

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2020100198

PARENT ON BEHALF OF STUDENT,

v.

CHARTER OAK UNIFIED SCHOOL DISTRICT.

DECISION

March 11, 2021

On October 7, 2020, the Office of Administrative Hearings, called OAH, received a due process hearing request from Student, naming Charter Oak Unified School District. Student filed an amended complaint on November 17, 2020. Charter Oak's request for continuance was granted on December 30, 2020. Administrative Law Judge Marlo Nisperos heard this matter by videoconference on January 26, 27, and 28, 2021.

Parent represented Student. Courtney Brady, attorney at law, represented Charter Oak Unified School District. Jonathan Raymond, director of special education, attended all hearing days on Charter Oak's behalf.

At the parties' request the matter was continued to February 16, 2021 for written closing briefs. Parent submitted a closing brief approximately one hour later than ordered; the brief was considered as it was received during business hours the date it was due. The record was closed and the matter was submitted on February 16, 2021.

ISSUES

1. Did Charter Oak deny Student a free appropriate public education, called FAPE, from June 24, 2020, through October 7, 2020, by:
 - a. failing to timely develop an initial individualized education program, referred to as IEP;
 - b. failing to consider assistive technology recommendation made by Nancy Tsubokawa in June 2020;
 - c. failing to address all areas of need, specifically auditory and visual processing;
 - d. failing to provide comparable individual family service plan services, specifically in the areas of applied behavioral analysis, called ABA, and physical therapy;
 - e. failing to contract with the Center for Autism Related Disorders, referred to as CARD, to provide in-home ABA services; and
 - f. failing to offer in-person services in the areas of physical therapy, occupational therapy, speech and language, and ABA and board-certified behavior analyst services?

JURISDICTION

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

- all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living, and
- the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, assessment, 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]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) Student had the burden of proof in this matter. 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 three years old and attending preschool at Charter Oak at the time of hearing. Student resided within Charter Oak's geographic boundaries at all relevant times. Student received individualized family services plan, called IFSP, services since March 19, 2019. Student received continuous services pursuant to the IFSP, through the time of hearing, based on an order after a due process hearing involving the regional center.

ISSUE 1.A. AND 1.D.: DID CHARTER OAK DENY STUDENT A FAPE FROM JUNE 24, 2020, THROUGH OCTOBER 7, 2020, BY FAILING TO TIMELY DEVELOP AN INITIAL IEP AND FAILING TO PROVIDE COMPARABLE IFSP SERVICES, SPECIFICALLY IN THE AREAS OF ABA AND PHYSICAL THERAPY?

Student alleged Charter Oak denied him a FAPE by failing to develop an IEP by his third birthday on June 24, 2020. Student argued the services ultimately provided were not a comparable program to his IFSP, specifically regarding ABA and physical therapy.

Charter Oak asserted that it was unable to develop an IEP because Parent failed to timely consent to the assessment plan. Charter Oak also argued it did not develop an IEP because it was prohibited from conducting in-person assessments based on local health department restrictions resulting from the COVID-19 global pandemic. Charter Oak contended it was only required to provide interim services until it could conduct a complete evaluation of Student. Charter Oak claimed the interim IEP provided Student services comparable to his IFSP.

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 (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); and see Ed. Code, §§ 56031, 56032, 56341, 56345, subd. (a) and 56363 subd. (a); 34 C.F.R. §§ 300.320 (2007), 300.321 (2007), 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 School Dist. v. Rowley* (1982) 458 U.S. 176, 201-204; *Endrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. ____ [137 S.Ct. 988, 1000].)

INDIVIDUALIZED FAMILY SERVICES PLAN

By law, regional centers are responsible for early intervention services for infants, toddlers and their families until the child is three years old. (20 U.S.C. §§ 1431-1444.) The regional center develops a family-focused IFSP of early interventions to support the family and the child's developmental outcomes. The IFSP contains a statement of the infant or toddler's present levels of development, and a statement of family's resources, priorities, and concerns for enhancing the development of their child. The IFSP also identifies the intervention services being delivered, the environments where the services will be delivered and the projected length, duration and frequency of each service. (20 U.S.C. § 1436(d); 34 C.F.R. § 303.344 (2011).)

