologist, or merely access to videos and text through online platforms. The reference to collaboration with a general education teacher when Student is in a special education classroom for severely disabled children was unclear and confusing.

Oroville's speech and language offer was similar to the one in *Tamalpais*, in which both individual and group speech services were offered by checking both individual and group services boxes on the IEP document. *Tamalpais* held that the IEP did not sufficiently give notice of the specific services the district was committing to provide because it did not clearly allocate the offered minutes between individual and group, rendering the IEP unenforceable and therefore unclear. (*Tamalpais, supra*, 271 F.Supp.3d at p. 1162.)

The unclear offer was a procedural violation that constituted a denial of FAPE because it significantly impeded the opportunity of Parents and Grandmother to participate in the IEP process. Considering the nature of Student's cognitive and speech and language impairments, the June 4, 2020 offer was too vague to permit Grandmother to make an informed decision to accept or reject the offer. There was no IEP team meeting held to discuss the offer with Mother or Grandmother, and Hernandez did not discuss the entire contents of the IEP during his brief telephone call with Grandmother on June 4, 2020. The vagueness of the offer caused exactly the problems foreseen in *Union*. Parents and Grandmother were not alerted to the need to consider seriously whether the proposed program was appropriate under the IDEA, because the offer was subject to such a vast array of interpretations. The offer was incapable of enforcement as to any one delivery method, as the amendment gave Oroville unlimited discretion to choose any combination of individual or group, direct or indirect, live or

recorded, and online or paper and pencil delivery. The vague reference to multiple modes of instruction and services implied, but did not commit Oroville to, a vast array of services to instruct and support Student. The June 4, 2020 offer did not give Parents and Grandmother the information necessary to make an informed decision on the services proposed by Oroville.

The March 30, 2020 IEP amendment was not offered until the day before the last day of the 2019-2020 regular school year. However, the March 30, 2020 IEP amendment was consented to on June 4, 2020, and in effect for the 2019-2020 extended school year. Therefore, Student met his burden of proving that Oroville denied him a FAPE during the 2019-2020 extended school year because the March 30, 2020 IEP amendment did not make a clear offer of FAPE, and denied Parents and Grandmother meaningful participation in the decision-making process. Student prevailed on Issue 5.

ISSUE 6: DID THE MARCH 30, 2020 IEP DENY STUDENT A FAPE?

Student contends that the amount and form of specialized academic instruction and speech and language therapy designated in the March 30, 2020 IEP amendment failed to offer him a FAPE. Oroville disagrees.

There is no question that the form of special education and related services under the IDEA would necessarily change during the COVID-19 pandemic. A change in the IEP delivery model was clearly required by California health and safety restrictions to contain the transmission of a deadly virus. However, the June 4, 2020 offer in the IEP amendment dated March 30, 2020 not only changed the delivery model of Student's services, it changed the amount of services to be received. The March 30, 2020 IEP amendment contained no explanation for the reduced services offered, and the

preponderance of evidence demonstrated that the drastic reduction in services was a denial of FAPE.

The IEP team that developed Student's initial IEP on February 10, 2020, determined that Student required 180 minutes of daily specialized academic instruction, and 120 minutes per month of speech services, to make progress on his annual goals through his annual IEP review in February 2021. That determination was made at an IEP team meeting that included Grandmother, assessors, service providers, teachers and program administrators. The team decided the services needed to support Student in making progress on his goals after presentations of assessment results and with input from all team members.

Oroville schools closed in mid-March 2020, after Student had been in Hernandez's class for less than three weeks. From March 30, 2020 through the end of the 2019-2020 school year on June 5, 2020, Hernandez did not interact with his students directly, and only posted videos and sent links for online access to recorded materials. On June 4, 2020, Oroville staff had insufficient information on Student's progress to recommend a decrease in Student's services. The March 30, 2020 IEP amendment offered Student only about three percent of the specialized academic instruction, and 65 percent of the speech services, determined to be appropriate in February 2020.

The March 30, 2020 IEP amendment was signed by Hernandez on June 2, 2020, and by VanDuzer on June 3, 2020. At that time, Hernandez and VanDuzer did not have a report on Student's present levels and did not have any new assessments. The language in the March 30, 2020 IEP was template language developed by Oroville, and there was no showing that Hernandez or VanDuzer took Student's unique educational needs into consideration in developing the offer presented to Grandmother.

The March 30, 2020 IEP's reduced services, without further assessment and insufficient information to support such a significant decrease, did not provide Student with access to specialized instruction and related services individually designed to provide Student educational benefit. Accordingly, the March 2020 IEP amendment was not reasonably calculated to enable Student to make progress in light of his circumstances.

Although Hernandez, Nutt, and Tyler each testified that, in their opinions, the March 30, 2020 IEP amendment offered Student a FAPE under the circumstances of the COVID-19 pandemic, their conclusory opinions were unpersuasive. None of them addressed the reduction in services, and each vaguely alluded to the amendment offering a minimum of services rather than the actual amount to be provided, or presumably needed for Student to receive educational benefit. None of them explained how 30 minutes weekly of specialized academic instruction and 20 minutes weekly of speech and language services were individually designed to provide Student with educational benefit that would enable him to make appropriate progress on his goals in light of his disabilities.

Student met his burden of proving that the decreased offer of special education and services in the March 30, 2020 IEP amendment denied him a FAPE. Student prevailed on Issue 6.

ISSUE 7: DID OROVILLE DENY STUDENT A FAPE BY FAILING TO OFFER AN EXTENDED SCHOOL YEAR PROGRAM FOR SUMMER 2020?

Student contends that he was denied a FAPE because Oroville did not offer him an extended school year program in Summer 2020, and that the lack of an extended

school year program caused Student to regress. Oroville contends that it had insufficient information to offer Student an extended school year program.

The IDEA requires a school to provide a child with extended school year services if the child's IEP team determines that the services are necessary for the provision of a FAPE. (34 C.F.R. § 300.106(a)(2).)

California special education regulations require that extended school year services be provided for each student who requires special education and related services in excess of the regular academic year. (Cal. Code Regs., tit. 5, § 3043.) A student needs extended programming if their disability is likely to continue indefinitely or for a prolonged period of time, and interruption of their educational programming may cause regression, rendering it impossible or unlikely that they will attain the level of self-sufficiency and independence that would otherwise be expected in view of their disabling condition. (*Ibid.*) Students who may require an extended school year include those placed in special classes. (Cal. Code Regs., tit. 5, § 3043, subd. (b)(1).)

Oroville was not required to offer Student an extended school year in the February 10, 2020 IEP because at that time Student had never been in a school setting, and the IEP team had not had an opportunity to determine whether Student was a child who would regress in school readiness skills during extended breaks to such an extent that he would not recoup them upon return to the classroom.

However, by June 2, 2020, when the March 30, 2020 IEP was developed, Hernandez and Nutt had the opportunity to observe whether Student experienced regression during two extended breaks. One break was over the two weeks that Oroville schools were first closed due to the COVID-19 pandemic in March 2020. The second was during the one-week Spring Break in April 2020. Although schools were still

closed to in-person instruction in June 2020, and Hernandez was not interacting live online with his students at that time, this information could have been gathered in multiple ways while still conforming to social distancing guidelines. Hernandez or Nutt could have telephoned Grandmother, emailed her, or initiated a videoconference that allowed them to speak with her and observe Student. Their failure to reach out to Grandmother to obtain information on Student's progress or regression in preschool readiness skills, or in language and functional communication, did not excuse Oroville from its obligation to determine if extended school year services were necessary for Student to receive a FAPE.

In fact, Mother, Grandmother and Great Aunt testified consistently and persuasively that Student regressed during his break in education after school closure. Student had begun making babbling sounds during in-person classes prior to the March 19, 2020 school closures, but such vocalizations stopped over the school closure break. Student exhibited less eye contact and engagement in activities when not in school. The evidence demonstrated that Student regressed in preschool readiness and language and speech skills during extended school breaks, and that evidence was available to Oroville at the time the March 2020 IEP Amendment was presented to Grandmother to sign.

