

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2021040483

PARENTS ON BEHALF OF STUDENT,

v.

MARIPOSA COUNTY UNIFIED SCHOOL DISTRICT AND
SIERRA FOOTHILL CHARTER SCHOOL.

DECISION

JULY 14, 2021

On April 13, 2021, Parents on behalf of Student filed a due process hearing request with the Office of Administrative Hearings, called OAH, naming Mariposa County Unified School District and Sierra Foothill Charter School.

Administrative Law Judge Paul H. Kamoroff heard this matter by videoconference in California on June 8, 9, 10, and 15, 2021.

Parents represented Student. Advocates Breeze Leal and Alfonso Padron, PhD., advised Parents but did not appear during the hearing. Student did not attend the hearing.

Attorneys Karen E. Gilyard and Ashley N. Turner represented Mariposa County Unified School District and Sierra Foothill Charter School. Richard Reed, Mariposa County Unified School District's Program Specialist, and Mindy Bolar, Sierra Foothill Charter School's Principal Superintendent, attended the hearing.

At the parties' request, OAH continued the matter to July 2, 2021, for written closing briefs. The record was closed and the matter was submitted on July 2, 2021.

ISSUES

The issues have been reorganized for clarity. The ALJ has authority to renumber and redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

1. Did Mariposa County and Sierra Foothill deny Student a free appropriate public education, called FAPE, from the start of the 2019-2020 school year, through April 13, 2021, by failing to offer an initial individualized education program, called IEP, that had appropriate and measurable academic goals, objectives, and baselines, and would provide Student an educational benefit?
2. Did Mariposa County and Sierra Foothill deny Student a FAPE, from the start of the 2019-2020 school year, through April 13, 2021, by failing to offer appropriate supplementary aids, services, accommodations, and modifications in Student's initial IEP?

3. Did Mariposa County and Sierra Foothill deny Student a FAPE, from the start of the 2019-2020 school year, through April 13, 2021, by failing to timely:
 - a. Conduct assessments, and
 - b. Implement Student's IEP?
4. Did Mariposa County and Sierra Foothill deny Student a FAPE, from the start of the 2019-2020 school year, through April 13, 2021, by failing to allow Parents the opportunity to fully participate in the process to develop the offer of FAPE?
5. Did Mariposa County and Sierra Foothill deny Student a FAPE, from the start of the 2019-2020 school year, through April 13, 2021, by failing to reassess Student after having prior knowledge of Student's continued behavioral deficits and academic decline?
6. Did Mariposa County and Sierra Foothill deny Student a FAPE, from the start of the 2019-2020 school year, through April 13, 2021, by failing to provide an appropriate IEP and supplemental aids and related services during COVID-19 related school closures commensurate to Student's needs?

JURISDICTION

This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006) et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the Individuals with Disabilities Education Act, referred to as the IDEA, are to ensure:

- all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to

meet their unique needs and prepare them for further education, employment and independent living, and

- the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, assessment, or educational placement of the child, or the provision of a free appropriate public education, referred to as FAPE, to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, and 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents, and has the burden of proof by a preponderance of the evidence. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 57-58, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) Student, as the petitioning party, had the burden of proof on all issues. 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).)

CHARTER SCHOOLS

Children with disabilities who attend public charter schools, and their parents, retain all rights under the IDEA and its regulations. (34 C.F.R. § 300.209(a).) A charter school that is a local educational agency must serve children with disabilities attending the charter school in the same manner as a local educational agency serves children with disabilities in other schools. (*Id.*, subd. (b)(1)(i); Ed. Code, § 47604.)

Placement decisions must be made on an individual basis. If a charter school is chartered as an independent local educational agency and retains responsibility under State law for ensuring that the requirements of Part B of the IDEA are met, it is required to make available the range of placement options needed by the children with disabilities enrolled in the charter school. (34 C.F.R. § 300.115; Ed. Code, §§ 56026.3 and 47604.) Education Code section 47646, subdivision (a), imposes on the chartering entity the duty to ensure that “all children with disabilities enrolled in the charter school receive special education ... in a manner that is consistent with their individualized education program” and is in compliance with the IDEA and its regulations. (*Ibid.*)

SIERRA FOOTHILL CHARTER SCHOOL

Sierra Foothill was a kindergarten through eighth grade charter school located in Cathey’s Valley, California. Sierra Foothill was an independent charter school. On this basis, Sierra Foothill was a nonprofit public benefit corporation and therefore was designated as a local educational agency, responsible for providing special education and related services to its students. (Ed. Code, § 56026.3; Ed. Code, § 47604.)

Sierra Foothill had a single campus, where it served 141 students. Classes were self-contained with one teacher, one classroom aide, and approximately 20 students. To serve students with disabilities, Sierra Foothill contracted with Mariposa County Unified School District. As a result of this agreement, Mariposa County was responsible for providing special education and related services to students enrolled at Sierra Foothill.

THE STUDENT

Student was 13 years old and in seventh grade at the time of hearing. Student enrolled in Sierra Foothill in fourth grade, the 2017-2018 school year, and was enrolled there at all relevant times.

Prior to the fourth grade, Student attended a different public school in Mariposa County. In May 2017, Mariposa County assessed Student for special education eligibility. The school psychologist identified moderate academic and attention deficits. During an IEP team meeting, Mariposa County and Parents considered the assessment results and discussed IEP eligibility. The IEP team, including Parents, determined that Student's educational needs could be met in regular education with a 504 plan. A 504 plan was an accommodation plan developed pursuant to Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794; 34 C.F.R. § 104.1 et. seq. (2000).) The Rehabilitation Act of 1973 is a federal anti-discrimination law, and is separate from the IDEA. Among other things, it protects the rights of children with disabilities in public schools by requiring school districts to provide accommodations and services to children who have physical or mental impairments that substantially limit learning. Claims regarding defects in developing or implementing a 504 plan are not within OAH's special education jurisdiction. (*Wyner v. Manhattan Beach Unified Sch. Dist.* (9th Cir. 2000) 223 F.3d 1026, 1028-1029 (OAH's jurisdiction is limited to due process claims arising under the IDEA).)