Once the child turns three, the local educational agency becomes responsible for providing preschool special education and related services if that child is eligible for special education. Each local educational agency participates in transition planning for toddlers served by an IFSP before the toddler is two years nine months, or at the

discretion of all parties up to six months before the child turns three, to ensure that an IEP is developed if the child is eligible. (20 U.S.C. § 1412(a)(9); 34 C.F.R. § 303.209(c)(1) (2011); Cal. Code Regs., tit. 17, § 52112(a).) Charter Oaks was Student's local educational agency.

Student's third birthday was June 24, 2020. On December 2, 2019, the regional center held a transition planning meeting to notify Charter Oak that Student was receiving early intervention services. Parent, Student's advocate, regional center representatives, and Anna Genna, school psychologist for Charter Oak, attended. At the meeting, Charter Oak received written notice from the regional center that Student was potentially eligible for preschool special education services under the IDEA. The written notice provided at this meeting was the initial referral to Charter Oak to determine Student's eligibility for special education services.

ASSESSMENT PLAN

Each public agency must conduct a full and individual initial evaluation before the initial provision of special education and related services to a child with a disability. (20 U.S.C. § 1414(a); 34 C.F.R. § 300.301(a) (2007).) Parental consent is required prior to conducting an initial evaluation to determine if a child qualifies for special education and related services as a child with a disability. (20 U.S.C. § 1414(a)(1)(D)(i)(I); Ed. Code, § 56043, subd. (b).) The IDEA uses the term evaluation, while the California Education Code uses the term assessment, and these terms are used interchangeably in this Decision.

On April 14, 2020, Genna sent Parent a proposed assessment plan and Parent responded the same day stating she did not agree with the plan. Parent believed the assessment plan did not address all areas of suspected disability and requested a

meeting to discuss her concerns. Genna, Parent, and Jennifer Brennan, a special education program specialist, met on May 22, 2020, to discuss Parent's concerns. No agreement on areas to be assessed was reached after the meeting and Charter Oak told Parent it would convene another meeting to further discuss Parent's concerns. Instead of holding another meeting, Charter Oak advised Parent to include her input as an attachment to the plan. On June 3, 2020, Parent amended Charter Oak's proposed assessment plan by adding additional areas of evaluation and attaching an exhibit that described Parent's concerns. Parent consented to the assessment plan with amendments and gave Charter Oak permission to begin the evaluation.

INITIAL AND INTERIM IEP

A child must be assessed and an IEP developed within 60 calendar days from the date of receipt of the parent's written consent for assessment, excluding schooldays when school is not in session and school vacations in excess of five schooldays, unless the parent agrees in writing to an extension. (Ed. Code, §§ 56043(c) & (f), 56302.1.)

Each local educational agency must have an IEP in effect for each individual with exceptional needs within its jurisdiction at the beginning of each school year. (34 C.F.R. § 300.323(a)-(b) (2006); Ed. Code, § 56344, subd. (c); 71 Fed. Reg. 4662 (August 14, 2006).) When a child with an IEP transfers into a school district from a school district not operating programs under the same local plan, the local educational agency must ensure that the child is immediately provided an interim placement for a period not to exceed 30 days. The interim placement must be in conformity with an IEP. (Ed. Code, § 56325.) This same requirement applies if the child has an IFSP and transfers into the school district when the child turns three years old. (See Ed. Code, § 56032.)

