BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

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# CASE NO. 2021030296

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PARENTS ON BEHALF OF STUDENT,

v.

VENTURA UNIFIED SCHOOL DISTRICT.

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# DECISION

June 18, 2021

On March 8, 2021, the Office of Administrative Hearings, called OAH, received a due process hearing request from Parents on behalf of Student, naming the Ventura Unified School District as respondent. Administrative Law Judge Charles Marson heard this matter by videoconference on May 5, 6, 7, 10, 11 and 12, 2021.

Attorney Sheila Bayne represented Student. Student's Father attended all hearing days on Student's behalf except for brief absences. Attorney Melissa Hatch represented Ventura. Marcus Konantz, Executive Director for Special Education and Pupil Services, attended all hearing days on Ventura's behalf.

At the parties' request the matter was continued to June 7, 2021 for written closing briefs. The record was closed, and the matter was submitted on June 7, 2021.

## ISSUES

Did Ventura deny Student a free appropriate public education, called a FAPE, during the 2019-2020 school year from March 8, 2019, through the 2020-2021 school year, to March 8, 2021, by failing to:

1. provide in-person services in person that were necessary to provide him a FAPE, and failing to implement the services required by Student's governing IEP, because during distance learning it did not provide the in-person services required by that IEP;
2. evaluate his needs during remote instruction;
3. provide necessary accommodations for remote instruction; and
4. offer Student a FAPE in its May 20, 2020 IEP offer because that offer failed to:
    a. offer sufficient services; specifically, by offering only two hours of instruction five days a week;
    b. provide proper academic goals; specifically, by offering goals in the areas of language and communication, reading, English language development, writing, and math that could not be implemented without the presence of another person and during in-person learning, that did not offer him sufficient processing time, and that were not sufficiently ambitious;
    c. offer a one-to-one aide during distance learning;
    d. assess for and offer extended school year services in light of his regression; and

e. offer adequate services in the areas of speech and language, academic instruction, occupational therapy, and assistive technology?

## 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 FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511 (2006); 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]; see 20 U.S.C. § 1415(i)(2)(C)(iii).) Student initiated this

matter and bore 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 12 years old and in the sixth grade at the time of hearing. He resided within Ventura's geographic boundaries at all relevant times. Student was eligible for special education under the categories of specific learning disability and language or speech disorder.

## ISSUE 1: DID VENTURA DENY STUDENT A FAPE DURING THE 2019-2020 SCHOOL YEAR, FROM MARCH 8, 2019, THROUGH THE 2020-2021 SCHOOL YEAR, TO MARCH 8, 2021, BY FAILING TO PROVIDE IN-PERSON SERVICES IN-PERSON THAT WERE NECESSARY TO PROVIDE HIM A FAPE, AND FAILING TO IMPLEMENT THE SERVICES REQUIRED BY STUDENT'S GOVERNING IEP, BECAUSE DURING DISTANCE LEARNING IT DID NOT PROVIDE THE IN-PERSON SERVICES REQUIRED BY THAT IEP?

Student contends that, during distance learning made necessary by the COVID-19 pandemic, Ventura was required to provide him the in-person services of specialized academic instruction, called SAI, speech language therapy, and occupational therapy consultation. He argues that these services were required to be provided in person both by his governing individualized education programs, called IEP's, and to provide him a FAPE. He also maintains that Ventura failed to provide him all the related services his IEP's required.

Ventura contends that its provision of SAI, speech language therapy, and occupational therapy consultation to Student online provided him a FAPE, and that his governing IEP's did not require any of those services to be provided in person during distance learning. It also contends that, in spring 2020 after the schools were first closed due to the COVID-19 pandemic, it provided as much of Student's related services as was feasible, and in the following school year provided all the services he was due.

A FAPE means special education and related services that are available to an eligible child, that meet state educational standards, and that are provided at no charge to the parent or guardian. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17 (2006).) 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); see Ed. Code, §§ 56031,56032, 56341, 56345, subd. (a), 56363 subd. (a); 34 C.F.R. §§ 300.320 (2007), 300.321 (2006), and 300.501 (2006).)

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 Sch. Dist. v. Rowley* (1982) 458 U.S. 176, 201-204 [102 S.Ct. 303, 473 L.Ed.2d 690]; *Endrew F. v. Douglas County Sch. Dist. RE-1* (2017) 580 U.S. ____ [137 S.Ct. 988, 1000, 197 L.Ed.2d 335].)

A school district violates the IDEA if it materially fails to conform to a child's IEP. (20 U.S.C. § 1401(9).) A material failure occurs when there is more than a minor discrepancy between the services provided to a disabled child and those required by the IEP. (*Van Duyn v. Baker Sch. Dist. 5J* (9th Cir. 2007) 502 F.3d 811, 815, 822 (*Van Duyn*).)

However, "the materiality standard does not require that the child suffer demonstrable educational harm in order to prevail." (*Id.* at p. 822.)

## STUDENT WAS NOT ENTITLED BY HIS IEP'S TO IN-PERSON SERVICES AND DID NOT REQUIRE THEM TO RECEIVE A FAPE

Student's complaint alleged that Ventura denied him a FAPE throughout the two-year period from March 8, 2019 to March 8, 2021. However, none of his specific allegations had anything to do with the period before March 16, 2020, when Ventura closed its schools due to the COVID-19 pandemic. Nothing in his evidence indicated any violation before that date. Student failed to meet his burden of proof that Ventura denied him a FAPE in any way before March 16, 2020.

Student's governing IEP on March 16, 2020, was dated April 25, 2019. It provided that he would be in general education, except he would be pulled out of class for SAI, which he received in small groups in the resource room, and speech and language therapy. He was entitled to 160 SAI minutes in English language arts a week, 120 SAI minutes in math a week, 120 minutes of speech and language therapy a month, and 30 occupational therapy minutes a month in the form of a therapist's consultation and collaboration with his teachers. He was entitled to these services from March 16, 2020 to May 26, 2020, when another IEP became effective.

The April 2019 and May 2020 IEP's were designed for normal instruction in a classroom. The May 2020 IEP was drafted during distance learning, but it was intended to structure Student's next school year, and the IEP team participants assumed that in-person learning would have resumed by then. Both IEP's identified the locations for Student's special education and services. The April 2019 IEP provided that Student was to be educated in the "general education classroom" except that his SAI services in

language arts and math would be provided "outside the classroom" in a "special ed class." His May 2020 IEP similarly provided that he would be placed "in the general education setting" except for services to be delivered in a "special education setting."

The federal and state requirements for the contents of IEP's are exclusive. Those requirements are not to be construed to require anything in an IEP that is not explicitly required by statute. (20 U.S.C. § 1414(d)(1)(A)(ii)(I); Ed. Code, § 56345, subd. (i).) Nothing in either IEP required anything to be done except in physical classrooms on a school campus. Student did not prove that his governing IEP's required the provision of any special education or service anywhere else.

Separately from the requirements of his IEP's, Student made no attempt at hearing to prove that he needed services of any kind to be delivered in person at his home during distance instruction in order to receive a FAPE. Student scheduled the testimony of an expert witness for the last day of hearing, but on the morning of that day withdrew the witness. This meant that no professional testified he had any such need, nor did any other witness. Student does not mention this argument in his closing brief and may have abandoned it. In any event the record would not support it. Ventura did not deny Student a FAPE by failing to provide in person services to him.