Although California special education regulations do not require a school district to offer extended programming to all students in special education, and specific criteria that an IEP team must consider is defined, the regulations do expressly state that students placed in special classes may experience regression. (Cal. Code Regs., tit. 5, § 3043, subd. (b)(1).) Student was placed in Hernandez's class for severely handicapped preschoolers, who could be expected not only to have a more difficult time learning school readiness skills, but to have a more difficult time retaining those skills over an

extended school break. By June 2020, Student had regressed, and was unlikely to quickly recoup lost skills without an extended school year program, making it clear he required extended school year services over Summer 2020 to receive a FAPE. The failure to include extended school year services in the IEP amendment dated March 30, 2020, denied Student a FAPE.

Student met his burden of proving that Oroville denied him a FAPE by failing to offer extended school year services to Student in the March 30, 2020 IEP amendment. Student prevailed on Issue 7.

ISSUE 8: DID OROVILLE DENY STUDENT A FAPE BY FAILING TO ASSESS STUDENT FOR OCCUPATIONAL THERAPY DURING THE 2019-2020 SCHOOL YEAR?

Student contends that he had a history of sensory and fine motor difficulties, and that Oroville denied him a FAPE by failing to assess him for occupational therapy during the 2019-2020 school year or extended school year. Oroville contends that an occupational therapy assessment was not necessary or appropriate at that time.

School district evaluations of students with disabilities under the IDEA serve two purposes. First, they identify students who need specialized instruction and related services because of an IDEA-eligible disability, and second, they help IEP teams identify the special education and related services the student requires. (34 C.F.R. §§ 300.301 and 300.303.) The first refers to the initial evaluation to determine if the child has a disability under the IDEA, while the latter refers to follow-up or repeat evaluations that occur throughout the course of the student's educational career. (See 71 Fed. Reg. 46,640 (Aug. 14, 2006).)

During an initial evaluation prior to initiation of special education services, a school district must conduct a full evaluation to determine if the child is a child with a disability and eligible for special education and related services. (20 U.S.C. § 1414(a)(1)(A), (a)(1)(C)(I).) The school district must assess the student in all areas of suspected disability. (*Timothy O. v. Paso Robles Unified School Dist.* (9th Cir. 2016) 822 F.3d 1105, 119. (*Timothy O.*)) The initial evaluation must also determine the educational needs of the child. (20 U.S.C. § 1414(a)(1)(C)(II).) California requires that a student also be assessed in all areas related to the suspected disability, including if appropriate, motor abilities, among other areas. (Ed. Code, § 56320, subd. (f).)

During Student's initial assessment in January 2020, VanDuzer reviewed a report dated November 21, 2019, and completed at the request of an early childhood program to test Student for autism. That assessor concluded that Student met the criteria for autism spectrum disorder. The assessor recommended that Student, who was almost three years old at the time, be referred to his local school district for development of an IEP and enrollment in a program to address preacademic skills, adaptive skills, language and social skills. The assessor also recommended that Student's sensory needs be assessed by an occupational therapist. The assessor did not testify, but the recommendation seemed to be based on reported observations during a play-based assessment, in which Student appeared to engage in sensory seeking behaviors, such as making long swipes on the carpet with his feet, smelling a blanket, taking off his shoes and socks, staring at things, feeling surfaces, jumping up and down, flapping his hands, and pushing his abdomen into chairs. Grandmother and Great Aunt were interviewed for that assessment and did not report sensory concerns.

VanDuzer conducted a play-based assessment of Student on January 21, 2020. Grandmother and Great Aunt accompanied Student to that assessment and did not

report any sensory concerns. VanDuzer's findings were consistent with the findings in the November 2019 evaluation, and she concluded that Student had adaptive, cognitive and speech and language delays, and qualified for special education as a student with autism.

Although VanDuzer saw the recommendation by the previous assessor for an occupational assessment of sensory needs, she did not think that was appropriate at the time for several reasons. VanDuzer was a credentialed school psychologist, with degrees in early childhood education and school psychology. She had taught preschool for six years, and been in medical administration for six years, prior to becoming a school psychologist for Oroville in 2018. First, many preschool-aged children, particularly those with autism, had mild sensory issues, such as aversions to particular textures and sensory seeking behaviors. Such sensory needs were addressed in Oroville's regional preschool program for children with severe disabilities, and young preschoolers were given the opportunity to progress with the classroom sensory curriculum and accommodations before pulling them out of the classroom for occupational therapy. This was consistent with guidance from the Butte County Office of Education, which directed school districts to implement classroom interventions before referring a child to assessment for occupational therapy.

Second, early childhood programs for infants and toddlers did not determine educational needs, and had treatment standards not relevant to school districts. Treatment needs were not necessarily educational needs, and a recommendation for assessment for sensory needs in the home did not require an assessment for sensory needs exhibited in the classroom, particularly where the child had not yet entered the classroom setting.

Third, other than the psychologist's recommendation in November 2019, there was no reasonable suspicion of sensory integration deficits that would affect Student's access to the curriculum. The family did not report sensory concerns during the November 2019 assessment, during VanDuzer's January 2020 assessment, or at the February 10, 2020 IEP team meeting. VanDuzer did not observe sensory seeking behaviors during her assessment, and although Grandmother mentioned that Student disliked sticky substances, this did not rise to a non-frivolous concern that Student had sensory needs that could not be addressed by the classroom curriculum.

VanDuzer's opinion that classroom interventions should be utilized first to see if the child made progress prior to referring them to occupational therapy was not contradicted by any other educational professional. VanDuzer believed that an experienced special education teacher like Hernandez should have an opportunity to implement in-class strategies, and that Student should only be pulled out of the classroom setting for occupational therapy if those strategies failed. She persuasively reasoned that if Hernandez had any concerns regarding Student's need for additional sensory support, he could make a referral or call an IEP team meeting to discuss additional services. VanDuzer's own assessment identified Student's fine motor skills deficits, and those deficits were addressed by Oroville's special education preschool curriculum.

Amber Copeland, a licensed occupational therapist from Butte County Office of Education who assessed Student during the 2020-2021 school year, gave a similar opinion. She testified that early childhood assessments of children under the age of three did not assess for sensory dysfunction that would affect a child's ability to function in the classroom. Recommendations from early childhood programs did not automatically warrant a school-based assessment, and it was appropriate for Hernandez

to observe Student in the classroom before determining if Student needed a referral for an occupational therapy assessment.

Mother and Grandmother testified that they were concerned that Student was seeking sensory input when he engaged in activities like snapping his fingers beside his ears, grinding his teeth, jumping on the trampoline, or refusing to wear a mask. However, these concerns were not expressed to the February 10, 2020 IEP team, or to VanDuzer, Hernandez, or any Oroville staff member during the 2019-2020 school year or extended school year. Further, Hernandez corroborated VanDuzer's opinions when he persuasively opined that Student did not display any sensory issues or fine motor skill deficits that could not be addressed in the classroom during the weeks Hernandez taught Student in February and March 2020. For example, Student had an aversion to sticky textures, which was not uncommon, and Hernandez and his staff would avoid engaging in activities that required Student to touch a sticky surface, would gradually introduce Student to various sticky textures to desensitize him, and would teach Student strategies to meet his sensory needs, such as washing his hands if he had a sticky substance on them.

The weight of the evidence established that Oroville was not required to assess Student for sensory or fine motor deficits, or any other area requiring occupational therapy, during the 2019-2020 school year and extended school year.

Student did not meet his burden of proving that Oroville denied him a FAPE by failing to provide him with an occupational therapy assessment during the 2019-2020 school year and extended school year. Oroville prevailed on Issue 8.

ISSUE 9: DID OROVILLE DENY STUDENT A FAPE BY FAILING TO IMPLEMENT THE FEBRUARY 2020 OR MARCH 30, 2020 IEPs DURING THE 2020-2021 SCHOOL YEAR?

Student contends he was denied a FAPE at the beginning of the 2020-2021 school year during the continuation of the COVID-19 school closure and distance learning because he was not receiving the services in his February or March 2020 IEPs. He also contends that after the school reopened for a combination of in-person and distance learning, he was denied a FAPE because he was not allowed to attend the in-person portion of his classes without a mask exemption, and therefore and did not receive the services in the March 30, 2020 IEP amendment. Oroville contends that it implemented Student's March 30, 2020 IEP amendment at all times.