Since the fourth grade, Mariposa County and Sierra Foothill provided Student a 504 plan that consisted of various accommodations and services, including pull-out academic instruction. With the 504 plan, Student received passing grades and was able to access his educational placement.

In January 2020, Parents requested that Mariposa County and Sierra Foothill reassess Student for special education eligibility. Mariposa County and Sierra Foothill quickly agreed to Parents' request and began reassessing Student in a timely manner. However, the reassessment was delayed because of school closures related to the COVID-19 pandemic. An IEP team meeting to review the reassessment report was not held until November 2020.

From November 2020 through February 2021, Mariposa County and Sierra Foothill held four IEP team meetings, during which the IEP team found Student eligible for special education and related services under the eligibility category specific learning disability. Specific learning disability is a learning disorder characterized by a severe discrepancy between ability and achievement to a degree that the pupil cannot be adequately served in regular classes without special education or related services. As a result of his disability, Student had difficulty with reading and writing. Parents did not consent to Mariposa County and Sierra Foothill's initial offer of special education and related services and, as of the hearing, Student had not received special education services.

ISSUES 1 AND 2: FAILING TO OFFER APPROPRIATE AND MEASURABLE ACADEMIC GOALS, OBJECTIVES, AND BASELINES TO PROVIDE STUDENT AN EDUCATIONAL BENEFIT, AND FAILING TO OFFER APPROPRIATE SUPPLEMENTARY AIDS, SERVICES, ACCOMMODATIONS, AND MODIFICATIONS IN STUDENT'S INITIAL IEP

Student contends that his IEP lacked appropriate goals, supports, accommodations, modifications, and services, thereby denying him a FAPE.

Mariposa County and Sierra Foothill respond that Student's IEP was appropriate in light of Student's circumstances.

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.)

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

The IEP must contain a statement of measurable annual goals designed to: (1) meet the student's needs that result from his disability to enable the student to be involved in and progress in the general curriculum; and (2) meet each of the child's other educational needs that result from his disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); 34 C.F.R. § 300.320(a)(2); Ed. Code, § 56345, subd. (a)(2).) The IEP team develops measurable annual goals that address the student's areas of need and which the student has a reasonable chance of attaining within a year. (Ed. Code § 56344; *Letter to Butler* (OSERS Mar. 25, 1988); U.S. Dept. of Educ., *Notice of Interpretation*, Appendix A to 34 C.F.R., part 300, 64 Fed. Reg. 12,406, 12,471 (1999 regulations).) The purpose of goals is to assist the IEP team in determining whether the student is making progress in an area

of need. The IEP must show a direct relationship between the present levels of performance, the goals, and the offered educational services. (Cal. Code Regs., tit. 5, § 3040, subd. (b).)

Mariposa County and Sierra Foothill convened Student's initial IEP team meeting on November 10, 2020, December 1, 2020, February 2, 2021, and February 26, 2021. Parents attended each meeting, along with all necessary IEP team members. Student was 12 years old and attending seventh grade at Sierra Foothill.

The IEP team first reviewed Student's present levels of performance and the results of a Mariposa County multidisciplinary assessment conducted in February, March, and October 2020. Mariposa County selected experienced and credentialed assessors to complete the testing, including school psychologist Jason Whisenhunt, special education teacher Dave Fiester, and school nurse Rebecca Ballinger. The assessors used multiple tools and tests to assess Student, including a review of educational records, interviews with Parent, Student, and teachers, observations, and standardized testing. Standardized testing included the Wechsler Intelligence Scale for Children, Fifth Edition, Wechsler Individual Achievement Test, Third Edition, and the Comprehensive Test of Phonological Processing, Second Edition. The purpose of the multidisciplinary testing was to determine if Student was eligible for special education and related services.

Student was polite and easy going. He had a good sense of humor, played soccer, and easily transitioned between his Parent's homes. Student was cooperative and well-mannered during the testing.

Teachers reported that Student was well behaved and consistently completed assignments on time. Student performed at grade level in each subject, except reading, where he was below grade level.

During a classroom observation, the school psychologist found that Student was attentive but sometimes fidgeted and became off-task. Student was receptive to redirection by the teacher or classroom aide.

Cognitive testing revealed that Student had strengths in the area of fluid reasoning, and weakness in processing speed. Scores ranged from low average to average in each area tested. Student had an average full-scale intellectual quotient.

Academic testing showed Student was in the low average range, with strengths in listening comprehension, math problem solving, and math fluency. Student had difficulties in reading comprehension, numerical operations, and written expression.

Student had average scores in phonological awareness and rapid symbolic naming abilities, and a poor score in the area of phonological memory.

The multidisciplinary report concluded that Student met special education eligibility criteria under specific learning disability, based upon a discrepancy between Student's intellectual ability and achievement in the areas of reading comprehension, math calculation, and written expression.

The IEP team adopted the multidisciplinary assessment report's recommendations and found Student eligible for special education and related services under the category specific learning disability. Parents were active participants during each meeting, asked questions, and had data and testing explained to them by qualified assessors in a meaningful manner. Parents directly contributed to the IEP's reflection of

Student's' strengths, interests, and areas of concern. During the hearing, there was no testimony or evidence submitted that impugned the recommendations from the multidisciplinary assessment report or IEP team recommendation for eligibility under specific learning disability.