## VENTURA ADEQUATELY IMPLEMENTED THE RELATED SERVICES REQUIRED BY STUDENT'S IEP'S EXCEPT FOR SPECIALIZED ACADEMIC INSTRUCTION IN SPRING 2020

### VENTURA HAD NO DUTY BETWEEN MARCH 16 AND APRIL 12, 2020 TO PROVIDE SERVICES TO STUDENT

On March 4, 2020, Governor Newsom declared a state of emergency in California due to COVID-19. On March 13, 2020, the Governor issued Executive Order N-26-20,

which guaranteed continued funding for school district operations during public-health-related school closures. Among other things, it expressly authorized distance learning if local districts chose to close their schools.

In March 2020, the United States Department of Education issued a Fact Sheet assuring school districts that ensuring compliance with the IDEA should not prevent any school from offering educational programs through distance instruction. The Department emphasized that the provision of a FAPE may include, as appropriate, special education and related services provided through distance instruction provided virtually, online, or telephonically. (United States Department of Education, Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities, March 21, 2020, pp. 1-2.) Relying on this agency advice, the Chief Judge of the Southern District of New York recently refused to order a nationwide return to in-person instruction in a class action brought against every school district in the country. (*J.T. v. de Blasio* (S.D.N.Y. 2020) 500 F.Supp.3d 137, 149-150, 178-180.)

On June 29, 2020, two new provisions of the Education Code went into effect. Section 43503 authorized distance learning as the result of an order or guideline from a state or local public health official. (*Id.*, subd. (a)(2)(A).) That authorization included the delivery of special education and related services by distance learning, as long as accompanied by accommodations necessary to ensure that a student's IEP could be executed in that environment. (*Id.*, subd. (b)(4).) The new Education Code section 43500 provided that distance learning may include interaction, instruction, and check-ins between teachers and pupils through the use of a computer or communications technology. (*Id.*, subd. (a)(1).)

All or virtually all public school districts in California closed their schools in response to the Governor's declaration of a state of emergency. Ventura did not provide instruction to any of its students, disabled or non-disabled, for the first few weeks after the Governor's declaration. Student argues that Ventura's obligation to provide him special education and services nonetheless continued uninterrupted after the statewide closure of schools. For reasons not stated, he selects March 19, 2020, as the date Ventura should have resumed providing his services, and measures the alleged shortfall in his services from that date.

Ventura argues that it had no duty to serve Student during that period because it was closed to all students.

Student's operative IEP's expressly excluded any obligation to educate Student while schools were closed. They stated that "[s]ervices will only be provided on regular school days … unless otherwise specified." Neither IEP specified anything to the contrary. So Student's governing IEP's did not require Ventura to provide Student any education or services while Ventura's schools were completely closed because those days were not regular school days. This fact by itself defeats Student's claim.

In addition, a school district that has closed to all students because of the pandemic does not violate the IDEA by closing to special education students. In March 2020, the United States Department of Education issued informal guidance suggesting that if a local educational agency closed to all students because of COVID-19, it was not required to provide services to students with disabilities during that time. (United States Department of Education, Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak, March 2020, Answer to Question A-1, p. 2.) This interpretation was consistent with the Ninth Circuit's decision

in *N.D. v. Hawaii Dep't of Educ*. (9th Cir. 2010) 600 F.3d 1104, 1116-1117, which upheld a district court's denial of a motion by special education students to enjoin the state's shutdown of all schools on Fridays during a fiscal emergency. The students argued that ceasing services owed them under their IEP's was a change of placement and therefore violated IDEA's stay put rule. However, the court disagreed, explaining that "Congress did not intend for the IDEA to apply to system wide administrative decisions" and that "[a]n across the board reduction of school days such as the one here does not conflict with Congress's intent of protecting disabled children from being singled out." (*Id*. at p. 1116.)

Student relies on dictum in that decision in which the court stated "A school district's failure to provide the number of minutes and type of instruction guaranteed in an IEP could support a claim of material failure to implement an IEP." (*N.D. v. Hawaii Dep't of Educ., supra,* 600 F.3d at p. 1117.) However, this dictum was only part of the court's observation that parents might have other remedies than reliance on the stay put rule. The court added: "The agency is required to address such a claim with a due process hearing, and full judicial review is available." (*Ibid*.) This suggests that the court was only stating such a claim could be made, not that it would necessarily prevail. In any event, *N.D.* preceded the Department of Education's more specific COVID-19 guidance by ten years.

Student also cites *Student v. Corona-Norco Unified Sch. Dist.* (OAH, May 20, 2021, No. 2020120698), pp. 10-11, which imposed liability during a period of school closure. OAH decisions may be persuasive in other OAH proceedings, but they are not binding authority. (5 C.C.R. § 3085.) Another OAH decision more closely follows the federal guidance and is more persuasive. (*Student v. Orcutt Union Sch. Dist.* (OAH, April 22, 2021, No. 2020100618), pp. 7-8.)

Student failed to establish that Ventura had a duty to serve him while its schools were fully closed to all students. Student did not prove that Ventura denied him a FAPE between March 16 and April 12, 2020.

VENTURA'S DUTY TO PROVIDE STUDENT'S IEP SERVICES RESUMED ON APRIL 13, 2020

On or about April 13, 2020, Ventura resumed educating its students, using distance learning. By that time Governor Newsom had issued Executive Order N-26-20, which had instructed the state departments of education and health to issue guidance that would ensure students with disabilities received a FAPE consistent with their IEP's during the pandemic. The Department of Education had responded with a guidance that encouraged school districts to deliver educational opportunities to the extent feasible through options such as distance learning and independent study.

Thus by the time Ventura resumed teaching all its students, federal and state law and guidance required Ventura to resume providing special education services in conformity with Student's IEP's. The need for distance learning caused by the pandemic did not alter a local educational agency's duty to provide an eligible student a FAPE. As the Legislature soon confirmed, local educational agencies were required to continue to implement a student's IEP, including related services and specialized academic instruction, during distance learning. (Ed. Code, § 43503, subd. (b)(4); see also *E.M.C. v. Ventura Unified Sch. Dist.* (C.D.Cal., Oct. 14, 2020, No. 2:20-cv-09024-SVW-PD) 2020 WL 7094071, pp. 5-6, 8).

Ventura argues that it should not be held responsible for the full implementation of the IEP's of its special education students between April 13, 2020, and the end of the school year on June 11, 2020, because of the crisis caused by the pandemic. Ventura

notes that an IEP has been said by a panel of the Ninth Circuit to be "like a contract" (*M.C. v. Antelope Valley Union High Sch. Dist.* (9th Cir. 2017) 858 F.3d 1189, 1197), and then relies on contract law to assert the affirmative defense of impossibility. Stating repeatedly in its closing brief that full implementation of IEP's was "impossible" or "impractical" or "not feasible," Ventura describes the pandemic as an irresistible, superhuman intervening cause, a "*force majeure* event," that should relieve it of liability for full implementation of IEP's for the balance of the 2019-2020 school year.