Charter Oak failed to develop an IEP by Student's third birthday. Charter Oak received Parent's consent to assess Student on June 3, 2020 and determined that it would not be able to timely complete a comprehensive evaluation based on COVID-19 restrictions that it asserted prohibited in-person assessments. On June 16, 2020, Charter Oak sent Parent a prior written notice stating it would not be able to assess Student and hold the initial IEP team meeting by his third birthday. Charter Oak cited no authority in its closing brief that excused the IDEA's requirement to develop an IEP by Student's third birthday. Charter Oak committed a procedural violation for failing to develop an IEP by June 24, 2020, Student's third birthday. Charter Oak also failed to develop an interim IEP by the first day of school, August 14, 2020. These constitute procedural IDEA violations.

ANALYZING A PROCEDURAL VIOLATION

Not all procedural violations are of legal consequence. A due process decision shall be based on substantive grounds based on whether a child received a FAPE. (20 U.S.C. § 1415 (f)(3)(E)(i); Ed. Code, § 56505, subd. (j) [decision cannot be based solely on a non-substantive error unless the error resulted in the loss of an educational opportunity or interfered with parental participation in the IEP process].)

A procedural violation results in a denial of a FAPE only if the violation impeded the child's right to a FAPE; significantly impeded the parent's opportunity to participate in the decision making process; or caused a deprivation of educational benefits. (20 U.S.C. § 1415 (f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2) (2006); Ed. Code, § 56505, subds. (f)(2) & (j); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484, superseded in part on other grounds by 20 U.S.C. § 1414(d)(1)(B); *L.M. v. Capistrano Unified School Dist.* (9th Cir. 2009) 556 F.3d 900, 910.) The Ninth Circuit

has held that a procedural error that causes a loss of an educational opportunity denies a student a FAPE. (*Doug. C. v. Hawaii Depart. of Education* (9th Cir. 2013) 720 F.3d 1038, 1047.) "A procedural error results in the denial of an educational opportunity where, absent the error, there is a 'strong likelihood' that alternative educational possibilities for the student 'would have been better considered.'" (*Ibid* at p. 1047, quoting concurring opinion of Judge Gould in *M.L. v. Federal Way School Dist.* (9th Cir. 2005) 394 F.3d 634, 657.)

Charter Oak acknowledged that it did not conduct an IEP team meeting by Student's third birthday nor have an IEP in place by the start of the school year. Charter Oak contended that it was not required to offer Student an IEP by his third birthday because it was unable to assess him due to the COVID-19 restrictions and Parent's untimely consent to the assessment plan. Charter Oak argued that its only obligation was to provide Student interim services comparable to Student's IFSP until assessments were completed and an IEP team meeting held. Charter Oak provided no legal authority supporting its position. Assuming that Charter Oak's position is legally supported, however, it would have to establish that it offered an interim IEP that was comparable to Student's IFSP.

Essentially, Charter Oak has raised an affirmative defense to Student's FAPE denial claims. Namely, that even if it committed procedural IDEA violations, the violations did not result in a substantive FAPE denial because it offered Student a comparable program to his IFSP. Charter Oak then has the burden of proof to establish that it offered Student a comparable program. (*Director, Office of Workers' Compensation Programs, Dept. of Labor v. Greenwich Collieries* (1994) 512 U.S. 267, 273.) Accordingly, whether Charter Oak's failure to provide an IEP by Student's third birthday or its failure to have an IEP in effect by the first day of school constituted substantive violations of

the IDEA need not be reached in this decision unless Charter Oak established it offered a comparable program to Student's IFSP. As discussed further, Charter Oak did not meet its burden of proving an affirmative defense.

COMPARABLE SERVICES

A student with an IEP that transfers from one public agency to another, shall be provided with services comparable to those described in the previously approved IEP or IFSP. Within 30 days the local educational agency must adopt the previously approved IEP or IFSP, or shall develop, adopt, and implement a new IEP. (Ed. Code, § 56325 and 56032 [for a child younger than three years of age, the term IFSP will apply when a statute or regulation refers to that child's IEP].)