Based upon recent assessments and Student's present levels of performance, the IEP team formulated five goals in the areas of reading, writing, math, and self-advocacy. Goal one, for reading decoding, sought for Student to self-correct 75 percent of errors, as measured by 75 percent accuracy in three trials by Student work samples and teacher-charted records. Goal two, in reading comprehension, sought for Student to be able to answer comprehensions questions when asked who, what, when, where, and why in a story, through the author's perspective in fiction or nonfiction reading materials, with 70 percent accuracy, as measured by written or verbal responses. The third goal, in writing, called for Student to develop a topic with relevant facts, definitions, concrete details, quotations, or other information and examples, measured by work samples or curriculum-based assessment in three out of four trials, with 70 percent accuracy. Goal four, in math, required Student to use a multiplication table or calculator to solve multi-step, real-life mathematical problems involving positive and negative rational numbers, using tools strategically, and assess the reasonableness of answers using mental computation and estimation strategies, with at least 70 percent accuracy in three trials, as measured by work samples and teacher records. The fifth goal was for attention, called self-advocacy, and sought to increase Student's ability to identify situations that caused him anxiety or frustration by requesting to stand, move about the class, or leave the class to decompress, without prompting, across three consecutive trials, measured by staff evaluation. In four of five days per week, Student would request to stand, move, or leave the class, using a finger numbering system. The

baselines for goals one through four were described using standard scores and grade equivalencies. The baseline for goal five included a description of Student's present functioning.

To meet these goals, the IEP offered accommodations and services. Accommodations included spelling and grammar devices, a text-to speech assistive device for reading passages, notes for outlines and instructions, alternate response options for reading, writing, and listening, reduction of assignments to check for knowledge, and streamlining for reading, writing, and listening assignments.

IEP services consisted of specialized academic instruction, five days per week, 30 minutes per session. Three sessions provided reading intervention, and two sessions provided math intervention. The services were provided outside of the classroom, called pull-out, in a resource specialist program classroom by special education staff. With the exception of the pull-out services, the remainder of Student's school day was in a regular education classroom with same-aged peers. Parents did not consent to the IEP or to the initial offer of special education and related services.

Mother and Father each testified in support of Student's case. Each had worked in public schools, Father as a teacher and high school principal, and Mother as a school nurse. They were loving and diligent parents who strongly advocated for Student. Parents were vocal participants during each IEP team meeting and sought to dictate the agenda for the meetings.

Parents were not pleased with the IEP, but failed to describe specific problems with the offer. For example, during testimony, Parents alleged the IEP goals were not appropriate or measurable. Parents posited that goals generally should not include standardized scores for the baseline as that could be confusing to parents. Yet,

Student's baselines also included grade equivalencies that were understood by Parents. Moreover, neither Parent testified that they did not understand a particular goal, or the manner in which a specific goal was measured. Neither Parent disagreed with a specific goal or recommended an additional goal during their testimony.

Parents also made vague assertions that the IEP aids, accommodations, and services were not appropriate. However, neither Parent described what was wrong or missing from the IEP aids, accommodations, or services. Neither Parent referenced a particular goal, aid, accommodation, or service during their testimony, or to any specific portion of the 77-page IEP document.

Father believed that Student was entitled to curriculum modifications, in addition to accommodations and services. Yet, he failed to describe what modifications should have been included in the IEP or why Student required modifications. Student had average intelligence, received passing grades without special education and related services, and was anticipated to be on a diploma track while attending high school. There was no evidence submitted during the hearing that supported modifying Student's academic curriculum.

In sum, Parents failed to describe with any degree of specificity that the goals, aids, accommodations, or services offered in Student's IEP were defective or inadequate. For these reasons, little weight was given to Parents' testimony.

Student's expert witnesses Kelly English and Raul Tejeda similarly failed to describe problems with the IEP offer. English was the founder and director of Maverick Academy Prep, an unaccredited private school in Fresno, California. English provided Student reading tutoring from July 2019 to February 2020. English was not credentialed or qualified to teach or assess students in a public school. During her

testimony, English reviewed a recommendation letter she provided to Parents in September 2019. In the letter, English opined that Student had a reading disorder, dyslexia. The recommendation letter was not provided to Mariposa County or Sierra Foothill prior to the hearing or reviewed during an IEP team meeting. Yet, English failed to describe how her recommendations differed from the reading interventions offered in Student's IEP. In fact, English did not review Student's IEP during her testimony.

English broadly testified that public school assessments were defective and unreliable, without describing a basis for this criticism. However, English did not specifically comment regarding Student's multidisciplinary assessment, and was not qualified to render an opinion regarding the school's assessment. English had not assessed Student, observed him at school, attended an IEP team meeting, or reviewed his educational records. English was not familiar with Student's IEP, and offered no opinion regarding the IEP goals, accommodations, or services. For these reasons, no weight was given to English's testimony.

Raul Tejeda was a licensed educational psychologist with experience conducting psychoeducational assessments. On February 9, 2021, Parents requested that Sierra Foothill and Mariposa County fund an independent educational evaluation by Tejeda. Sierra Foothill and Mariposa County agreed to Parents' request and funded an independent educational evaluation in the area of psychoeducation by Tejeda. The independent educational evaluation was completed after the hearing commenced and had not been reviewed by an IEP team. Tejeda did not review his evaluation or findings during the hearing, and the independent educational evaluation was not submitted as evidence during the hearing.

Tejeda had mild criticisms of the school's 2020 multidisciplinary assessment. He opined that he would have conducted additional testing in the areas of attention, learning memory, executive functioning, and processing. However, Tejeda fell short of describing the school's assessment as invalid or incorrect regarding its findings or recommendations. Although Tejeda had completed his testing and report for Student by the time he testified, he did not compare or contrast his assessment findings with the school's assessment. Tejeda did not discuss his report at all during the hearing. Nor did Tejeda discuss Student's IEP during his testimony. Tejeda offered no criticism, recommendations, or opinion regarding Student's IEP.