AUGUST 2020 TO OCTOBER 2020 - DISTANCE LEARNING

At the beginning of the 2020-2021 school year, Student's operative IEP was the March 30, 2020 IEP amendment that Grandmother consented to on June 4, 2020. That was the IEP that Oroville was required to implement.

On August 12, 2020, Oroville's 2020-2021 school year began with schools still closed because of the ongoing pandemic. For eight school days, from August 12, 2020 through August 21, 2020, Oroville devoted its resources to training teachers and aides, and ensuring that parents were able to get online and familiar with the different online platforms that Oroville teachers would be using for instruction. Oroville teachers were also getting materials prepared for parents to pick up. Hernandez was still Student's preschool teacher, and Hernandez prepared a packet for his students that included work on the letters A through D, coloring sheets, and materials for fine motor skill practice,

such as crayons, paint, safety scissors and play dough. He frequently called to check in with parents, including Grandmother, to help them with enrollment and distance learning preparation. Oroville's preparations for these eight days did not constitute instruction.

Governor Newsom issued Executive Order N-73-20 on August 24, 2020, requiring schools to ensure that students had computers and connectivity to access distance learning.

On Monday August 24, 2020, Hernandez's classes began with an online meeting for students and their parents to review his classroom's distance learning program. The preschool morning program began daily with a live videoconference Circle Time four mornings a week for 20 to 30 minutes. Afterwards, his students would be assigned to log in to one of two live 15-to 20-minute videoconference activities where they would work on their goals, referred to as Art with Martha and Pre-Academics with Jewel. Hernandez posted over 60 instructional videos to his Padlet for parents and students to access throughout the day, with typed narratives to direct the adults working with his students. Circle Time and the art and preacademic activities occurred on four days of synchronous, or live, instruction. One day was reserved for asynchronous, or recorded, instruction. Hernandez used the asynchronous day to correspond with parents and prepare for the following week.

A week after instruction began, on September 2, 2020, Nutt began to live 20- to 30-minute videoconference Speech Circle for students in Hernandez's class. Nutt worked on language skills, imitation, and turn-taking during Speech Circle.

Circle Time was as long by videoconference as it had been during in-person classes before the COVID-19 school closures. The live videoconference activities were

roughly equivalent to the time his students spent at activity centers in the classroom during in-person learning prior to the COVID-19 school closure. Parents were expected to access recorded materials, or work on the students' packets, for the remainder of the preschool day.

Between August and October 2020, Student participated in about 50 percent of Circle Time video classes, and when he did, he was assisted by Grandmother and engaged. However, during this period Student only attended Art with Martha three times, and Pre-Academics with Jewel one time. He attended one or two Speech Circles. Hernandez was unable to track when or how often Student logged into the asynchronous materials.

From September 9, 2020 through September 11, 2020, Student's school was closed due to a nearby wildfire. All teachers, including Hernandez, could not access their classrooms or materials for an additional week while Oroville cleaned the school of smoke damage and ash deposited by the fire. Although asynchronous videos were available during that time, there were no live videoconferences offered for Hernandez's class.

There was no denial of FAPE due to Oroville's failure to implement Student's March 30, 2020 IEP amendment from August 12, 2020 through August 21, 2020, a period of eight school days. Although Hernandez did not provide any specialized academic instruction during that time, the IDEA generally recognizes that a school district's failure to provide a FAPE for less than 10 days in a school year is not a material failure. (See, e.g., 20 U.S.C. § 1414(k)(1)(C).)

There was no denial of FAPE when Hernandez did not provide instruction during the fire closure from September 9, 2020 through approximately September 18, 2020, a

period of eight school days. Instruction was not offered to any students during that time period, including general education students, so Oroville was not required to provide Student with services during that period of school closure.

Oroville otherwise implemented Student's March 30, 2020 IEP amendment. From August 25, 2020 through October 16, 2020. Hernandez provided well in excess of 30 minutes per week of specialized academic instruction, with 45 minutes of live instruction and activity work on goals offered four days per week, and additional online resources available throughout the week. With the exception of the first week of instruction, Oroville also implemented the 20 minutes per week of designated speech services, as Nutt provided live speech services for 20 to 30 minutes per week during Speech Circle.

Accordingly, Oroville implemented Student's March 30, 2020 IEP from August 12, 2020 through October 19, 2020, except for 8 school days during which parents, teachers and staff were being trained and no instruction was being implemented, and one week of speech services, which was not a material failure.

OCTOBER 20, 2020 TO JANUARY 26, 2020 - HYBRID PROGRAM

On September 4, 2020, the California Department of Public Health issued guidance for reopening classes as small isolated cohorts, or groups, who did not interact with individuals from other cohorts during the school day. It cautioned that adults and students were required to wear face coverings at all times. CDE also issued guidance for limited reopening of schools for special education, and stressed that school districts should comply with federal, state, and local health directives with the prime consideration being the safety and health of students, teachers and service providers.

In September 2020, Oroville sent questionnaires to parents to find out if they were interested in having their children attend school two days per week in-person in cohorts, with supplemental distance learning, as part of a hybrid program. Grandmother responded that Student would attend the hybrid program.

On October 19, 2020, Oroville began a hybrid preschool special education program with cohorts. Hernandez taught one cohort for five and a half hours per day on Mondays and Wednesdays, and a different cohort for five and a half hours on Tuesdays and Thursdays.

While inquiring about hybrid preschool arrangements, Grandmother was informed that Student could not board the school bus or attend in-person if he was not wearing a mask. Over the previous summer, Grandmother had moved out of Oroville's boundaries and into Thermalito's boundaries. She was also informed that Oroville would not transport Student outside of Oroville's boundaries.

On October 20, 2020, Grandmother emailed Oroville's special education director Tyler, informing her that Student was unable to wear a mask due to sensory issues and requested a reasonable accommodation. Oroville made the administrative decision to move Student to the distance learning preschool classroom, taught by special education teacher Rhonda Barton, because Student was unable to attend Hernandez's hybrid program which required students to wear masks. In addition, Student was assigned to Amplio Speech for his language and speech services. Amplio was a nonpublic agency contracted by Oroville to provide online speech services to preschoolers in Barton's class who were unable to attend school for in-person speech services.

Neither Parents nor Grandmother were informed of the change in teacher or speech provider. Mother could not identify Student's teacher during the mask

exemption process, and Grandmother testified that no one from Oroville informed her of the teacher change. Oroville did not present any credible evidence to contradict Grandmother on this point, and Barton did not testify. Copeland was aware that Student had been moved to Barton's class because Barton was designated as the case carrier in correspondence with the Butte County Office of Education, and Barton was listed as Student's teacher in attendance records, but there was no showing that Grandmother had access to, or was given, this information. Oroville offered only unpersuasive hearsay testimony that Amplio attempted to contact Grandmother, and that Grandmother did not return calls from Amplio to schedule online speech services. Grandmother continued to believe that Student was in Hernandez's hybrid classroom, but unable to attend until and unless the mask exemption request was approved.

Oroville made no showing of the services offered in Barton's classroom, or the number of times Amplio claimed to have contacted Grandmother. Accordingly, Oroville did not establish that the services offered while Student was in Barton's class complied with Student's March 30, 2020 IEP amendment, had Grandmother known how to access them.

Oroville did not implement Student's March 30, 2020 IEP during the period Student was moved to Barton's classroom on October 20, 2020 through Student's transfer to Thermalito on January 26, 2021.

Tyler did not respond to Grandmother's mask exemption request until October 28, 2020. Tyler informed her that Oroville was working with Butte County's public health department to develop a mask exemption process. The mask exemption was not approved until January 26, 2021.

In summary, for the 2020-2021 school year, Student did not meet his burden of proving that Oroville failed to implement the March 30, 2020 IEP from August 12, 2020 through October 16, 2020. Student met his burden of proving that Oroville denied him a FAPE during the 2020-2021 school year, by failing to implement the March 30, 2020 IEP from October 20, 2020 through January 26, 2021. Student partially prevailed on Issue 9, and Oroville partially prevailed on Issue 9.