Ventura's argument stretches the Ninth Circuit's contract analogy far beyond its original context, which was simply to state that an IEP is binding on a school district, but it has a greater flaw. There is not sufficient evidence in the record to support it. Even assuming, without deciding, that the impossibility defense in contract law could be applied, it is an affirmative defense, and Ventura had the burden of proving it. (See *Hensler v. City of Los Angeles* (1954) 124 Cal.App.2d 71, 83; Rule 8(c)(1), Fed. Rules Civ. Proc.)

In making this novel argument, Ventura persuasively describes the difficulties the district faced in moving its education of students online. Its teachers had to be trained, software had to be obtained and learned, and database platforms had to be secured. All this had to be done by staff who had been largely ordered by the Governor to stay home.

However, the record lacks any specific evidence that Ventura could not have done more than it did in conforming to Student's IEP's between April 13, 2020 and the end of the school year. Its resumption of instruction on April 13 demonstrated that at least some online instruction was possible, and with one exception, no witness testified that Ventura could not have done more than it did for the rest of the school year.

Most of Student's teachers and service providers testified at hearing. The testimony relied on here was from Susan Slavin, Roman Galli, Andrea Conant, Mackenzie Hurley, Alisa Lehman, Brian Hubert and Maritza Mireles. Without exception, those teachers and providers appeared knowledgeable about Student's needs. Their testimony was frequently confirmed by contemporaneous documents, and in no case was any of their testimony undermined on cross-examination. Student does not argue that they lacked credibility. The testimony of those teachers and providers was credible and is entitled to substantial weight.

Student's fifth grade SAI teacher and case manager Susan Slavin stated generally that she did all that she could do in providing SAI to Student during spring 2020, but it was a passing comment in a lengthy witness examination. She gave no details and did not describe any constraints that might have prevented her from spending more time in instructing Student. In addition, Slavin was just one staff member. There was no evidence that someone else in the District could not have assisted. The speech pathologist delivered nearly all of the speech services Student's IEP's required, and Ventura does not explain why one teacher could go no further but another teacher could. And in any event Ventura's limitations on the delivery of special education had not been decided by its staff. The record shows that district leadership announced on April 3, 2020, that for the rest of the school year special education services would be "abbreviated," and the facts and considerations behind that larger decision are not in the record.

Ventura did not prove that the more complete provision of IEP services to Student between April 13, 2020 and the end of the school year was impossible, impracticable or not feasible, and therefore did not establish the factual predicate required to prevail on the defense of impossibility.

## VENTURA FAILED TO PROVIDE STUDENT A MATERIAL PART OF THE SPECIALIZED ACADEMIC INSTRUCTION TO WHICH HE WAS ENTITLED IN FIFTH GRADE IN SPRING 2020

On May 3, 2020, Parents received an email from Slavin explaining the services Student would receive during distance learning in compliance with the April 3 prior written notice. Slavin informed Parents that Student would receive a weekly minimum of two 30-minute SAI online sessions for a total of 60 minutes a week. He would receive speech therapy in a Google classroom in an "asynchronous" manner, which meant without direct interaction with the therapist. Instead, once a week the therapist would send him an online assignment that would take about 25 minutes to complete. Slavin also informed Parents that the occupational therapy consultation in Student's IEP would continue to be provided to Student's teachers by the occupational therapist in the same amount as the IEP required. On May 4, 2020, Slavin began meeting Student face to face on Zoom to provide SAI directly.

Slavin, who was the primary Ventura staff person in charge of delivering SAI to Student in spring 2020, conceded in her testimony that she delivered fewer SAI minutes than required by his IEP's. The parties dispute the proper way to count those missing minutes.

Ventura introduced a printout of a computerized log of IEP related services that Student actually received between April 13, 2020, when online instruction started, and June 11, 2020, the last day of school. The log contained day-by-day entries by service providers of the services provided. At hearing, Slavin confirmed the accuracy of her entries in the log of SAI minutes she provided to Student during that period. Those

entries showed the following shortfalls in the SAI minutes to which Student was entitled under his governing IEP's:

| Week of Monday | SAI Minutes Owed | SAI Minutes Provided | Shortfall |
|---|---|---|---|
| April 13, 2020 | 280 | 180 | 100 |
| April 20 | 280 | 120 | 160 |
| April 27 | 280 | 210 | 70 |
| May 4 | 280 | 210 | 70 |
| May 11 | 280 | 180 | 100 |
| May 18 | 280 | 120 | 160 |
| May 25 | 300 | 105 | 195 |
| June 1 | 300 | 90 | 210 |
| June 8 | 240 | 30 | 210 |
| Totals | Total: 2520 | Total: 1425 | Shortfall: 1275 min. (21.25 hrs.) |

Student's entitlement to SAI minutes increased in the week of May 25 to 300 minutes a week under a new IEP dated May 16, 2020, which went into effect on May 26 when Parents signed it. Student's entitlement to SAI minutes in the week of June 8 are reduced in the calculation above to four fifths of a week because Thursday, June 11, was the last day of school.

Student in his closing brief offers a calculation of missing minutes of SAI in spring 2020 that yields a much larger number than the calculation above. Student asserts that the shortfall of SAI minutes was 4,739 minutes. However, Student's calculation is flawed in so many ways that it is not useful. For example, Student starts counting from March 19, 2020, not April 13, 2020, when Ventura resumed teaching all its students. Student includes in his calculation of missing minutes 120 minutes of occupational therapy allegedly due to him, but his actual entitlement was to 30 minutes a month of consultation and collaboration between the occupational therapist and his teachers. He was not entitled to any direct services.

Most importantly, Student does not give Ventura credit in his calculation for many hours of SAI furnished by Slavin because he apparently does not regard those hours as SAI. For example, in the three weeks beginning April 13, 2020, Slavin logged 510 SAI minutes provided to Student, but Student's count of her services for those weeks is zero minutes. Student does not explain why he excludes those 510 minutes.

Slavin's entries in the log for SAI time in April are not for direct interaction with Student. They include such activities as emailing parents explaining the online Canvas platform, considering needed accommodations, consulting with Student's general education teacher, and verifying contact information. They also include reviewing work Student submitted on Canvas, and having a meeting on Zoom with Father, Student and the general education teacher to discuss why Student was having difficulty with certain assignments.

Slavin testified at hearing that she regards these activities as part of the delivery of SAI to Student, and the law supports her testimony. The Education Code describes the duties of a resource specialist like Slavin as including the provision of consultation, resource information, and material regarding special education students to their parents and to regular staff members. (Ed. Code, § 56362, subd. (a)(3).) California law does not specifically define the term "specialized academic instruction," but the understanding of that term in California is that its meaning is the same as the federal term "specially designed instruction." (See, e.g., California Legislative Analyst, Overview of Special Education in California, Jan. 3, 2013 (the URL for which is https://lao.ca.gov/reports/2013/edu/special-ed-primer/special-ed-primer-010313.aspx [as of June 15, 2021]); California Teachers' Assn., Special Education in California (2012)(the URL for which is http://www.cutacentral.org/wp-content/uploads/2017/08/CTA-SPED-resource-guide.pdf, p. 13 [as of June 15, 2021] ).

Federal law defines the term "specially designed instruction" as "adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction" to meet the child's unique needs. (34 C.F.R. § 300.39(b)(3) (2006).) That definition includes the activities Slavin listed as SAI in April 2020, so Student's exclusion of those activities in his calculation is unjustified.