In sum, neither of Student's expert witnesses testified regarding the appropriateness of the IEP goals, objectives, baselines, supplementary aids, services, accommodations, or modifications. Given that Student's IEP was the focal point of this dispute, Tejeda's and English's failure to discuss Student's IEP was conspicuous and failed to support Student's issues. While Parents were self-represented, they were advised by advocates who described themselves as having specialized knowledge in special education. Nonetheless, Student failed to elicit evidence that was probative to his issues. It was not enough to make vague accusations that the IEP lacked appropriate goals, aids, services, accommodations, and modifications, while failing to ask Student's experts a single question regarding the IEP offer.

The remaining witnesses, including school psychologist Catherine Rohrbaugh, program specialist Richard Reed, Sierra Foothill Principal Superintendent Mindy Bolar, classroom teacher Andrea Contreras, school psychologist Jason Whisenhunt, classroom aide Donna Harveston, special education teacher David Fiester, resource aide Verna Fellows, Madera-Mariposa County Superintendent of Schools Special Education Local Planning Area program specialist Donna Waddell, and Mariposa County Director

of Special Services Joshua Kim, failed to support Student's issues or to articulate with specificity a defect in the IEP offer.

The witnesses who were familiar with Student's IEP testified that it was appropriate to meet Student's unique needs. For example, Reed credibly testified the goals were measurable and appropriately addressed Student's needs in reading, writing, and math. Waddell and Bolar credibly opined that the IEP offer, including daily, pull-out specialized academic instruction and placement in a regular education classroom, appropriately met Student's unique needs in light of his academic delays. Fiester, Fellows, Harveston, Contreras, and Bolar credibly pointed out that Student had progressed well under his 504 plan, which provided less pull-out services than those offered in Student's IEP.

Mariposa County and Sierra Foothill had not yet implemented Student's IEP because Parents had not consented to the initial offer of special education and related services. Each IEP team meeting consisted of qualified teachers, educators, assessors and administrators, along with Parents. For example, Bolar had 30 years of experience as a teacher, administrator, and superintendent at public schools. Reed, in addition to being the program specialist, was a credentialed school psychologist. Whisenhunt had conducted numerous psychoeducational assessments as a credentialed school psychologist. Ballinger was a school nurse and registered nurse. Fiester was an education specialist since 2002. The IEP offer conformed to credible input and data gathered from recent testing and each IEP team member. Moreover, Student had progressed each year while receiving similar accommodations and less services pursuant to his 504 plan. It was therefore reasonable to believe that Student would continue progressing under the IEP, which increased services.

Student bore the burden of proof by a preponderance of evidence to show the IEP goals, accommodations, or services failed to offer him a FAPE. A preponderance of the evidence means "evidence that has more convincing force than that opposed to it." (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.) Student failed to meet this burden.

The IEP is not intended to be a perfect document. Rather, an IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) An IEP is "a snapshot, not a retrospective." (*Ibid.*) A child's needs can be fluid, and that snapshot may change as services are trialed, data is collected, and additional testing is administered. However, that does not mean the IEP was inappropriate when it was offered, or that an IEP should not be implemented because additional information may come to light at a later time. While Parents desired additional testing before agreeing to goals and services, and what they envisioned as a perfected IEP document, that does not mean the initial IEP was inappropriate. To the contrary, Student's IEP was based upon recent assessments and robust input from Parents and educators. It offered a solid plan to meet Student's identified deficits in reading, writing, and math, in light of Student's circumstances.

An IEP need not conform to a parent's wishes to be sufficient or appropriate. (*Shaw v. Dist. of Columbia* (D.D.C. 2002) 238 F.Supp.2d 127, 139 [The IDEA does not provide for an "education designed according to the parent's desires."].) The IDEA does not empower parents to make unilateral decisions about programs funded by the public. (*Slama v. Independent School Dist. No. 2580* (D.Minn. 2003) 259 F. Supp.2d 880, 885 [refusal to assign service providers of parent's choice does not result in a denial of a FAPE.]; *N.R. v. San Ramon Valley Unified School Dist.* (N.D. Cal. January 25, 2007, No. C 06-1987 MHP) 2007 WL 216323, at p.7 [parents are not entitled to their preferred

provider].) Parents, no matter how well intended, do not have a right to compel a school district to provide a specific program or employ a specific methodology in providing education for a disabled child. (*Rowley, supra*, 458 U.S. at p. 208.)

Based upon the foregoing, Student failed to show by a preponderance of the evidence that Mariposa County and Sierra Foothill denied him a FAPE, by failing to have appropriate and measurable academic goals, objectives, and baselines to provide Student an educational benefit, or by failing to offer appropriate supplementary aids, services, accommodations, and modifications in Student's IEP.

ISSUE 3(A): FAILING TO TIMELY CONDUCT ASSESSMENTS

Student asserts that Mariposa County and Sierra Foothill failed to timely conduct an assessment, following Parents' request for a special education assessment in January 2020. Mariposa County and Sierra Foothill acknowledge that the agencies failed to complete the assessment and hold an IEP team meeting to review the assessment within 60 days, as required by applicable law. The school district responds it was not possible to timely complete the assessment because of school closures related to the COVID-19 pandemic, and offered compensatory education to compensate for the delay.

Prior to making a determination of whether a child qualifies for special education services, a school district must assess the child. (20 U.S.C. § 1414(a), (b); Ed. Code, §§ 56320, 56321.) A school district must conduct a reassessment if it "determines that the educational or related service needs of the child, including improved academic achievement and functional performance, of the child warrant a reevaluation," or if the student's parents or teacher request a reassessment. (20 U.S.C. § 1414(a)(2)(A)(i); Ed. Code, § 56381, subd. (a)(1).)

An IEP meeting to review the results of an assessment must be held within 60 days, not counting days between a pupil's regular school sessions, terms, or days of vacation in excess of five school days, from the receipt of the parent's written consent to the assessment, unless the parent agrees in writing to an extension. (Ed. Code, § 56043, subd. (f)(1).)