ISSUE 10: DID OROVILLE DENY STUDENT A FAPE BY FAILING TO TIMELY ASSESS STUDENT FOR OCCUPATIONAL THERAPY IN THE 2020-2021 SCHOOL YEAR?

Student contends that Oroville should have assessed him during the 2020-2021 school year for sensory needs prior to February 21, 2021. Oroville contends that it did not have information to warrant testing Student prior to the occupational therapy screening in December 2020 and acted promptly to assess Student after the screening.

The IDEA provides for reevaluations, referred to as reassessments in California law, to be conducted not more frequently than once a year unless the parent and school district agree otherwise, but at least once every three years unless the parent and school district agree that a reevaluation is not necessary. (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).) A reassessment must be conducted if the school district determines that the educational or related services needs, including improved academic achievement and functional performance, of the pupil warrant a reassessment, or if the pupil's parents or teacher requests a reassessment. (20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).)

A school district cannot disregard a non-frivolous suspicion of which it becomes aware simply because of the subjective views of its staff, nor can it dispel this suspicion through informal observation. (*Timothy O., supra*, 822 F.3d at p. 1121.)

Without updated information from a reevaluation, it may be difficult to develop an educational program that would ensure a student's continued receipt of a FAPE. (*Cloverdale Unified School Dist. v. Student* (March 21, 2012) OAH Case No. 2012010507.) A substantial change in the student's academic performance or disabling condition is an example of conditions that warrant a reevaluation. (*Gilroy Unified School Dist. v. Student* (June 5, 2018) OAH Case No. 2018031204.)

A failure to properly assess is a procedural violation of the IDEA. (*Dept. of Education., State of Hawaii v. Cari Rae S.*, 158 F.Supp. 2d 1190, 1196; *Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1032 (*Park*)). However, a procedural error does not automatically require a finding that a FAPE was denied. A procedural violation results in a denial of FAPE only if it impedes the child's right to a FAPE, significantly impedes the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child, or causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2).); see *Target Range, supra*, 960 F.2d at p. 1484.)

As discussed at Issue 8, at the end of the 2019-2020 school year, Oroville did not have information that would warrant an occupational therapy assessment for sensory issues, and Student's fine motor deficits had been identified and addressed with a fine motor goal. Both Student's fine motor needs and his sensitivity to sticky surfaces could be addressed in the classroom with the curriculum and classroom strategies implemented by Hernandez and his staff. Accordingly, Oroville had no reason to

conduct an occupational therapy assessment when the 2020-2021 school year began on August 12, 2020.

Parents and Grandmother did not report any sensory concerns that would interfere with Student's access to his educational program until Grandmother emailed Tyler on October 20, 2020 that Student's sensory issues prevented him from wearing a face mask. This information was not a frivolous report of sensory issues, as this sensitivity prevented Student from attending in-person classes with his peers. In-person instruction would enable Student to work on annual goals such as following classroom routines and improving functional communication by requesting desired items or activities. Ensuring Student's successful return to in-person instruction with peers warranted a reassessment in the area of sensory integration.

Oroville did not respond to Grandmother's October 20, 2020 email until November 28, 2020, proposing an in-person sensory screening for the mask exemption, rather than providing an assessment plan. Occupational therapist Copeland performed the screening on December 16, 2020, and immediately determined that Student had significant tactile sensitivities. Copeland promptly requested that Oroville initiate a comprehensive occupational therapy assessment of Student. However, an assessment plan for an occupational therapy assessment was not generated by Oroville before Student transferred to Thermalito on January 26, 2021.

As of October 20, 2020, Oroville was on notice that Student had sensory issues that significantly interfered with learning and obligated to initiate the process for conducting an occupational therapy assessment for sensory issues at that time. Student's IEP team required information to determine if Student's sensory needs had

changed since the 2019-2020 school year, and if Student needed more sensory supports than could be provided in the classroom.

Although Oroville, and Tyler in particular, were focused on processing a mask exemption request, a mask exemption did not address Student's reported sensory needs in the classroom. Oroville should have prepared and sent Grandmother an assessment plan to initiate an occupational assessment of sensory integration deficits after receiving Grandmother's October 20, 2020 email. The screening by Copeland, although necessary to the mask exemption process, was an unnecessary delay in initiating a reassessment.

An in-person screening was necessary for the mask exemption process, but not to determine if Grandmother's report was non-frivolous. Grandmother was the adult primarily responsible for assisting Student with his access to distance learning. If Oroville required more information about Grandmother's report, Copeland could have promptly obtained this information from Grandmother by telephone, email, or a videoconference that enabled Copeland to observe Student exhibiting sensory concerns and Grandmother trying to get Student to wear a mask.

Oroville's unreasonable delay in sending Grandmother an assessment plan was particularly egregious as Student's annual IEP review was due by February 10, 2021, and without updated information on Student's sensory needs, the IEP team would not be able to develop an educational program that would ensure Student received a FAPE.

Oroville committed a clear procedural violation of the IDEA by failing to timely initiate an occupational therapy assessment, and the delay resulted in a substantive denial of FAPE.

When a student is referred for an assessment, the school district has 15 days to provide the parent with a proposed assessment plan. (Ed. Code, § 56321, subd. (a).) The district must then allow the parent 15 days to review and sign the plan, although the assessment may begin as soon as the assessment plan is signed and returned. (Ed. Code, § 56321, subd. (c)(4).) The school district must hold an IEP to review the assessment report, which must be developed within a total time not to exceed 60 days, excluding days between the student's regular school sessions, terms, or days of school vacations in excess of five school days, from the date of receipt of the parent's written consent for assessment, unless the parent agrees to an extension in writing. (Ed. Code, § 56344, subd. (a).)

Oroville had 15 days from October 20, 2020, or through November 4, 2020, to prepare and give Parents or Grandmother an assessment plan. If Grandmother signed and returned the assessment plan immediately, as she had the March 30, 2020 IEP amendment, Oroville would have had 60 days to complete the occupational therapy assessment, without counting the vacation days for Winter Break. Oroville's Winter Break was extended to three weeks due to increased COVID-19 cases in Butte County, from December 21, 2020 through January 8, 2021, a period of 19 days. Therefore, Oroville had 79 days, or until January 22, 2021 to conduct the assessment and hold an IEP team meeting to review that assessment.

Grandmother first represented to Oroville that Student no longer lived within Oroville boundaries on January 21, 2021, and Oroville was aware then that Student would be transferring to Thermalito. However, if Oroville had timely completed the assessment and scheduled an IEP team meeting to review the assessment prior to the meeting with Mother and Grandmother, Student could have taken that assessment to Thermalito on January 26, 2021 to develop an IEP based upon his educational needs as

identified by that assessment. This is particularly true as Copeland worked with all of the school districts in Butte County through its Office of Education and would have been available to interpret her assessment results and make program recommendations. Oroville's failure to timely complete the assessment constituted a procedural violation.

This procedural violation resulted in a loss of educational benefit due to the delay, as an occupational therapy assessment was not completed and reviewed at an IEP team meeting until April 14, 2021, when Student was offered occupational therapy services. It also significantly interfered with Parents' opportunity to participate in the decision-making process, as their child's sensory needs remained unidentified during his transition back to an in-person classroom setting, and at Student's annual IEP review on February 5, 2021.

However, Student has already received compensatory occupational therapy to remedy this loss. Copeland assessed Student in April 2021, that was reviewed at an IEP team meeting on April 14, 2021. Copeland recommended, and the April 14, 2021 IEP offered, one hour per week of occupational therapy, which she testified was as much as double the services Student required at that time, and was intended to compensate for the time Student had not received occupational therapy during distance learning. Accordingly, there is no need for a compensatory award of occupational therapy for a failure to timely assess, although Oroville staff training will be ordered.

Student met his burden of proving that Oroville denied him a FAPE by failing to timely assess him in the area of occupational therapy during the 2020-2021 school year. Student prevailed on Issue 10.