Student also challenges the counting of time for any service if the instruction was asynchronous, which means not part of direct real-time interaction between teacher and student. However, asynchronous instruction is deeply rooted in educational practice and is expressly authorized by special education law. Whether instruction is in person or online, asynchronous instruction such as reading assignments, tests, exercises and the like have always played an important part in public education.

In addition, the new Education Code section 43500 authorizes asynchronous instruction. It provides that distance learning may include instruction in which the primary mode of communication between the pupil and certificated employee is online interaction, instructional television, video, telecourses, or other instruction that relies on computer or communications technology. (*Id.*, subd. (a)(2).) And it also may include the use of print materials incorporating assignments that are the subject of written or oral feedback. (*Id.*, subd. (a)(3).) The language of the latter two subsections describing "telecourses, or other instruction that relies on computer or communications technology" and "the use of print materials incorporating assignments that are the subject of written or oral feedback" describes asynchronous instruction. Student offers no authority or reason to believe that, in determining whether he received a FAPE, asynchronous instruction should be discounted.

The evidence therefore established that during the period of distance learning from April 13, 2020, to the end of Student's fifth grade year, Ventura failed to provide him 1275 minutes, or 21.25 hours, of the specialized academic instruction required by his governing IEP's. This constituted a reduction of his promised SAI instruction by 50.6 percent, which was a material departure from the requirements of his IEP's under *Van Duyn, supra.* Ventura therefore denied Student a FAPE from April 13, 2020, to the end of the school year by materially reducing the amount of specialized academic instruction to which his IEP's entitled him.

VENTURA PROVIDED SUBSTANTIALLY ALL OF THE SPEECH THERAPY TO WHICH STUDENT WAS ENTITLED IN FIFTH GRADE IN SPRING 2020

Student's April 2019 and May 2020 IEP's both required that he receive 120 minutes a month of speech and language therapy. Since Ventura's obligation to provide that service resumed on April 13, 2020, it owed Student approximately 65 minutes for that month. Student's fifth grade speech therapist, Megan Bojar, made entries in the service log showing that she provided 75 minutes of speech and language therapy in April, 100 minutes in May 2020, and 50 minutes in June 2020 before school ended on June 11, 2020.

Ventura's service log therefore shows that the only shortfall in speech and language therapy, even measured strictly by the month, was 20 minutes in May 2020. That shortfall was not a material failure of implementation of Student's IEP's under *Van Duyn, supra*. The number of minutes was small. It was effectively made up by the extra 15 minutes in April and the 50 minutes in June before the close of school, which would have resulted in more than the required 120 minutes if sustained at the same rate for

the entire month. The shortfall of speech and language therapy in spring 2020 was not material and did not deny Student a FAPE.

VENTURA DID NOT FAIL TO PROVIDE OCCUPATIONAL THERAPY CONSULTATION AND COLLABORATION TO STUDENT'S TEACHERS IN FIFTH GRADE IN SPRING 2020, BUT IF IT DID, THAT POSSIBLE FAILURE WAS NOT A MATERIAL DEPARTURE FROM STUDENT'S IEP's

Ventura's obligation under Student's April 2019 IEP was to deliver 30 minutes a month of occupational therapy consultation and collaboration to Student's teachers. On May 26, 2020, Student's new IEP changed the frequency of that consultation and collaboration to 150 minutes a year. Maritza Mireles, Student's occupational therapist in spring 2020, stood ready to provide consultation and collaboration to Student's teachers during distance learning, but none of them requested it.

Mireles's readiness to consult with Student's teachers fulfilled the consultation and collaboration requirement of Student's April 2019 IEP. A specialist who is ready and available to be consulted but is not called upon still performs a service. But if Mireles's availability did not satisfy the requirement of Student's IEP's, the shortfall of 60 minutes in two months was not numerically or educationally significant. Student does not identify any occupational therapy concern during his spring 2020 distance learning that his teachers might have addressed. Any deficit in spring 2020 of occupational therapy consultation and collaboration was therefore not material within the meaning of *Van Duyn, supra,* and did not deny Student a FAPE.

## DURING THE SIXTH GRADE, VENTURA PROVIDED ALL THE SERVICES REQUIRED BY STUDENT'S IEP'S

In August 2020, Student advanced to sixth grade and to Cabrillo Middle School, where the model for delivering his services changed. Student began the year with four periods a day in a special day class and two in general education. He was usually not pulled out of class to receive related services. Instead, they were largely delivered in his classes. In October 2020, Father persuaded the IEP team to move Student to a more challenging social studies class, after which Student had three classes in the special day class and three in general education.

Roman Galli, a special education teacher, was Student's case manager at the start of the year, and taught him academic subjects in his special day class. Looking at the list of SAI minutes in Student's May 2020 IEP, Galli established that he and his colleagues provided the required SAI minutes to Student. Galli himself delivered about 3 hours a day of SAI in his small morning class, which included Student. The rest of the minutes were provided through asynchronous instruction such as assignments and exercises, primarily by Student's other teachers and providers.

Andrea Conant, another special education teacher, provided some of the asynchronous portions of Student's SAI. Her testimony showed that she provided Student all of the 444 SAI minutes for which she was responsible.

Alisa Lehman, a general education teacher, taught Student math during his sixth grade year. She established at hearing that she provided him the 222 SAI math minutes a week to which he was entitled under his IEP's.

Mackenzie Hurley was Student's speech and language provider during his sixth grade year. She demonstrated that Ventura's log showing the delivery of related services to Student accurately stated her services to him. From that log she established that during distance learning in sixth grade, Student received an average of 135 speech and language therapy minutes a month, which was somewhat more than the minutes to which his IEP's entitled him.

Student does not argue in his closing brief that there was any shortfall in the provision of speech and language or occupational therapy services in his sixth grade year up to March 8, 2021. He offers a different calculation of an alleged shortfall in the provision of SAI minutes during that time. According to Student, Ventura provided 16,073 fewer minutes than the amount of SAI to which he was entitled. However, Student's numerical calculation is confusing and opaque, and does not accurately represent the entries in the service log upon which it depends.

Student's larger error is to assume that if SAI minutes were not logged in the service log, they were not given. Student overlooks Galli's credible testimony that he did not keep track of his own SAI efforts in the service log used by the other teachers and providers. Instead, he maintained his own log in a different format, and it had not been uploaded into the service log introduced in evidence.

In calculating Student's sixth grade SAI time, Student also overlooks the fact that he was no longer always pulled out of class for SAI and speech therapy, as he had been in fifth grade. Instead, those services were delivered in class as well as out. Galli sent Parents a distance learning plan on August 25, 2020, that stated that live SAI teaching

sessions would be provided in "whole group, small group … or individual sessions." Galli established at hearing that Student received direct SAI services in his daily three-hour class. Student does not count any in-class time as involving SAI, whereas Ventura properly does. That means Student's calculation is off by about three hours of SAI time every school day, and is therefore not useful or persuasive.

The preponderance of the evidence showed that, in Student's sixth grade year up to March 8, 2021, Ventura provided Student all of the service minutes to which his IEP's entitled him, including SAI minutes, and did not deny him a FAPE.