In March 2020, the Centers for Disease Control and Prevention recommended local educational agencies close school campuses in response to an outbreak of a new coronavirus disease, called COVID-19. On March 13, 2020, Governor Gavin Newsom issued an Executive Order closing school campuses in California in response to the COVID-19 pandemic. The Order provided that local educational agencies will continue to receive state funding during school closures so they can continue educating students to the extent feasible through, among other options, distance learning and/or independent study.

When a local educational agency provides education to general education students during a school closure, the local educational agency must ensure that students with disabilities also have equal access to the same opportunities, including the provision of FAPE. (34 C.F.R. §§ 104.4, 104.33 (Section 504); 28 C.F.R. § 35.130 (Title II of the Americans with Disabilities Act of 1990)). Local educational agencies must ensure that, to the greatest extent possible, each student with a disability can be provided the special education and related services identified in the student's IEP. (34 C.F.R. §§ 300.101, 300.201 (IDEA)).

On March 21, 2020, the United States Department of Education's Office for Civil Rights and Office of Special Education and Rehabilitative Services affirmed that this general rule applies to school closures related to COVID-19. The IDEA "should not

prevent any school from offering educational programs through distance instruction.” “School districts must remember that the provision of FAPE may include, as appropriate, special education and related services provided through distance instruction provided virtually, online, or telephonically.” (Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elem. and Secondary Schs. While Serving Children with Disabilities, (OSERS/OCR March 21, 2020.) Significantly, disability law poses no bar to online school during the COVID-19 pandemic.

However, the United States Department of Education’s Office for Civil Rights emphasized that federal law provides local educational agencies flexibility in determining how to meet the individual needs of students with disabilities, which may be “different in this time of unprecedented national emergency” and that “FAPE may be provided consistent with the need to protect the health and safety of students with disabilities and those individuals providing special education and related services to students.” (*Ibid.*)

During school closures, local educational agencies are not able to provide services in the same manner they are typically provided. If a local educational agency determines that it is not safe or feasible to provide a service, even using flexible guidelines in the methodology and modality of the service, the local educational agency should have an IEP team meeting when schools reopen to offer compensatory services in the area of service that was not provided, to bring the student back to the level he/she was at when services stopped.

The U.S. Department of Education has not waived legal requirements relating to triennial assessments during school closures for Covid-19 and distance learning.

(California Department of Education Special Education Guidance for Covid-19, September 30, 2020.)

California in Statutes 2020, chapter 3, section 8, effective March 17, 2020, enacted emergency legislation that suspended timelines regarding the commencement of assessment process in developing an assessment plan in Education Code, section 56043, subdivision (a), and section 56321, subdivision (a), while a student's school was closed. This exception lasted only through July 1, 2020, pursuant to Statutes 2020, chapter 110, section 56. However, while California provided school districts with protection regarding the start of the assessment process as to developing and presenting parents with an assessment plan, California law made no changes to Education Code, section 56043, subdivision (c), which governs the timeline for school districts to complete the assessment after parent's consent to assessment plan and to present the assessment findings at an IEP team meeting.

By letter on January 23, 2020, Parents requested that Mariposa County and Sierra Foothill conduct a special education reassessment for Student. On January 27, 2020, Mariposa County provided Parents an assessment plan to reassess Student for special education eligibility. The assessment plan included evaluations in the areas of academic achievement by a special education teacher, health by a school nurse, intellectual development by a school psychologist, and observations, interviews, and processing, by school staff and the school psychologist. Along with the assessment plan, Mariposa County provided Parents a notice of their procedural rights and safeguards. Parents consented to the assessment on January 31, 2020, and did not request additional assessments as part of this plan.

Joshua Kim was Mariposa County's Director of Special Services and credibly testified in support of Mariposa County and Sierra Foothill. Mr. Kim was an experienced administrator and educator who served 21 years as a special education teacher or director. Mr. Kim was a careful and informed administrator who was familiar with the school district's special education assessment and IEP obligations. He ensured that Mariposa County provided Parents an assessment plan just four days after their request for a special education reassessment, and that Mariposa County began assessing Student on February 13, 2020, within two weeks of Parents' consent to the assessment plan. School testing continued through March 2020, and Mr. Kim intended to hold Student's initial IEP team meeting in early April 2020, to review the completed assessment report, within the allotted 60-day time frame. In mid-March 2021, this plan was unexpectedly delayed because of school closures related to the COVID-19 pandemic.

Mariposa County and Sierra Foothill frequently communicated with Parents regarding the status of school closures related to the COVID-19 pandemic. On March 15, 2020, the schools sent Parents an email and letter informing them of the cancellation of all classes, including regular education, to help mitigate the spread of COVID-19. On April 23, 2020, the schools sent Parents another email and letter informing them that school closures had been extended until the end of the regular school year, June 11, 2020, because of the COVID-19 pandemic.

By letter on April 28, 2020, Mariposa County informed Parents that it was not possible to complete portions of Student's testing remotely, and that Student's assessment would be completed within 60 days after the school campus reopened. The 2020-2021 regular school year began August 24, 2020. On October 21, 2021, Sierra Foothill campus reopened for in-person learning. Mariposa County completed

Students' multidisciplinary assessment on October 22, 2020. On November 10, 2020, Mariposa County and Sierra Foothill convened an initial IEP team meeting to review the assessment report with Parents.

In mid-October 2020, Parents filed a compliance complaint with the California Department of Education regarding the school's failure to timely complete the assessment. On December 14, 2020, the California Department of Education found Mariposa County and Sierra Foothill out of compliance with the 60-day requirement for completing Student's assessment. As a corrective action, the California Department of Education ordered that the school district provide Student an unspecified amount of compensatory education. To comply with the corrective order, Mariposa County and Sierra Foothill offered Student 70 hours of compensatory education. Mr. Kim communicated this offer to Parents and the California Department of Education, and no further action was required by the California Department of Education.