ISSUE 11: DID OROVILLE AND THERMALITO DENY STUDENT A FAPE BY FAILING TO OFFER ANY SPEECH SERVICES DURING THE 2020-2021 EXTENDED SCHOOL YEAR?

Student contends that Oroville and Thermalito denied Student a FAPE during the 2020-2021 extended school year by failing to offer speech services in the February 5, 2021 IEP. Oroville contends that Student was offered speech services for the 2021 extended school year in the February 5, 2021 IEP.

THERMALITO

Under Education Code section 48200, a school district is responsible for providing a FAPE to all eligible students whose parent or legal guardian resides within the jurisdictional boundaries of the school district, subject to several specified exceptions. (*Los Angeles Unified School Dist. v. Garcia* (2013) 58 Cal.4th 175, 186-187, citing *Union, supra*, 15 F.3d at p. 1525.)

California law defines a parent for special education purposes as any one of five categories. The two categories relevant here are, first, the biological parent or, second, an individual acting in the place of the biological parent, including a grandparent, stepparent or other relative, with whom the child lives. (Ed. Code, § 56028, subds. (a)(1) & (4).)

The determination of residency under the IDEA or Education Code is no different from an ordinary determination of residency under California law. (*Union, supra*, 15 F.3d. at p. 1525.) Residency in California is determined based on rules set forth in Government Code, section 244, which provides that there can be only one residence,

and that the residence of an unmarried minor is the residence of the parent with whom the child maintains his or her place of abode. (Gov. Code, § 244, subds. (b) & (d).)

Over summer 2020, Grandmother moved to an address within Thermalito's boundaries. Parents continued to drop Student off at Grandmother's house each morning, and pick him up each evening, during the work week.

While Oroville was processing Student's mask exemption, Grandmother arranged a meeting on January 20, 2021 to discuss the mask exemption and transportation, attended by Grandmother, Mother, Tyler, Oroville Superintendent Dr. Spencer Holtom and a local councilwoman. Mother left soon after the meeting started. Grandmother told the people at that meeting that Student lived with her in Thermalito, and that she was his primary caregiver. Tyler and Dr. Holtom told Grandmother that if Student lived with her in Thermalito, Thermalito was Student's school district of residence, and that Student would need to enroll in Thermalito and obtain transportation from Thermalito. They explained that students from the surrounding school districts were permitted to attend and were transported to Oroville's regional preschool program because it served districts throughout Butte County. They told her although Student was no longer a resident of Oroville, he would be able to attend Hernandez's hybrid preschool program in Oroville as a Thermalito student.

Grandmother contacted the director of special education at Thermalito, Katie Todd on January 21, 2021. Grandmother told Todd that Student was a new student in Thermalito, was expecting an approved mask exemption, and had an IEP from Oroville placing him in Oroville's preschool program. Todd promptly began arrangements for Thermalito to transport Student to Oroville's preschool program. Once the mask exemption was finalized on January 26, 2021, Grandmother signed a Student Bus Rider

Verification the same day, under penalty of perjury, stating that Student resided at her address within Thermalito's boundaries. Thereafter, Thermalito provided transportation to Student to Hernandez's hybrid program in Oroville. Thermalito was designated as the school district responsible for FAPE on the February 5, 2021 IEP. Thermalito was financially responsible for special education services provided to its students by Oroville, and Todd was waiting for Oroville to bill Thermalito for Student's services on and after January 26, 2021 at the time of the hearing.

As of April 16, 2021, Grandmother continued to represent that Student lived with her when she signed, under penalty of perjury, a caregiver's affidavit stating that Student lived with her.

Grandmother's statements to the representatives of Oroville and Thermalito, and on the Bus Rider Verification and caregiver affidavit, were false. Student did not live with Grandmother, and always lived with Parents. Grandmother misrepresented Student's residence so she could obtain transportation for Student from her home in Thermalito's boundaries to Oroville's preschool program.

Grandmother's testimony that she had been instructed by Tyler and Dr. Holtom at the January 20, 2021 meeting to lie to Thermalito to obtain transportation was unpersuasive for several reasons. First, her testimony was contradicted by compelling testimony from Tyler and Dr. Holtom. Both denied they ever instructed Grandmother to lie. Tyler explained that if Grandmother had said at that meeting that Grandmother was merely a daycare provider, Tyler would have contacted Thermalito to see if an informal arrangement could be made to allow Student on the Thermalito bus that went to Student's Oroville school each day with other Thermalito preschool students. Tyler did not explore those arrangements because Grandmother represented that Student lived

with Grandmother in Thermalito, making Thermalito Student's district of residence responsible for providing FAPE and implementing the transportation in Student's IEP.

Dr. Holtom testified convincingly that he would not have told Grandmother to lie. He was adamant that he would he not have told Grandmother to misrepresent her status to Thermalito, and that he certainly would not have acted so unprofessionally in front of an Oroville city councilwoman. His affront at Grandmother's statement appeared genuine. In California, committing perjury is a crime (Cal. Pen. Code, § 118), and it is unlikely that Tyler and Dr. Holtom would have encouraged Grandmother to perjure herself. The testimony of Tyler and Dr. Holtom was more persuasive than that of Grandmother.

Second, if Student lived with Grandmother as represented, she was a parent for IDEA purposes, and her Thermalito address was Student's residence for special education purposes and Thermalito was obligated to offer Student a FAPE. Tyler and Dr. Holtom's statements to Grandmother to enroll and seek transportation from Thermalito were appropriate based on her representations to them that Student lived with her in Thermalito.

Third, it is a commonsense principle for evaluating witness credibility that the trier of fact may disbelieve a witness who deliberately lies about something significant because experience has taught us that a deliberate liar cannot be trusted. (*People v. Lawrence* (2009) 177 Cal.App.4th 547, 554-555; see also Cal. Jury Instr. - Criminal (2021) C2.21.2.) Grandmother twice deliberately lied under penalty of perjury, to secure transportation for Student for her convenience. Grandmother's statement that she was instructed to lie by Tyler and Dr. Holtom was not believable.

Student never lived with Grandmother in Thermalito. At all times relevant to this hearing, Student lived within the boundaries of Oroville with Parents, and Thermalito never had any responsibility to provide Student with a FAPE. Accordingly, Student cannot prevail on any issues alleging a denial of FAPE against Thermalito.

Thermalito prevailed on Issue 11, as well as Issues 12, 13 and 14, in which Student contends it denied Student a FAPE. Thermalito's prevailing status on Issues 12, 13 and 14 will be noted at the end of the analysis of each of the Issues. The remaining Issues will be analyzed as to Oroville only.

OROVILLE

Grandmother enrolled Student in Thermalito on January 26, 2021, at which point Thermalito took responsibility for transporting Student and offering Student a FAPE. On February 5, 2021, an IEP team meeting regarding Student was held by Thermalito, and Thermalito was designated on the IEP document as the district responsible for offering Student a FAPE. The FAPE offer in the February 5, 2021 IEP was made by Thermalito during the period Grandmother misrepresented that Student lived with her in Thermalito's boundaries.

The totality of evidence established that Oroville reasonably relied on Grandmother's representations that Student lived with her, which made Thermalito the district of residence responsible for offering Student a FAPE. Therefore, Oroville was not required to, and did not, itself offer Student a FAPE on February 5, 2021.

Although Student continued to attend Hernandez's class as a regional student transported into Oroville by Thermalito, his attendance in Oroville's program did not make it responsible for offering Student a FAPE so long as Grandmother misrepresented

that Student lived with her in Thermalito's boundaries. Student's change in enrollment was evident in the second notice of IEP team meeting scheduled for February 5, 2021, which was sent after Student transferred to Thermalito. The second notice invited Thermalito's director of special education Todd to attend as Thermalito's administrative designee. Hernandez prepared the second notice by altering the notice document previously prepared by VanDuzer on January 12, 2021, and only added Todd and Amplio Speech to the proposed attendees. The fact that Hernandez did not change the date of the notice or Student's Oroville address at the top of the page was insufficient to place responsibility for a FAPE offer on Oroville after Student transferred to Thermalito.