JUNE 24, 2020 THROUGH SEPTEMBER 11, 2020

Student turned three on June 24, 2020, which triggered Charter Oak's obligation to provide him FAPE. Charter Oak was aware earlier in June that it could not complete assessments and hold an IEP team meeting by that date. It sent Parent a letter on June 16, 2020, stating such. In the letter, Charter Oak told Parent it would develop an interim IEP for Student based on his IFSP if Parent provided consent in writing. Charter Oak cited no authority for requiring a parent to consent in writing to trigger a school's authority to develop an interim plan. Essentially, the June 16, 2020 letter constituted an offer to make an offer of services.

Despite communication back and forth between Charter Oak and Parent, no interim offer was made. Accordingly, from June 24, 2020, through September 11, 2020, Student did not receive any offer of services, much less one comparable to that contained in his IFSP. An offer to make an offer is insufficient. This impeded Student's

right to a FAPE and significantly impeded Parent's opportunity to participate in the decision making process. Accordingly, Student established he was denied a FAPE from June 24, through September 11, 2020.

SEPTEMBER 11, 2020, THROUGH OCTOBER 7, 2020

Between July 28, 2020, and September 8, 2020, Parent had various email exchanges with Jonathan Raymond, Charter Oak's special education director, and Brennan. Parent was instructed to and did officially enroll Student at Charter Oak. Parent inquired about notices she received regarding Charter Oak's distance learning plans. Ultimately, by early September no IEP or interim IEP was offered.

Parent emailed Charter Oak on September 9, 2020 and recited the efforts she made to obtain interim services from Charter Oak since December 2, 2019 and expressed frustration with Charter Oak's failure to assess or provide services to Student by his third birthday. Charter Oak interpreted Parent's email on September 9, 2020 as consent to develop an interim IEP and internally began the process of creating one.

Charter Oak did not provide Parent a written interim IEP or proposed IEP at any time up to October 7, 2020. Kim Setter, special education credentialed teacher for Charter Oak for more than 20 years, was Student's specialized academic instruction teacher in the preschool inclusion program. Setter emailed and spoke with Parent on September 11, 2020, to provide information about the virtual classroom and information related to the computer programs that Charter Oak used to communicate with parents. Student began distance learning on September 14, 2020.

Charter Oak did not provide a formal written offer for the interim IEP services, including ABA and physical therapy. The IDEA requires written prior notice when an

educational agency proposes, or refuses, to change the educational placement of a disabled child. (20 U.S.C. § 1415(b)(3)(A).) A local educational agency is required to make a formal written offer for educational placement. (*Union. School Dist. v. Smith* (9th Cir. 1994) 15 F.3d. 1519, 1526 (*Union*).) A written offer creates a clear record that would eliminate troublesome factual disputes about when placements were offered, what placements were offered, and what additional educational assistance was offered to supplement a placement, if any. *Ibid*.

Union addresses the requirements regarding a written IEP offer. The case is analogous to the facts herein. A written IEP offer and written interim offer share the same underlying purpose, to inform parents and create a clear record. Student's IFSP included ABA services for 18 hours per week by an ABA certified therapist and specialized instruction with an ABA component for 6 hours per week. Charter Oak offered no ABA services in the interim IEP. The testimony by Charter Oak's witnesses that Student's placement had sufficient ABA components to meet his need was not persuasive. Charter Oak did not prove that no ABA support in Student's interim IEP was comparable to the 24 hours per week of ABA support that was provided by Student's IFSP. Charter Oak failed to prove its affirmative defense that it offered a comparable interim IEP.

During the time period at issue, Charter Oak failed to present a formal written offer to Parent specifying the placement and services that Student would receive pursuant to the interim IEP. This impeded Student's right to a FAPE and significantly impeded Parent's opportunity to participate in the decision making process.

Accordingly, Student established he was denied a FAPE through October 7, 2020, based on Charter Oak's failure to offer Student a program comparable to his IFSP, including in ABA and physical therapy.