During the hearing, Mr. Kim acknowledged that Student's assessment was not completed within the statutorily required timeframe and took responsibility for this failure. The school believed it was unsafe to continue in-person testing from mid-March 2020, to Mid-October 2020, and acted in accord with this belief. Mr. Kim based the compensatory offer of 70 hours upon the duration and frequency of the services offered in Student's initial IEP, and the amount of weeks the IEP offer was delayed because of the COVID-19 pandemic, not including school breaks. There was no evidence submitted during the hearing that contradicted Mr. Kim's testimony or calculation of compensatory service hours.

Mariposa County and Sierra Foothill Ranch's failure to assess Student within the statutory timeframe constitutes a procedural violation of the IDEA. (*R.B., ex rel. F.B. v.*

Napa Valley Unified Sch. Dist. (9th Cir. 2007) 496 F.3d 932, 940). A procedural violation of the IDEA constitutes a denial of a FAPE “only if the violation: (1) impeded the child’s right to a FAPE; (2) significantly impeded the parent’s opportunity to participate in the decisionmaking process; or (3) caused a deprivation of educational benefits.” (Ed. Code, § 56505(f)(2); *W.G. v. Bd. of Trustees of Target Range Sch. Dist. No. 23, Missoula, Mont.* (9th Cir. 1992) 960 F.2d 1479, 1484.) Here, Student had a specific learning disability that resulted in delays in reading, writing, and math. Student’s academic delays impacted his ability to progress in a manner that was commensurate with his same-aged peers without special education or related services. Therefore, Mariposa County and Sierra Foothill’s failure to assess Student in a timely manner deprived him of educational benefits and, normally, would constitute a FAPE denial on that basis. (*Carrie I. ex rel. Greg I. v. Dep’t of Educ., Hawaii* (D.Haw. 2012) 869 F.Supp.2d 1225, 1247.)

While Mariposa County and Sierra Foothill’s failure to timely complete assessments was a procedural violation of the IDEA, Student failed to show that 70 hours of compensatory education was inadequate to make up for Student’s lost educational benefit, thereby denying him a FAPE. Courts have long held that a school district may provide a placement or services that as closely as possible replicates the IEP placement or service when it is not possible or feasible to implement the IEP because of changed circumstances. (*R.F. Frankel v. Delano Union School District*, (E.D. Cal 2016) 224 F. Supp. 3d, 979, citing, *Van Scoy ex rel. Van Scoy v. San Luis Coastal Unified School Dist.* (C.D. Cal. 2005) 353 F.Supp.2d 1083,1086.)

In *Ms. S. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131, (superseded on other grounds by statute), the court found the school district could unilaterally implement a special education placement that was a close approximation to the IEP placement when it became impossible to implement the student’s IEP. Similarly,

here, it became impossible to timely complete Student's assessment because of school closures related to a global pandemic. Mariposa County and Sierra Foothill acted in good faith by attempting to timely complete the assessments and by frequently communicating with Parents regarding the delay. To make up for the delayed assessment, the school district offered the closest approximation possible to what Student would have received had there been no delay, 70 hours of compensatory education. There was no evidence submitted that showed it was feasible to timely conduct the testing or that the compensatory services already offered by Mariposa County and Sierra Foothill were not appropriate to make up Student's lost educational benefits because of the delayed assessment.

OAH's Prehearing Conference Order required that any party seeking reimbursement for expenditures shall present admissible evidence of these expenditures, or a stipulation to the amount of the expenditures. A party seeking compensatory education should provide evidence regarding the type, amount, duration, and need for any requested compensatory education. Yet, Student failed to submit any evidence supporting reimbursement, compensatory education, or any specific remedy for any of Student's issues considered for this matter. This overt failure further supported Mariposa County and Sierra Foothill's offer of 70 hours of compensatory education to redress Student's lost educational benefit.

For the foregoing reasons, Student failed to show by a preponderance of the evidence that Mariposa County and Sierra Foothill denied him a FAPE by failing to timely conduct assessments.

ISSUES 3(B) AND 6: FAILING TO TIMELY IMPLEMENT IEP AND FAILING TO PROVIDE AN APPROPRIATE IEP AND SUPPLEMENTAL AIDS AND RELATED SERVICES DURING COVID-19 SCHOOL CLOSURES COMMENSURATE TO STUDENT'S NEEDS

Student asserts that Mariposa County and Sierra Foothill failed to timely implement Student's IEP and to provide an IEP commensurate to his needs when school campus was closed because of the COVID-19 pandemic. Mariposa County and Sierra Foothill respond they were unable to implement an IEP, because Parents had not consented to the public agencies' initial offer of special education and related services.

Pursuant to California Education Code section 56346, subdivision (a), a local educational agency that is responsible for providing a FAPE to a child with a disability shall seek to obtain informed consent from the child's parent before providing special education and related services. If the child's parent does not consent to the initiation of special education and related services, the public agency shall not provide special education and related services to the child. (Ed. Code, §56346, subd. (b).) If the child's parent refuses consent to the initial provision of special education and related services, the public agency shall not be considered in violation of the requirement to make available a FAPE to the child. (Ed. Code, §56346, subd. (c)(1).)

Mariposa County and Sierra Foothill made an initial offer of special education and related services to Student in an IEP dated November 10, 2020, December 1, 2020, February 2, 2021, and February 26, 2021. As of the hearing, Parents had not consented to the IEP offer or the public agencies' initiation of special education and related services for Student. Consequently, by the above authority, Mariposa County and

Sierra Foothill were barred from implementing Student's IEP and cannot be found to have denied him a FAPE on that basis.