STUDENT DID NOT PROVE THAT THE AMOUNTS OF RELATED SERVICES PROVIDED HIM IN THE FIFTH AND SIXTH GRADES DENIED HIM A FAPE

Separately from Student's entitlement to related services under his IEP's, Student produced no evidence that he was denied a FAPE due to any shortage of related services. No professional testified in support of that or any other of Student's claims. Only Father was dissatisfied with the related services delivered, and his objections were based on his larger rejection of distance learning, not to any specific shortage of related services. As discussed, federal and state special education law specifically authorized distance learning during the pandemic.

Student does not address this argument in his closing brief and may have abandoned it. Student failed to meet his burden of proving this claim. Ventura did not deny Student a FAPE due to any shortage of related services in his fifth or sixth grade years.

## ISSUE 2: DID VENTURA DENY STUDENT A FAPE DURING THE 2019-2020 SCHOOL YEAR FROM MARCH 8, 2019, THROUGH THE 2020-2021 SCHOOL YEAR, TO MARCH 8, 2021, BY FAILING TO EVALUATE HIS NEEDS DURING REMOTE INSTRUCTION?

Student contends that Ventura denied him a FAPE because it failed to evaluate his needs relating to online instruction. Ventura asserts that such an evaluation was unnecessary because it already knew what he needed, and that no harm resulted from the absence of a formal evaluation.

Student contends that new post-COVID legislation required such an assessment, arguing that Education Code section 43509, subdivision (f)(1)(A), "required the District to evaluate whether Student had suffered regression (learning loss) and address that." However, that statute only requires that a school district adopt a learning continuity and attendance plan that addresses the impact of COVID-19 on students and staff, including what the district will do for pupils who have experienced significant learning loss. It does not require any assessment.

Student also relies on the more general duty of a district to ensure that a child is assessed in all areas related to a suspected disability. (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) The statutes give examples of areas related to a suspected disability such as health and development, vision, including low vision, hearing, motor abilities, language function, general intelligence, academic performance, communicative status, self-help, orientation, and mobility skills, career and vocational abilities and interests, and social and emotional status. (Ed. Code, § 56320, subd. (f).) None of these categories applies directly to assessing the requirements of online instruction. Student's

claim is that the District did not assess "Student's circumstances," which is not an area of suspected disability.

Even if it were, the duty to assess is triggered by a suspicion that a student may be suffering from a disability to the extent that special education is required, and the threshold for that suspicion is relatively low. (*Dept. of Educ., State of Hawaii v. Cari Rae S.* (D. Hawai'i 2001) 158 F.Supp.2d 1190, 1195.) But it is not nonexistent. Student fails to specify any event or information during his experience with online learning that would have triggered that suspicion, and therefore the duty to assess. He certainly found it frustrating from time to time, and according to Father needed direct help when dealing with new concepts. But Student had sufficient computer skills to receive online instruction on his own once he understood the programs Ventura used. He did have occasional technical difficulties, but they related to connectivity and outages at the platforms used by the District, or incomplete explanations of those platforms by the District, not to Student's abilities with a computer.

Student correctly points out that no one at the May 20, 2020 IEP team meeting discussed what he might need during distance learning in the sixth grade. The evidence showed that all present assumed the District would return to in-person instruction by the beginning of that school year.

However, by the time of that May 20, 2020 IEP team meeting, Student had already experienced weeks of distance learning, and his teachers generally reported that after a brief initial period, he had adapted well to it. Case manager Slavin established at hearing that she looked at every online assignment to determine what accommodation or other support Student might need to complete it, and she therefore did not need to

assess him because she already knew what his online needs were. There was no evidence to the contrary.

Student does not identify any harmful consequence of any failure to assess him for online needs that is not a repackaging of his other arguments. And if a formal assessment had been conducted, it would not have provided information for educational programming until the fall, even if the process had begun as early as mid-April 2020. Upon receipt of a signed assessment plan, the District would have had 60 days, excluding summer break, to complete the assessment and hold an IEP team meeting to discuss its results. (Ed. Code, §§ 56321(a), 56302.1.) By the fall, Student was responding well to online instruction at Cabrillo and receiving mostly A grades without any assessment of his online needs. Student did not prove that Ventura denied him a FAPE by failing to evaluate his needs during online instruction.

## ISSUE 3: DID VENTURA DENY STUDENT A FAPE, DURING THE 2019-2020 SCHOOL YEAR FROM MARCH 8, 2019, THROUGH THE 2020-2021 SCHOOL YEAR, TO MARCH 8, 2021, BY FAILING TO PROVIDE NECESSARY ACCOMMODATIONS FOR REMOTE INSTRUCTION?

Student contends that Ventura did not give him the accommodations necessary to support him adequately in online instruction. Ventura maintains that the accommodations in Student's IEP's were sufficient for that purpose and were actually provided except when inapplicable to distance learning.

An IEP must contain a statement of the program modifications or supports that will be provided for the student to advance appropriately toward attaining his annual goals and to be involved in and make progress in the regular education curriculum, and

a statement of any individual accommodations that are necessary to measure the student's academic achievement and functional performance. (20 U.S.C. § 1414(d)(1)(A)(i)(IV), (VI)(aa); Ed. Code, § 56345, subds. (a)(4), (6)(A).)

Student's April 2019 IEP, which governed all but the last two weeks of his fifth grade year, provided him numerous accommodations. They were extended time to complete assignments, a seat near the teacher and next to a strong and helpful partner, a visual schedule, a seat away from distractions and noise, testing in a small group, and extended time on tests. The accommodations also included allowing for increased verbal response time, directions given one at a time and through visual cues, frequent checks for understanding, simple repetitive directions, verbal encouragement, and answer choices read aloud. Finally, the IEP provided for increased verbal response time, use of manipulatives, reduced paper and pencil tasks when appropriate, and a graphic organizer.

Brian Hubert was Student's general education teacher in fifth grade. At hearing, he described his methods during distance learning in spring 2020. He taught both synchronously and asynchronously. He spent one hour a day on Zoom directly with his class, usually reading from a novel and asking or assigning comprehension questions related to the reading. He also posted the questions online on a platform accessible by students and parents called Canvas. The students could then work on the answers to those questions after the class and turn them in.

Student had difficulty following directions and was easily distracted. Before the schools were closed in March 2020, Hubert consulted with Slavin about accommodations for Student at least twice a week and took care in selecting where Student sat and which other students were near him. At hearing, Hubert went through

the list of accommodations in Student's IEP's one by one and established that he provided nearly all of them to Student in his distance learning class in spring 2020. Slavin confirmed that testimony, stating that nearly all the accommodations in his governing IEP's were given to him.

Both Hubert and Slavin noted that there were a few accommodations that did not fit distance learning. For example, neither seating near the teacher nor seating next to a strong partner could be accomplished online, and neither teacher had any ability to ensure that the room in which Student sat was quiet. But they agreed that the accommodations that could be provided were provided.

The IEP team added four new accommodations to Student's IEP at the May 20, 2020 meeting, anticipating Student's advancement to sixth grade and middle school. They were a text-to-speech application, word prediction software, warning Student of changes to his schedule, and sentence and paragraph frames. Without exception, Student's sixth grade teachers were shown the list of accommodations at hearing and agreed that they had been provided to Student, except those irrelevant to online learning like a seat near the teacher. On Zoom, the teacher was nearby on a computer screen.