The fact that Oroville preschool staff attended and participated in drafting the IEP was also insufficient reason to impose the responsibility on Oroville to offer Student a FAPE while Student was purportedly residing in Thermalito. Hernandez and the other program administrators and service providers were mandatory IEP team members (see 34 C.F.R. § 300.321(a)), and were servicing Student according to his IEP as a regional program under a financial arrangement with Thermalito. The presence and assistance of Oroville staff, who were working with Student, familiar with his educational needs, and knowledgeable of his disability, did not impose an obligation on it to offer a FAPE on behalf of Oroville.

There was some evidence that Oroville took responsibility for offering Student a FAPE at an April 14, 2021 IEP team meeting, and that Grandmother subsequently executed the caregiver affidavit under penalty of perjury that Student lived with her in Thermalito on April 16, 2021. However, because those events occurred after the amended complaint was filed on April 13, 2021, they are not addressed in this Decision.

Grandmother's misrepresentation from January 21, 2021 forward placed Student in a no-win situation. Thermalito was not obligated to offer Student a FAPE because it was not Student's district of residence, and Oroville was not obligated to offer Student a FAPE while Student was enrolled in Thermalito. Student is estopped by Grandmother's statements and conduct, intentionally and deliberately made to mislead Thermalito and Oroville into believing that Student lived with her, from asserting in this due process proceeding that Oroville was obligated to offer him a FAPE after January 21, 2020 because Grandmother's statements were false. (See Evid. Code, § 623.)

Accordingly, Oroville was not obligated to offer Student a FAPE after January 21, 2021, and it is not responsible for any denial of FAPE due to the alleged insufficiencies of the February 5, 2021 IEP offer.

Student did not meet his burden of proving that he was denied a FAPE by either Oroville or Thermalito because speech services were not offered for the 2020-2021 extended school year in the February 5, 2021 IEP. Oroville and Thermalito prevailed on Issue 11.

ISSUE 12: DID OROVILLE AND THERMALITO DENY STUDENT A FAPE BY FAILING TO MAKE A CLEAR OFFER OF FAPE AT THE FEBRUARY 5, 2021 IEP TEAM MEETING?

Student contends that Oroville and Thermalito denied Parents and opportunity to meaningfully participate in the decision-making process by failing to make a clear offer of FAPE at the February 5, 2021 IEP team meeting. Oroville contends that the February 5, 2021 offer of FAPE was clear, and Thermalito contends it was not obligated to offer Student a FAPE on February 5, 2021.

As discussed at Issue 11, neither Oroville nor Thermalito were obligated to offer Student a FAPE in the February 5, 2021 IEP. Student may not recover against either Oroville or Thermalito for the alleged denial of FAPE in the February 5, 2021 IEP offer.

Student did not meet his burden of proving that Oroville or Thermalito denied him a FAPE by not making a clear offer at the February 5, 2021 IEP team meeting. Oroville and Thermalito prevailed on Issue 12.

ISSUE 13: DID OROVILLE AND THERMALITO DENY STUDENT A FAPE BY FAILING TO PROVIDE A COPY OF PROCEDURAL SAFEGUARDS PRIOR TO THE FEBRUARY 5, 2021 IEP TEAM MEETING?

Student contends that he was denied a FAPE because Parents were not given a copy of procedural rights by Oroville or Thermalito prior to the February 5, 2021 IEP team meeting. Oroville contends that Parents received a copy of procedural rights, and Thermalito denies any responsibility to Student.

As discussed at Issue 2 regarding the 2019-2020 school year, Student's witnesses did not persuasively testify that they had not received copies of procedural safeguards during Student's attendance at Oroville, only that they were unable to find copies of the procedural safeguards in their admittedly incomplete records from the past two years. Hernandez also persuasively testified that it was his usual practice to provide a copy of procedural safeguards to parents at the IEP team meetings.

The February 5, 2021 IEP was sent to Grandmother electronically during the pandemic, with a box checked that the procedural safeguards had been received. Hernandez testified that he would have included a copy of procedural safeguards with the IEP document. Grandmother testified that she did not receive the procedural

safeguards, and that she was not aware of a way to uncheck the box. However, Grandmother returned a printed copy of the February 5, 2021 IEP to the school with a note in her handwriting complaining about slow processing of the mask exemption, and she made no reference to any attempt to uncheck the box, or to any failure to receive the procedural safeguards. For that reason, and Grandmother's general lack of credibility, her testimony that she did not receive a copy of the procedural safeguards with the IEP document was less persuasive than that of Hernandez.

Regardless of whether Hernandez included a copy of procedural safeguards with the February 5, 2021 IEP, Parents were only entitled to one copy of the procedural safeguards each school year after the initial assessment, no later than the annual review of the IEP at an IEP team meeting. (34 C.F.R. § 300.504; see also Ed. Code, § 56500.1, subd. (b).) Here, by the time of Student's annual IEP team meeting on February 5, 2021, neither Thermalito nor Oroville was responsible for providing Student with a FAPE, and they were not obligated to provide Student with a copy of the procedural safeguards any earlier than that IEP team meeting during the 2020-2021 school year.

Student did not meet his burden of providing that he was denied a FAPE because Oroville and Thermalito failed to provide Parents with a copy of the procedural safeguards during the 2020-2021 school year. Oroville and Thermalito prevailed on Issue 13.

ISSUE 14: DID OROVILLE AND THERMALITO DENY STUDENT A FAPE DURING THE 2020-2021 SCHOOL YEAR BY FAILING TO FAIL TO PROVIDE PRIOR WRITTEN NOTICE BEFORE REMOVING INSTRUCTIONAL SERVICES BY A TEACHER?

Student contends that Oroville denied him a FAPE during the 2020-2021 school year when it failed to provide prior written notice of a change in his services from Hernandez's classroom to Barton's classroom. Student also contends that Oroville and Thermalito failed to provide Parents with prior written notice of the change in delivery of services to the hybrid program at Oroville. Student contends that program provided in-person instruction for five and a half hours two days per week, rather than the 180 minutes daily required by Student's February 10, 2020 IEP. Oroville contends no prior written notice was required, and Thermalito denies any responsibility to Student.

A school district is required to give the parents of a child with a disability written notice a reasonable time before it refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child. (20 U.S.C. § 1415(b)(3)(b); 34 C.F.R. § 300.503(a)(2); Ed. Code, §56500.4(a).)

Parents are not entitled to choose teachers or other instructional personnel. The regulations implementing the IDEA do not require a school district to identify the particular classroom or teacher in which a child's IEP must be implemented, even where more than one of classroom or teacher is available that would be consistent with the placement decision. (*Letter to Wessels* (OSEP March 9, 1990) 16 IDELR 735.) Although districts may choose to let the child's multidisciplinary team make such decisions, the IDEA permits districts to treat these matters as administrative decisions, which are made

by school personnel. (*Ibid.*) A number of unpublished Ninth Circuit court decisions, provide guidance on this issue, holding that if the assigned personnel are qualified to perform the designated services, the allocation of qualified personnel is in the administrative discretion of the agency. (See *Blanchard v. Morton School Dist., et al.* (9th Cir. 2010) 385 F.Appx 640, 640-41, affirming *Blanchard v. Morton School Dist.* (W.D.Wash 2009) 2009 WL 481306 [nonpub. opn.]; *Gellerman v. Calaveras Unified School Dist.* (9th Cir. 2002) 43 F.Appx 28, 31 [nonpub. opn.]; *Zasslow v. Menlo Park City School Dist.* (9th Cir. 2003) 60 F.Appx. 27, 28 [nonpub. opn.])

Student's move from Hernandez's distance learning classroom to Barton's distance learning classroom did not require prior written notice. From the beginning of the 2020-2021 school year, Student was receiving special education and related services pursuant to his March 30, 2020 IEP through distance learning. Hernandez's classroom switched to a hybrid program, but Student's education was not part of that switch because he did not have a mask exemption so he could attend in-person classes. Oroville's decision to change Student's distance learning teacher from Hernandez to Barton was a personnel decision that did not affect implementation of Student's March 30, 2020 IEP amendment. It was not a change to the identification, evaluation, educational placement or provision of a FAPE to Student. Therefore, no prior written notice was required when Student was moved from Hernandez's distance learning class to Barton's distance learning class.