As to Student's claim that he was not provided an IEP that was commensurate to his needs during the COVID-19 related school closure, Student did not have an IEP when the school closure began in March 2020. Because Student did not have an IEP, Mariposa County and Sierra Foothill could not have modified an IEP to make it commensurate to his needs during distance learning. Student was first found eligible for special education and related services in November 2020, after the Sierra Foothill school campus had reopened. The IEP offered in-person learning, including daily specialized academic instruction in a resource specialist program classroom. As examined in Issues 1 and 2 of this Decision, there was no evidence submitted during hearing that showed the special education and related services offered in Student's IEP were not appropriate or commensurate with Student's unique needs. Further, as examined in Issue 3(a), Mariposa County and Sierra Foothill offered adequate compensatory education in their initial IEP offer to cover the delay in the initial assessment and IEP offer.

For the foregoing reasons, Student failed to show by a preponderance of evidence that Mariposa County or Sierra Foothill denied him a FAPE by failing to timely implement an IEP or by failing to provide an appropriate IEP during COVID-19 related school closures.

ISSUE 4: FAILING TO ALLOW PARENT THE OPPORTUNITY TO FULLY PARTICIPATE IN THE PROCESS OF STUDENT'S INITIAL IEP

Parents assert they were not allowed to fully participate in the development of Student's educational program. Sierra Foothill and Mariposa County respond that Parents were active participants during each IEP team meeting.

Under the IDEA, parents of a child with a disability must be afforded an opportunity to participate in IEP team meetings with respect to the provision of a FAPE to their child, and the local educational agency must fairly and honestly consider parents' concerns. School officials may discuss the issues and concerns in advance of the IEP team meeting, but they may not arrive at an IEP team meeting with a "take it or leave it" offer. (*JG v. Douglas County School Dist.*, (9th Cir. 2008), 552 F.3d 786, 801, fn. 10.)

Parental participation in the development of an IEP is essential to the IDEA. (*Winkelman v. Parma City Sch. Dist.* (2007) 550 U.S. 516, 524.) It is "[a]mong the most important procedural safeguards" in the Act. (*Amanda J. v. Clark County. School District* (9th Cir. 2001) 267 F.3d 877, 882.) The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child; and the provision of FAPE to the child. (34 C.F.R. § 300.01b.)

Mariposa County and Sierra Foothill held four IEP team meetings for Student, including meetings on November 10, 2020, December 1, 2020, February 2, 2021, and February 26, 2021. School staff provided Parents adequate notice for each meeting and a copy of their procedural safeguards. Parents attended each of the IEP team meetings

and were outspoken participants during each meeting. Parents contributed input and data during the meetings and into the IEP document, including for Student's present levels of performance, strengths, preferences, interests, weaknesses, and educational concerns.

Qualified school staff, including school psychologist Whisenhunt, regular education teacher Contreras, education specialist Fiester, school nurse Ballinger, Principal Superintendent Bolar, Program Director Reed, and Special Education Local Planning Area program specialist Waddell, attended the meetings. The school's assessors, including Whisenhunt, Fiester, and Ballinger, shared their testing and findings with Parents. Student's regular education teacher Contreras shared information regarding Student's classroom performance. Special education staff was available to answer questions regarding special education and related services. School staff were qualified to answer questions regarding the multidisciplinary assessment, along with all aspects of Student's educational program, and did so. Parents asked questions and school staff attempted to answer each question. Parents were not limited in their ability to participate during the IEP team meetings.

During hearing, Student failed to submit evidence that supported the assertion Parents were not permitted to meaningfully participate in the development of Student's educational program. During their testimony, Parents failed to support this allegation or clarify why they believed they were not fully involved in the IEP process. General criticisms of a school were not sufficient to show a FAPE denial.

Parents improperly tried to set the agenda for the IEP team meetings and made clear their displeasure with Mariposa County and Sierra Foothill. Yet, a school district is not required to agree to a parent's demands to provide a FAPE. (*Rowley, supra*, 458 U.S.

at p. 208.) Moreover, as clarified in Student's written closing brief, Parents' displeasure with the school district stems from Student being provided a 504 plan in 2017, instead of finding Student eligible for special education and providing Student with an IEP. However, Student's 504 plan was not an issue considered for this matter and any claim that arose in 2017 exceeded the two-year statute of limitations for this matter. (Ed. Code, § 56505, subd. (j).) Finally, this concern bore little weight on whether Parents were afforded the opportunity to participate during Student's 2020 and 2021 IEP team meetings. Evidence overwhelmingly showed that Parents were active participants during each IEP team meeting held during the time frame in dispute.

Based upon the foregoing, Student failed to prove by a preponderance of the evidence that Parents were denied the ability to meaningfully participate in the development of Student's educational program.

ISSUE 5: FAILING TO REASSESS AFTER HAVING PRIOR KNOWLEDGE OF STUDENT'S CONTINUED BEHAVIORAL DEFICITS AND ACADEMIC DECLINE

Student alleged that Mariposa County and Sierra Foothill should have reassessed Student prior to Parents' request for a special education reassessment in January 2020, based upon declining grades and continued behavior problems. Mariposa County and Sierra Foothill respond that Student did not demonstrate academic or behavioral problems that warranted a reassessment prior to Parents' request for reassessment.

A school district must conduct a reassessment if it "determines that the educational or related service needs of the child, including improved academic achievement and functional performance, of the child warrant a reevaluation," or if the

student's parents or teacher request a reassessment. (20 U.S.C. § 1414(a)(2)(A)(i); see also Ed. Code, § 56381, subd. (a)(1).)

In the case of a child whose behavior impedes his or her learning or that of others, the IEP team must consider, when appropriate, "strategies, including positive behavioral interventions, strategies, and supports to address that behavior." (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i); Ed. Code, § 56341.1, subd. (b)(1).)