The only evidence that contradicted this testimony of District staff came from Student's Father. Father was familiar with Student's adaptation to the new distance learning in spring 2020. Because of COVID-19, Father started working at home. He would do his own work in the living room, which was open to the kitchen, and Student would work at the kitchen table. This enabled Father to respond to any difficulties Student encountered, and to closely monitor his son's online instruction when necessary. Father was extremely attentive and helpful to Student in his online program

throughout the two school years addressed here. Student's Mother and older brother sometimes supported him as well.

Father testified that Ventura's teachers provided only some, not all, of the accommodations due to Student during spring 2020. Some part of that perception was based in a more exacting view of what the accommodations required than District staff had. For example, District staff believed Student was given extended time on tests because he could do them overnight. Father believed that since there was no schedule, there could be no extra time given. District staff believed that Student was given frequent checks for understanding when the teacher would ask a group of five or six students that included Student whether they understood something. Father thought that accommodation required individual dialogue with Student.

Aside from those differences, the evidence established that Student's teachers provided him the accommodations that were practical or possible to provide online. The ones they did not provide were not relevant to online teaching. There was no evidence that any shortcoming in the furnishing of accommodations had any effect on Student's education.

To the extent that Ventura's staff failed to provide all the accommodations in Student's governing IEP's, they failed to comply strictly with Student's entitlement to accommodations. However, aside from accommodations that did not fit the online environment, Ventura's teachers substantially provided the accommodations in Student's IEP's. Their variance from Student's IEP's was not material under *Van Duyn, supra,* and therefore did not deny Student a FAPE. Student does not mention this argument in his closing brief and may have abandoned it. He did not discharge his burden of proving it.

ISSUE 4(a): VENTURA DENY STUDENT A FAPE, DURING THE 2019-2020 SCHOOL YEAR FROM MARCH 8, 2019, THROUGH THE 2020-2021 SCHOOL YEAR, TO MARCH 8, 2021, BY FAILING TO OFFER STUDENT A FAPE IN ITS MAY 20, 2020 IEP OFFER BECAUSE THAT OFFER FAILED TO OFFER SUFFICIENT SERVICES; SPECIFICALLY, BY OFFERING ONLY TWO HOURS OF INSTRUCTION FIVE DAYS A WEEK?

Student contends that the May 20, 2020 IEP, to which Parents agreed, failed to offer him a FAPE because it only offered two hours a day of instruction, five days a week. Ventura does not address this argument in its closing brief.

A special education student must receive as much instruction in a regular school day as his chronological peer group. (Cal. Code Regs., tit. 5, § 3053, subd. (b)(2).) An IEP team may reduce that time only if it makes an express finding in an IEP that the student cannot function for the length of time of a regular school day. (*Id.*, subd. (b)(2)(B).)

There was no evidence that the May 20, 2020 IEP offered Student less than a full school day. The IEP did not specifically state the length of his proposed school day, but other portions of it show he was offered a full school day. For the rest of the 2019-2020 school year his related services, by themselves, consumed 62 minutes a day, which would leave less than an hour for general education if his day had been two hours long. And the IEP provided for 183.6 minutes a day of instruction in a special day class when the new school year started. In addition, Student's grade reports show he received grades for six classes in the early fall, while the May 2020 IEP was still in effect. His school day included three hours with Galli in the morning, and then lunch, physical education, an elective, and study time in the afternoon. Student did not prove that the

May 20, 2020 IEP offered him only two hours of instruction a day, and Ventura did not deny him a FAPE based on any reduction of the length of his regular school day.

Student does not address this contention in his closing brief and may have abandoned it. Student did not meet his burden of proving it.

## ISSUE 4(b): DID VENTURA DENY STUDENT A FAPE, DURING THE 2019-2020 SCHOOL YEAR FROM MARCH 8, 2019, THROUGH THE 2020-2021 SCHOOL YEAR, TO MARCH 8, 2021, BY FAILING TO OFFER STUDENT A FAPE IN ITS MAY 20, 2020 IEP OFFER BECAUSE THAT OFFER FAILED TO PROVIDE PROPER ACADEMIC GOALS; SPECIFICALLY, BY OFFERING GOALS IN THE AREAS OF LANGUAGE AND COMMUNICATION, READING, ENGLISH LANGUAGE DEVELOPMENT, WRITING, AND MATH THAT COULD NOT BE IMPLEMENTED WITHOUT THE PRESENCE OF ANOTHER PERSON AND DURING IN-PERSON LEARNING, THAT DID NOT OFFER HIM SUFFICIENT PROCESSING TIME, AND THAT WERE NOT SUFFICIENTLY AMBITIOUS?

Student contends that the goals offered him in his May 20, 2020 IEP denied him a FAPE because they could not be implemented without the assistance of another person, could be implemented only through in-person learning, did not offer him sufficient processing time, and were insufficiently ambitious.

Ventura asserts that the offered goals were successfully implemented in distance learning without the need for the assistance of an adult, offered Student sufficient processing time, and were appropriately ambitious.

An annual IEP must contain a statement of measurable annual goals designed both to meet the student's disability-related needs to enable the pupil to be involved in and make progress in the general curriculum; and meet each of the pupil's other educational needs that result from disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); Ed. Code, §56345, subd. (a)(2).) Annual goals are statements that describe what a child with a disability can reasonably be expected to accomplish within a 12-month period in the child's special education program. (*Letter to Butler*, 213 IDELR 118 (OSERS 1988); United States Department of Education, Notice of Interpretation, Appendix A to 34 C.F.R., part 300, 64 Fed. Reg., pp. 12,406, 12,471 (1999 regulations).) To provide a FAPE, annual goals must be appropriately ambitious in light of the student's circumstances. (*Endrew F. v. Douglas County Sch. Dist. RE-1*, *supra*, 137 S.Ct. at p. 992.)

Student's new goals in the May 20, 2020 IEP, were in effect for the last two weeks of the 2019-2020 school year. They were also in effect throughout Student's sixth grade year up to March 8, 2021. In both of those time periods Student was engaged solely in distance learning.

Student prospered while the May 2020 goals were in effect. His grades in academic classes in sixth grade were outstanding. His first quarter progress report, on October 23, 2020, showed that he received "A" grades in all his academic subjects. In Math his grade was "A+." His second quarter grades were all "A"s. A progress report on March 3, 2021, just before the end of the period examined here, showed "A+" grades in art, math, and social studies, and "B+" grades in language arts, reading, and writing.

Teachers Conant and Lehman and speech pathologist Hurley established that they were able to implement the May 2020 goals online, and teacher Slavin proved that she was able to implement their predecessors online. There was no contrary evidence.

Since the IEP was intended for Student's sixth grade year in middle school, Slavin drafted the goals in collaboration with a representative from the middle school. Slavin demonstrated in her testimony that she carefully reviewed Student's existing goals, made changes in several of them that were appropriate to sixth grade rather than fifth, and added four new goals.

Student introduced no evidence that showed there were any defects in his May 2020 goals. No one testified that the goals could not be implemented in distance learning, or that they could not be implemented without the physical presence of another adult helping Student, or that they did not allow Student sufficient processing time, or that they were not appropriately ambitious. No professional testified in support of any part of Student's case.