ISSUE 1B: DID CHARTER OAK DENY STUDENT A FAPE FROM JUNE 24, 2020, THROUGH OCTOBER 7, 2020, BY FAILING TO CONSIDER ASSISTIVE TECHNOLOGY RECOMMENDATION MADE BY NANCY TSUBOKAWA IN JUNE 2020?

Student alleged that Charter Oak did not consider Nancy Tsubokawa's assistive technology assessment because those recommendations were not included in any plan offered to Student.

Charter Oak asserted that Tsubokawa's assistive technology assessment was considered as it developed Student's interim IEP. Charter Oak acknowledged it did not incorporate the technology and programs recommended by Tsubokawa because they were not appropriate for Student in an educational setting.

The local educational agency must consider an independent educational evaluation that parent obtains and gives to the agency in any decision made with respect to the provision of FAPE to the child, so long as the evaluation meets agency criteria. (34 C.F.R. § 300.502(c) (2006); Ed. Code, § 56329, subd. (c).) An independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question. (34 C.F.R. 300.502(a)(3)(i) (2006).)

Here, as found above, no IEP team meeting was held nor written interim special education plan developed for Student and provided to Parent. Student failed to meet his burden of proving when the assistive technology recommendation made by Nancy Tsubokawa was provided to Charter Oak. Student offered an email dated October 28, 2020, that stated Parent was following up on her request for a device and software

recommended in Tsubokawa's report. Student also failed to provide any legal authority that required Charter Oak to consider an independent educational evaluation outside of the IEP process. The law requires the IEP team to consider the independent educational evaluation, but no IEP team meeting was held during the time period at issue. Based on the reasons stated, Student failed to meet his burden of proving Charter Oak denied him a FAPE for failing to consider the assistive technology report.

ISSUE 1C: DID CHARTER OAK DENY STUDENT A FAPE FROM JUNE 24, 2020, THROUGH OCTOBER 7, 2020, BY FAILING TO ADDRESS ALL AREAS OF NEED, SPECIFICALLY AUDITORY AND VISUAL PROCESSING?

Student contended the assessment plan did not adequately take into account Student's apparent auditory and visual processing deficits. Parent argued that Student was experiencing difficulty in processing information based on his inconsistent responses to auditory and visual prompts. Student claimed a neuropsychological evaluation was necessary to address these areas of suspected disability. Student did not place at issue, however, Charter Oak's alleged failure to assess in all areas of suspected disability. Accordingly, no findings are made in this decision regarding that contention.

Charter Oak contended that the assessment plan included assessments that sufficiently addressed all areas of Student's suspected disabilities, including auditory and visual processing. Charter Oak further asserted that based on assessment results, it intended to develop a plan that met all Student's areas of need. As the assessments were not yet complete, Student's areas of need, particularly in auditory and visual processing had not been established in an educational setting. Charter Oak claimed the interim program it offered Student addressed any deficits that he may have had in these areas.

Special education is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39 (2006); Ed. Code, § 56031.) The local educational agency must develop an IEP that offers measurable annual goals designed to: (1) meet the student's needs that result from the disability so the student may be involved in and make progress in the general education curriculum and (2) meet each of the other educational needs that result from student's disability. (Ed. Code, § 56345.)

Student did not present evidence establishing that Student had needs in auditory and visual processing that impacted his education. Student presented assessments conducted by the regional center and his medical provider and Parent's testimony regarding his deficits. The prior assessments and Parent's testimony addressed Student's IFSP services not his educationally related needs under the IDEA. No evidence was presented establishing that Student had needs in those areas. Therefore, Student did not meet his burden to establish a FAPE denial on this basis.

ISSUE 1E: DID CHARTER OAK DENY STUDENT A FAPE FROM JUNE 24, 2020, THROUGH OCTOBER 7, 2020, BY FAILING TO CONTRACT WITH CARD TO PROVIDE IN-HOME ABA SERVICES?