Prior to attending Sierra Foothill, Student was first assessed for special education by Mariposa County in a May 2017 psychoeducation evaluation. The assessment identified academic problems that warranted consideration for special education eligibility under the categories special learning disability and other health impairment. Mariposa County held an IEP team meeting, during which the team, including Parents, agreed that Students' educational needs could be met without an IEP, through a 504 plan.

Student began attending Sierra Foothill the following 2018-2019 school year, where he was provided a 504 plan. The present complaint was filed on April 13, 2021. Therefore, any claims that predated April 13, 2019, were barred by the applicable two-year statute of limitations, as Student did not assert an exception to the statute and Parents were reasonably aware of Student's educational program when the asserted claims arose. (20 U.S.C. § 1415(b)(6)(B); 34 C.F.R. § 300.507(a)(2) (2006); Ed. Code, § 56505, subd. (j).) Moreover, Student's issues for this matter begin at the start of the 2019-2020 school year.

Regarding any continuing violations based upon the May 2017 assessment and decision to implement a 504 plan instead of an IEP, special education law does not recognize the doctrine of continuing violations as an exemption from the two-year

statute of limitations. (*J.L. v. Ambridge Area School Dist.* (W.D.Pa. 2008) 622 F.Supp.2d 257, 268-269; *Moyer v. Long Beach Unified School Dist.* (C.D. Cal. Jan 24, 2013, No. CV 09-04430 MMM (AJWx)) 2013 WL 271686, *7, fn. 71; 71 Fed.Reg. 46697 (Aug. 13, 2006).)

Parents first requested a reassessment for special education on January 23, 2020. Mariposa County and Sierra Foothill agreed to Parents' request and conducted a multidisciplinary assessment. As found herein, Mariposa County and Sierra Foothill's response to Parent's reassessment request did not deny Student a FAPE. Consequently, Student's Issue 5 is limited to the 2019-2020 school year, through January 22, 2020.

Just prior to the start of the 2019-2020 school year, Student's end-of-year report card for the 2018-2019 school year, fifth grade, showed that Student had progressed academically and behaviorally. Student received 3s, demonstrating grade-level ability, in writing, speaking, listening, science, and history, and 2s, demonstrating grade-level skills were nearly met, in reading and math. Student received satisfactory scores in personal citizenship skills, which included behavior. The classroom teacher reported Student was "sweet and helpful" in class. He made nice progress in reading, used his time wisely, and responded to content-based questions with accuracy.

Student continued to receive passing grades during the 2019-2020 school year, sixth grade. Student received 2s in reading and writing, and 3s in math, science, and history. Student's behavior continued to be satisfactory. The teacher reported Student was a pleasure to have in her class, followed directions, and made steady progress in reading and math.

During hearing, there was no evidence submitted that showed Student declined academically while at Sierra Foothill. Student had a reading delay but progressed steadily each year, as evidenced by his report cards and uncontradicted testimony from

Bolar, Contreras, Fellows, and Harveston. Notably, Student's witnesses failed to recommend an academic support or service that should have been offered as a result of Student's perceived academic decline.

Behaviorally, Student had no disciplinary incidents during the school years in dispute, or during any school year. Student did not demonstrate disciplinary problems at school or home. Although Student was sometimes inattentive, he timely completed work, got along with others, and was able to access his educational placement.

Moreover, Mariposa County's May 2017 psychoeducation assessment included the Behavior Assessment Scale for Children, a multi-approach method to evaluate behavior in children. Responses from Parents, teacher, and Student did not identify any behaviors in the clinically significant range. During the hearing, Student's witnesses failed to recommend any behavior interventions that should have been offered to Student as a result of his perceived behavior problems. There was no persuasive evidence submitted during the hearing that showed behavior was an area of deficit for Student.

Parents did not request a reassessment until January 2020, and school staff, including Student's teachers, did not request a reassessment for any reason. Nor did evidence support a school district request for reassessment. Consequently, a preponderance of evidence did not support Student's claim that Mariposa County and Sierra Foothill had prior knowledge of Student's continued behavioral deficits or academic decline. Overall, evidence demonstrated that Student did not have behavior problems and made steady academic progress.

Given the foregoing, a preponderance of evidence failed to support that Sierra Foothill and Mariposa County denied Student a FAPE, by failing to reassess Student due to continued behavioral deficits and academic decline.

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: Mariposa County and Sierra Foothill did not deny Student a FAPE by failing to have appropriate and measurable academic goals, objectives, and baselines to provide Student an educational benefit. Mariposa County and Sierra Foothill prevailed on this issue.

Issue 2: Mariposa County and Sierra Foothill did not deny Student a FAPE by failing to implement appropriate supplementary aids, services, accommodations, and modifications into Student's IEP. Mariposa County and Sierra Foothill prevailed on this issue.

Issue 3(a) and (b): Mariposa County and Sierra Foothill did not deny Student a FAPE by failing to timely (a) conduct assessments, and (b) implement Student's IEP. Mariposa County and Sierra Foothill prevailed on this issue.

Issue 4: Mariposa County and Sierra Foothill did not deny Student a FAPE by failing to allow Parent the opportunity to fully participate in the process of FAPE. Mariposa County and Sierra Foothill prevailed on this issue.

Issue 5: Mariposa County and Sierra Foothill did not deny Student a FAPE by failing to reassess after having prior knowledge of Student's continued behavioral deficits and academic decline. Mariposa County and Sierra Foothill prevailed on this issue.

Issue 6: Mariposa County and Sierra Foothill did not deny Student a FAPE by failing to provide an appropriate IEP and supplemental aids and related services during COVID-19 school closures commensurate to Student's needs. Mariposa County and Sierra Foothill prevailed on this issue.

ORDER

Student's claims for relief are denied.

RIGHT TO APPEAL THIS DECISION

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

/s/

Paul H. Kamoroff
Administrative Law Judge
Office of Administrative Hearings