Student in his closing brief dismisses the new set of goals in the May 20, 2020 IEP as making "de minimus" changes. There was no evidence introduced in support of that claim, and even Student's Father appeared not to agree with it. Father was asked at hearing whether he thought Student's goals in the May 2020 IEP were meeting Student's needs. He stated that they were appropriate for in-person learning. He did not believe they were appropriate for online learning, due to the absence of interaction between Student and teacher.

Student now identifies only a single goal in support of his claim that the whole set of six goals was insufficiently ambitious. Annual goal number one in the May 2020 IEP addressed language and communication, and was directed at Student's habit of

interrupting the teacher in class. In an explanation of the reason for the goal, the May 2020 IEP document stated that due to school closures, there was no new data collected to develop a new communication goal, and therefore Student would continue to work on the goal from his previous IEP. Since Student had not been in a physical class after the schools closed, the absence of new data was not surprising.

However, notwithstanding the statement that Student would continue to work on his previous goal, the new goal was actually more demanding than the old one. The same goal in Student's April 2019 IEP asked Student to use appropriate strategies in getting the teacher's attention in four out of five opportunities for three out of five days a week. A year later, Student had not met that goal. He was capable of using appropriate strategies to get the teacher's attention on only three of five opportunities for three of five days in a week. Nonetheless, the new goal in the May 20, 2020 IEP, which Student characterizes as the same, actually increased the requirement from the previous year, asking Student to use appropriate strategies in four of five opportunities for four out of five days a week. So even the one goal Student selects to illustrate his argument was made more difficult for him, and asked him to accomplish in a year something he could not do in May 2020.

The evidence showed that the annual goals in Student's May 2020 IEP met his individual needs, allowed him to make progress in the general education curriculum, and could be implemented online without the presence of an adult helping Student. No evidence showed that the goals failed to allow Student sufficient processing time or were not sufficiently ambitious. Ventura did not deny Student a FAPE in offering him the annual goals in the May 20, 2020 IEP.

## ISSUE 4(c): DID VENTURA DENY STUDENT A FAPE, DURING THE 2019-2020 SCHOOL YEAR FROM MARCH 8, 2019, THROUGH THE 2020-2021 SCHOOL YEAR, TO MARCH 8, 2021, BY FAILING TO OFFER STUDENT A FAPE IN ITS MAY 20, 2020 IEP OFFER BECAUSE THAT OFFER FAILED TO OFFER A ONE-TO-ONE AIDE DURING DISTANCE LEARNING?

Student contends that he could not receive a FAPE during distance learning without a one-to-one aide assisting with his lessons and keeping him on task, and that Ventura should have provided such an aide in his May 20, 2020 IEP and during sixth grade. It is not clear whether Student contemplated that such an aide would appear online to assist Student or in person in Student's home.

Ventura asserts that Student did not need a one-to-one aide, and succeeded in his education without one.

An aide may be a required supportive service if one is "required to assist a child with a disability to benefit from special education . . ." (34 C.F.R. § 300.34(a) (2006); Ed. Code, § 56363, subd. (a)s.)

Father did not request a one-to-one aide at the May 2020 IEP team meeting, and did not clearly do so at hearing. He did testify that Student sometimes needed someone by his side to assist him in distance learning. Father was available in that role throughout Student's distance learning and frequently helped Student directly. He testified that while Student did not need assistance all the time, he needed assistance with new concepts or unfamiliar assignments.

Student's teachers and providers did not believe Student needed a one-to-one aide. Resource teacher Slavin pointed out that Student did not have an aide in his fifth grade class before the pandemic. Based on her experience with him online and working with him on assignments on the Canvas platform, he did not need one during distance learning either.

Student's sixth grade teachers agreed. Science, reading and writing teacher Conant noted that at the start of the sixth grade, Student's Father was by his side, but as the year progressed, Student started wearing headphones and appeared to be participating without assistance. She added that while his attention sometimes lapsed, he was easy to redirect simply by telling him to get back to work. He did not need a full-time aide.

Speech teacher Hurley agreed that it was not difficult to keep Student's attention, and noted that there were many times in which Student did not appear to have anyone by his side.

Technology teacher Matthew Haines thought Student was attentive and could stay on task by himself long enough to complete his assignment. Like all Student's other teachers, Haines praised Student's hard work and dedication to learning.

Although Father aided Student substantially during distance learning, and was always available in the next room, there were extended periods of time in which Student participated in online learning without anyone at his side assisting him.

As mentioned, Student received extraordinarily good grades during his sixth grade year. He benefited from special education (34 C.F.R. § 300.34(a) (2006); Ed. Code, § 56363, subd. (a)) without a full-time one-to-one aide.

The preponderance of evidence showed that a one-to-one aide was not required to assist Student in benefiting from special education. Student did not need a one-to-one aide during distance learning, and Ventura did not deny Student a FAPE by failing to offer him a one-to-one aide in his May 20, 2020 IEP.

## ISSUE 4(d): DID VENTURA DENY STUDENT A FAPE, DURING THE 2019-2020 SCHOOL YEAR FROM MARCH 8, 2019, THROUGH THE 2020-2021 SCHOOL YEAR, TO MARCH 8, 2021, BY FAILING TO OFFER STUDENT A FAPE IN ITS MAY 20, 2020 IEP OFFER BECAUSE VENTURA FAILED TO ASSESS FOR AND OFFER EXTENDED SCHOOL YEAR SERVICES IN LIGHT OF HIS REGRESSION?

Neither Student nor Ventura addresses this claim in closing briefs.

A district is required to provide extended school year, called ESY, services to a student with an IEP if an ESY program is necessary to provide the student a FAPE. (34 C.F.R. § 300.106(a) (2006); Ed. Code, § 56345, subd. (a)(9)(A)(iv).) However, the standards for determining whether a student is entitled to an ESY placement in order to receive a FAPE are different from the standards pertaining to FAPE in the regular school year. The purpose of special education during the ESY is to prevent serious regression over the summer months. (*Hoeft v. Tucson Unified Sch. Dist.* (9th Cir. 1992) 967 F.2d 1298, 1301; *Letter to Myers* (OSEP 1989) 16 IDELR 290.) The mere fact of likely regression is not enough to require an ESY placement, because all students "may regress to some extent during lengthy breaks from school." (*MM v. School Dist. of Greenville Cty.* (4th Cir 2002) 303 F.3d 523, 538.) The relevant standard for determining ESY eligibility in California is whether interruption of the student's educational programming may cause regression, when coupled with limited recoupment capacity, rendering it impossible or unlikely that

the pupil will attain the level of self-sufficiency and independence that would otherwise be expected. (Cal. Code Regs., tit. 5, § 3043, 1st par.)

The IEP team considered at its May 20, 2020 meeting whether Student was eligible for ESY. It decided he was not because, according to the notes, he was not at risk for regression without recoupment. The evidence confirmed that view. Father testified that he noticed Student regressing during the spring and summer, and when Student returned to the sixth grade, he could see a "huge difference." However, neither Father nor any other witness presented evidence concerning Student's capacity for recoupment.