Student's program was not changed to the hybrid model until his mask exemption was approved on January 26, 2021. By that time, Grandmother had misrepresented Student's residence address and enrolled him in Thermalito. As discussed at Issue 11, neither Thermalito nor Oroville were obligated to offer Student

with a FAPE while he was enrolled in Thermalito. Accordingly, neither district was obligated to provide Student with prior written notice of the change in programs.

Student did not meet his burden of proving that Oroville and Thermalito denied him a FAPE by failing to provide Parents with written notice of the change to Barton's classroom, or of the change in implementing Student's IEP through a hybrid model. Oroville and Thermalito prevailed on Issue 14.

CONCLUSIONS AND PREVAILING PARTY

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

Issue 1: Oroville denied Student a FAPE during the 2019-2020 school year, including the extended school year, by failing to implement his February 10, 2020 individualized education program following COVID-19 school site closures. Student prevailed on Issue 1.

Issue 2: Oroville did not deny Student a FAPE during the 2019-2020 school year, including the extended school year, by significantly impeding Parents from meaningfully participating in the decision-making process by failing to provide Parents with a notice of parental rights and procedural safeguards in the 2019-2020 school year. Oroville prevailed on Issue 2.

Issue 3: Oroville did not deny Student a FAPE during the 2019-2020 school year, including the extended school year, by having Grandmother sign a copy of an IEP

amendment on June 4, 2020. The IEP had an effective date of June 4, 2020, not March 30, 2020. Oroville prevailed on Issue 3.

Issue 4: Oroville did not deny Student a FAPE during the 2019-2020 school year, including the extended school year, by impeding Parents from meaningfully participating in the decision-making process by asking Grandmother to sign Student's IEP Amendment that was developed and signed without any parental involvement. Oroville prevailed on Issue 4.

Issue 5: Oroville denied Student a FAPE during the 2019-2020 extended school year, not by impeding Parents from meaningfully participating in the decision-making process, but by failing to make a clear offer of FAPE in the March 30, 2020 IEP amendment. Student prevailed on Issue 5.

Issue 6: Oroville denied Student a FAPE during the 2019-2020 school year by offering him only 30 minutes of specialized academic instruction per week and only 20 minutes of speech and language therapy per week online or via work packets or through consultations and collaborations in the March 30, 2020 IEP. Student prevailed on Issue 6.

Issue 7: Oroville denied Student a FAPE during the 2019-2020 school year, including extended school year, by failing to offer or provide Student with an extended school year program and services. Student prevailed on Issue 7.

Issue 8: Oroville did not deny Student a FAPE by failing to provide Student with an occupational therapy assessment in the 2019-2020 school year. Oroville prevailed on Issue 8.

Issue 9: Oroville did not deny Student a FAPE during the 2020-2021 school year, including extended school year, by failing to implement Student's February 10, 2020 or March 30, 2020 IEPs from August 12, 2020 through October 16, 2020. Oroville did deny Student a FAPE during the 2020-2021 school year by failing to implement Student's March 30, 2020 IEP from October 20, 2020 through January 26, 2020. Student partially prevailed on Issue 9, and Oroville partially prevailed on Issue 9.

Issue 10: Oroville denied Student a FAPE by failing to timely offer Student an occupational therapy assessment in the 2020-2021 school year. Student prevailed on Issue 10.

Issue 11: Neither Oroville nor Thermalito denied Student a FAPE by offering no speech and language therapy during the 2020-2021 extended school year. Oroville and Thermalito prevailed on Issue 11.

Issue 12: Neither Oroville nor Thermalito denied Student a FAPE by impeding Parents from meaningfully participating in the decision-making process regarding the provision of FAPE by failing to provide a clear offer of a FAPE at the February 5, 2021 IEP team meeting. Oroville and Thermalito prevailed on Issue 12.

Issue 13: Neither Oroville nor Thermalito denied Student a FAPE during the 2020-2021 school year by impeding Parents from meaningfully participating in the decision-making process regarding the provision of FAPE by failing to provide them with a copy of the procedural safeguards prior to the February 5, 2021, IEP team meeting. Oroville and Thermalito prevailed on Issue 13.

Issue 14: Neither Oroville nor Thermalito denied Student a FAPE during the 2020-2021 school year, including the extended school year, by impeding Parents from

meaningfully participating in the decision-making process regarding the provision of FAPE by failing to provide prior written notice before removing instructional services by a teacher. Oroville and Thermalito prevailed on Issue 14.

REMEDIES

Student prevailed on Issues 1, 5, 6 and 7 regarding the 2019-2020 school year, and on Issue 9 partially and Issue 10 regarding the 2020-2021 school year.

Under federal and state law, courts have broad equitable powers to remedy the failure of a school district to provide a FAPE to a disabled child. (20 U.S.C. § 1415(i)(1)(C)(iii); Ed. Code, § 56505, subd. (g); see *School Committee of the Town of Burlington, Massachusetts v. Dept. of Education* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385] (*Burlington*).) This broad equitable authority extends to an administrative law judge who hears and decides a special education administrative due process matter. (*Forest Grove School Dist. v. T.A.* (2009) 557 U.S. 230, 244, n. 11 [129 S.Ct. 2484, 174 L.Ed.2d 168].)

School districts may be ordered to provide compensatory education or additional services to students who have been denied a FAPE. (*Parents of Student W. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.) These are equitable remedies that courts may employ to craft appropriate relief for a party. (*Ibid.*) An award of compensatory education need not provide a day-for-day compensation. (*Id.* at p. 1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.)

An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid ex rel. Reid v.*

District of Columbia (D.D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be fact-specific and be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. (*Ibid.*)

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

Mother, Grandmother and Great Aunt testified about their wishes for compensatory education for Student. These witnesses were not credentialed special education teachers, speech pathologists or occupational therapists, and were not qualified to give an expert opinion about Student's specialized academic instruction, speech or occupational service needs. Mother, Grandmother and Great Aunt also opined that Student should be awarded services for the 2020-2021 extended school year, but services after Grandmother's misrepresentation on January 21, 2021 are not considered or awarded in this Decision.

Grandmother's failure and refusal to access distance learning services provided by Oroville was conduct considered and determined to warrant a reduction of compensatory education awarded. Although Oroville was found to have denied Student a FAPE by failing to fully provide the services called for in the February 10, 2020 IEP, or

to offer a FAPE in the March 30, 2020 amendment, Oroville did make distance learning services available to Student that Grandmother declined to access. There was also significant evidence that Grandmother intentionally chose not to access online services, and acted unreasonably in not inquiring about what services were available, or how alternative services could be accessed if and when Grandmother had internet problems or was uncomfortable with the online platform registration process. Although Student might not have received a full FAPE during online instruction, he would have benefitted from accessing the educational services offered online, and several compensatory amounts are reduced accordingly.

In addition, extended school year services are prospective and not to be used for past denials of FAPE. (*IDEA Part B Service Provision* (OSEP, September 28, 2020) *Answer Q4*, p. 4.)

SPECIALIZED ACADEMIC INSTRUCTION 2019-2020

Student prevailed against Oroville on Issues 1, 5, 6 and 7, having established a denial of FAPE during the 2019-2020 school year and extended school year. Student was denied a FAPE after schools reopened in March 2020 by Oroville's failure to implement the February 10, 2020 IEP. Student was denied a FAPE during the 2019-2020 extended school year because Oroville failed to make a clear offer of FAPE on June 4, 2020, made an unwarranted reduction to Student's services in the March 30, 2020 IEP amendment, and failed to offer 2019-2020 extended school year services.

The total time Student was denied a FAPE during the 2019-2020 regular school year was from the reopening of schools for distance learning on March 30, 2020 through the last day of the school year, June 5, 2020. This is a period of nine weeks excluding a one-week Easter Recess from April 13, 2020 through April 17, 2020. A

typical extended school year is four weeks, and although Oroville witnesses testified that there was an extended school year in summer 2020, neither party admitted a 2019-2020 extended school year calendar to establish a shorter period. Extended school year days are also typically half of the average regular school year day, or here, the equivalent of two weeks of instruction. Accordingly, Student will be awarded compensatory specialized academic instruction for a total of 11 weeks for the 2019-2020 regular and extended school year.