Student's excellent performance when he began sixth grade wholly refutes any claim that he had regressed over the summer to the degree that he could not recoup any loss of skills and knowledge. By late September, Student had been in school for about six weeks. According to his first quarter progress report, dated September 25, 2020, he was receiving "A+" grades in all four of his academic classes, and a "B" grade in his elective, woodworking. His grades remained at that general level throughout his sixth grade year to March 8, 2021. A student who had regressed and was unable to recoup lost skills could not have performed nearly as well.

Student was not eligible for extended school year in summer 2020, and he did not prove that Ventura denied him a FAPE by failing to offer him ESY in the May 20, 2020 IEP.

## ISSUE 4(e): DID VENTURA DENY STUDENT A FAPE, DURING THE 2019-2020 SCHOOL YEAR FROM MARCH 8, 2019, THROUGH THE 2020-2021 SCHOOL YEAR, TO MARCH 8, 2021, BY FAILING TO OFFER STUDENT A FAPE IN ITS MAY 20, 2020 IEP OFFER BECAUSE VENTURA FAILED TO OFFER ADEQUATE SERVICES IN THE AREAS OF SPEECH AND LANGUAGE, ACADEMIC INSTRUCTION, OCCUPATIONAL THERAPY, AND ASSISTIVE TECHNOLOGY?

Student asserted in his complaint that the May 20. 2020 IEP offer denied him a FAPE because it did not offer adequate services in the areas of speech and language, academic instruction, occupational therapy, and assistive technology. Student limits this claim to the period of time in which he was engaged in distance learning. He now argues that he should be assessed so that those needs can be measured. Ventura maintains that its offer was adequate in all those areas

Student introduced no evidence in support of this contention and did not attempt to meet his burden of proof. Student did not prove that the May 20, 2020 offer denied him a FAPE because it offered inadequate services in the areas of speech and language, academic instruction, occupational therapy, or assistive technology.

## 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. During the 2019-2020 school year from March 8, 2019, through the 2020-2021 school year, to March 8, 2021, Ventura did not deny Student a FAPE because

it failed to provide in-person services that were necessary to provide him a FAPE, but it did deny him a FAPE by failing to implement all of the SAI services required by his governing IEP's. Ventura prevailed in part on this issue, and Student prevailed in part on this issue.

Issue 2: During the same time period, Ventura did not deny Student a FAPE because it failed to evaluate his needs during remote instruction. Ventura prevailed on this issue.

Issue 3: During the same time period, Ventura did not deny Student a FAPE because it failed to provide necessary accommodations for remote instruction. Ventura prevailed on this issue.

Issue 4(a): During the same time period, Ventura did not deny Student a FAPE in its May 20, 2020 IEP offer by failing to offer sufficient services; specifically, by offering only two hours of instruction five days a week. Ventura prevailed on this issue.

Issue 4(b): During the same time period, Ventura did not deny Student a FAPE in its May 20, 2020 IEP offer by failing to provide proper academic goals; specifically, by offering goals in the areas of language and communication, reading, English language development, writing, and math that could not be implemented without the presence of another person and during in-person learning, that did not offer him sufficient processing time, and that were not sufficiently ambitious. Ventura prevailed on this issue.

Issue 4(c): During the same time period, Ventura did not deny Student a FAPE in its May 20, 2020 IEP offer by failing to offer him a one-to-one aide during distance learning. Ventura prevailed on this issue.

Issue 4(d): During the same time period, Ventura did not deny Student a FAPE in its May 20, 2020 IEP offer by failing to assess for and offer extended school year services in light of his regression. Ventura prevailed on this issue.

Issue 4(e): During the same time period, Ventura did not deny Student a FAPE in its May 20, 2020 IEP offer by failing to offer adequate services in the areas of speech and language, academic instruction, occupational therapy, and assistive technology. Ventura prevailed on this issue.

## REMEDIES

ALJ's have broad latitude to fashion appropriate equitable remedies for FAPE denials. (*School Comm. of Burlington v. Department of Educ.* (1985) 471 U.S. 359, 370 [105 S.Ct. 1996, 85 L.Ed.2d 385]; *Parents of Student W. v. Puyallup Sch. Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*).) In remedying a FAPE denial, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3) (2006).) Appropriate relief means "relief designed to ensure that the student is appropriately educated within the meaning of the IDEA." (*Puyallup, supra,* 31 F.3d. at p. 1497.)

Compensatory education is an equitable remedy that depends upon a fact-specific and individualized assessment of a student's current needs. (*Puyallup, supra,* 31 F.3d at p. 1496; *Reid v. District of Columbia* (D.C.Cir. 2005) 401 F.3d 516, 524 (*Reid*).) The award must 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." (*Reid*, *supra*, 401 F.3d at p. 524.)

This Decision holds that in spring 2020, Ventura partially failed to implement all of the services in Student's governing IEP's. It fell short by 1275 minutes, or 21.25 hours, in providing him SAI in English language arts and math. Student is therefore entitled to relief that restores those hours of instruction to him.

Parents also seek reimbursement for $6000 they spent on private tutoring for Student to compensate for Ventura's shortfall in services, but the evidence did not support that claim. The Order Following Prehearing Conference ordered that a party seeking reimbursement should provide evidence regarding the type, amount, duration and need for the expenditures. At hearing, Student failed almost entirely to adhere to those requirements. Father testified that Parents spent approximately $6,000 on various tutors that he described, but no specifics or documentation were produced.

Father's estimate did not fit the period of time in which Student was denied a FAPE. It included expenditures from March 2020 to the hearing in May 2021, a period of time far longer than nine weeks in spring 2020. It included math and language instruction, but it also included piano teachers and voice instruction, which did not directly substitute for the SAI that Student lost. There was no way to tell from the evidence Student introduced what kind of provider was hired, when that provider worked, or how much the provider charged. There is therefore no principled way in which the estimated sum can be divided into expenditures that were justified to compensate for the denial of a FAPE and expenditures that were not. This part of Student's request for relief must be denied for lack of adequate evidence.

## ORDER

1. Ventura shall provide Student 21.25 hours of individual instruction by a licensed special education teacher, or a teacher with equivalent credentials, to be divided between English language arts and math in the sole discretion of the tutor after consultation with Parents.
2. Ventura shall make the instructional hours ordered above reasonably available to Student starting 45 days after the date of this Decision and until the end of the 2023-2024 regular school year. Ventura shall ensure that the instruction is delivered during the regular school year, unless the parties agree to some other arrangement. Ventura's obligation to provide the instructional hours shall cease at the end of the regular 2023-2024 academic year notwithstanding any incomplete usage of the service.
3. Ventura shall ensure that the teacher provides the instruction in one hour-long sessions a week, two thirty-minute sessions a week, or on such other schedule as is most consistent with Student's other obligations, to be determined in the sole discretion of the tutor after consultation with Parents.
4. If Student is absent from any scheduled session of instruction without 24-hours' notice, Ventura may subtract that session from the total hours of instruction ordered here. With or without adequate notice, if Student is absent from any scheduled session of instruction for a reason that is not treated as an excused absence under Ventura's standard practices, Ventura may subtract that session from the total.
5. All of Student's other requests for relief are denied.

## RIGHT TO APPEAL THIS DECISION

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

/s/

CHARLES MARSON

Administrative Law Judge

Office of Administrative Hearings