Student did not present much information on Student's school day during in-person instruction prior to the COVID-19 school closure. Student's February 10, 2020 IEP called for 180 minutes per day of specialized academic instruction five times per week, but a three-hour instructional day in Oroville's preschool program for severely handicapped students did not provide direct instruction for that entire period. Preschoolers also participated in snack time, recess and a nap period, which would reasonably be expected to total one hour. Much of the specialized academic instruction in pre-academic school readiness skills was whole class, with individual goals worked on daily at two 15-minute activity stations. Therefore, Student's program provided at least 30 minutes per day, or two and one-half hours per week, of individualized instruction, and approximately one and one-half hours per day, or seven and one-half hours per week, of group instruction, for a total of 10 hours of direct instruction, with the remainder of the day consisting of indirect instruction through play and classroom routines. An award of five hours of direct intensive one-to-one specialized academic instruction can reasonably be expected to provide Student with the equivalent benefit of one week of individualized and group preschool instruction.

Grandmother picked up a packet of materials in March 2020 for Student to work on his goals during distance learning, including fine motor skills. By April 2020,

Hernandez posted a significant volume of educational videos on various online resources that would have provided Student with educational benefit. During this period Grandmother deliberately chose not to access these online resources, and any compensatory education award may equitably be reduced accordingly.

An award of five hours of intensive one-on-one specialized academic instruction per week, multiplied by 11 weeks, equals 55 hours of compensatory education. That number will be reduced by half due to Grandmother's failure to access the instructional services offered which would have provided Student with some educational benefit, for a total award of 27 and one-half hours of compensatory intensive one-to-one specialized academic instruction for the loss of specialized academic instruction during the 2019-2020 regular school year and extended school year.

SPECIALIZED ACADEMIC INSTRUCTION 2020-2021

Student prevailed against Oroville on Issue 5, having established that the March 30, 2020 IEP amendment, effective June 4, 2020, did not offer a FAPE. This was the IEP in effect for the 2020-2021 school year, and its implementation resulted in a denial of FAPE for the 2020-2021 school year from the time instruction began on August 24, 2020 through Grandmother's misrepresentations to Oroville on January 21, 2021. Student also partially prevailed on Issue 9, that the March 30, 2020 IEP amendment was not implemented from October 20, 2020 through January 21, 2021, but those periods of FAPE denial overlap, and only a single compensatory specialized academic instruction award will be made for the 2020-2021 school year.

Because the March 30, 2020 IEP amendment did not offer Student a FAPE, the remedies for loss of FAPE during the 2020-2021 school year will be calculated using the February 10, 2020 IEP, which would have been in effect without that amendment.

The 2020-2021 school year, from August 24, 2020 through January 21, 2021 was 22 weeks and two school days. Six weeks will be subtracted , including two weeks of no instruction to all students due to a local wildfire and clean-up, one week for the Thanksgiving Recess and three weeks for the Christmas Recess, leaving 16 weeks and two days that Student was denied a FAPE. From August 24, 2020 through October 20, 2020, a period of eight weeks, Student was offered, and sporadically attended, 30 minutes of Circle Time, and 15 minutes of art and preacademic instruction four days per week, for a total of 180 minutes, or three hours, per week of direct instruction. Indirect asynchronous instruction was also available, although there was no showing of how much instructional time this component of Student's program provided. Because significantly more instructional resources were available to Student during the 2020-2021 school year from August 24, 2020 through October 20, 2020, the direct one-to-one specialized academic instruction awarded for lost instructional time will be reduced to four hours per week, rather than five hours, for those eight weeks.

Using these calculations, the award for the eight-week distance learning period of August 24, 2020 through October 20, 2020 would be eight weeks times four hours per week, or 32 hours. One hour will be added for the additional two school days of that Student did not receive a FAPE during that period, for a total of 33 hours. That number will be reduced by approximately half due to Grandmother's failure and refusal to access the instructional services offered, to 16 and one-half hours.

The award for the remaining eight weeks through January 21, 2020 would be eight weeks times five hours per week, or 40 hours. No reduction is made for this period, as Oroville did not inform Grandmother of Student's move to Barton's classroom pending processing of the mask exemption request. Therefore, a total of 56 and one-

half hours of compensatory intensive one-to-one specialized academic instruction is awarded for the loss of FAPE during the 2020-2021 school year.

In total, Student is awarded 84 hours of compensatory direct one-to-one specialized academic instruction.

LANGUAGE AND SPEECH SERVICES - 2019-2020

The February 10, 2020 IEP called for Student to receive two hours per month, or 30 minutes per week, of individual and group speech therapy.

The online resources posted by Nutt during distance learning in the 2019-2020 school year and extended school year did not comply with Student's February 10, 2020 IEP. Nutt provided individualized speech services online, but Grandmother was not informed that these were available on request. Using the same time period calculation above, Student was denied a FAPE because speech services were not provided for 11 weeks during the 2019-2020 regular and extended school year. At 30 minutes per week, this totals five and one-half hours of missed speech services. This number will not be reduced because had Grandmother accessed the posted resources, Student still would not have received the speech services in his February 10, 2020 IEP. The total award of compensatory one-to-one language and speech services for the loss of FAPE during the 2019-2020 school year is five and one-half hours.

LANGUAGE AND SPEECH SERVICES – 2020-2021

During the 2020-2021 school year, as calculated above, Student was denied a FAPE from August 24, 2020 through January 21, 2021, or 16 weeks. However, from September 2, 2020 through Student's move to Barton's classroom on October 20, 2021, or a period of seven weeks, Nutt provided Student with the 30 minutes per week called

for in the February 10, 2020 IEP through online group Speech Circle. Oroville will be credited with providing these services, which Grandmother failed or refused to access. Therefore, seven weeks will be subtracted, leaving a period of nine weeks during the 2020-2021 school year that Student was denied a FAPE due to Oroville's failure to provide him with language and speech services. Nine weeks times 30 minutes per week equals four and one-half hours of missed speech services. This award will not be reduced due to Grandmother's failure to access services, because there was no persuasive evidence offered that Grandmother was informed of the speech services available through Amplio after October 2, 2020.

Accordingly, Student is awarded a total of 10 hours of compensatory individualized language and speech services.

ASSESSMENT TRAINING

Student prevailed on Issue 10 due to Oroville's failure to timely conduct an occupational therapy assessment for sensory issues and hold an IEP team meeting to review those results. Although Student was already offered compensatory occupational therapy, which is in line with the recommendation by OSEP that IEP teams determine compensatory services (*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.), staff training is warranted to ensure that procedural violations like this do not occur with other children. Oroville's consideration of the health and safety of students and staff while developing a mask exemption process and reviewing Student's mask exemption request did not excuse it from meeting its assessment obligations under the IDEA and California special education law. Training as a remedy will be awarded.

ORDER

1. Oroville will provide Student with 84 hours of compensatory education in the form of direct one-to-one intensive specialized academic instruction with a credentialed special education teacher.
2. Oroville will provide Student with 10 hours of compensatory education in the form of direct one-to-one language and speech services by a licensed language-speech pathologist.
3. District will provide and fund the services ordered at Orders 1 and 2 through its own staff, SELPA contractors or a non-public agency, at Parents' discretion. Parents have through June 30, 2022, to use the services in Orders 1 and 2, and any unused services will be forfeited.
4. Within 90 days of this decision, District shall provide 4 hours of training to any and all of its administrative and certificated personnel who are or may be involved with the administration of special education programs, including the preparation of assessment plans, conduct of assessments, arrangement of IEP team meetings and conduct of IEP team meetings, in the following topics: a school district's duty to assess, timelines and procedures for obtaining parental consent to assess; timelines and procedures for conducting assessments; proper preparation and presentation of assessment results; the role of the IEP team in determining eligibility for special education and related services and identifying educational needs. Training should give specific attention to working with parents whose children are less than three years of age, and IEP teams for preschool age children.

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/

ALEXA HOHENSEE

Administrative Law Judge

Office of Administrative Hearings