Student alleged Charter Oak denied him a FAPE by failing to contract with his current provider, CARD, to provide in-home ABA services during distance learning because he was unable to access his education without ABA support.

Charter Oak asserted it was not required to contract with Student's prior service provider to provide in-home ABA services.

A district has the prerogative to determine the choice of methodology and parents are not allowed to select service providers or compel a district to provide a particular education program or methodology. (*Poway Unified School Dist. v. K.C. ex rel. Cheng* (S.D. Cal. Mar. 13, 2013, No. 10CV897-GPC(DHB)) 2013 WL 990837, * 9 [nonpub. opn.]; see *Board of Educ. Of Hendrick Hudson Central School Dist., Westchester County v. Rowley*, *supra*, 458 U.S. at pp. 207-208.)

This case is similar to *Johnson ex rel. Johnson v. Special Education Hearing Office, State of California* (9th Cir. 2002) 287 F.3d 1176 (*Johnson*). In *Johnson*, the parents sought to modify an order that required the school district to maintain the student's educational placement and services pursuant to his IFSP, but did not require the district to use the same vendors previously used by the regional center. (*Ibid* at 1179.) The *Johnson* court held it was proper to analogize student's transition from an IFSP to an IEP to the transfer of a student between school districts. (*Ibid* at 1181.) The Court concluded that a school district is required to provide an interim placement in conformity with student's IFSP, but is not required to use the same vendors. It reasoned that this maintained the stability of student's educational program while taking into account the reality of a shift in responsible agencies. (*Ibid* at 1182.)

Student failed to meet his burden of proving that Charter Oak was required to contract with a specific service provider, CARD, to provide in-home ABA services. As described above, Charter Oak denied Student a FAPE for failing to offer comparable services to Student's IFSP, including a failure to offer ABA services. However, if Charter Oak offered ABA services as part of the interim program, Student would not have the authority to dictate the agency that would provide them. Accordingly, Student failed to meet his burden of proving Charter Oak denied him a FAPE for failing to contract with CARD to provide ABA services during distance learning.

ISSUE 1F: DID CHARTER OAK DENY STUDENT A FAPE FROM JUNE 24, 2020, THROUGH OCTOBER 7, 2020, BY FAILING TO OFFER IN-PERSON SERVICES IN THE AREAS OF PHYSICAL THERAPY, OCCUPATIONAL THERAPY, SPEECH AND LANGUAGE, AND ABA AND BOARD CERTIFIED BEHAVIOR ANALYST SERVICES?

Student alleged Charter Oak denied him a FAPE for failing to offer in-person interim services. Charter Oak argued that the related services provided virtually during distance learning met Student's needs.

As found above, Charter Oak denied Student a FAPE from June 24, 2020, through October 7, 2020, by failing to offer Student a program comparable to his IFSP. Charter Oak essentially seeks now to overcome that denial by asserting that despite that failure, the services it actually provided to Student met his needs. Charter Oak's argument is unpersuasive.

Charter Oak made no formal IEP or interim IEP offer to Student during the time at issue. The evidence established that Student received physical therapy, occupational therapy, speech and language, and ABA services pursuant to his IFSP. There was no evidence adduced at hearing that Student's IFSP included board certified behavior analyst services. Had Charter Oak determined that the services in Student's IFSP were not needed, it could have held an IEP team meeting during which district team members and Parent could have discussed Student's needs. Alternatively, Charter Oak could have offered Student a written interim IEP giving Parent an opportunity to consider whether the offered program was comparable to Student's IFSP. Instead, Charter Oak made no written offer of services. It cannot now defend the FAPE denial by

asserting that what it actually gave was comparable. Under the facts of this case, Student established a FAPE denial from June 24, 2020, through October 7, 2020, by Charter Oak's failure to provide a written offer of physical therapy, occupational therapy, speech and language, and ABA services.

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 1a.: Charter Oak denied Student a FAPE from June 24, 2020, through October 7, 2020, by failing to timely develop an initial IEP. Student prevailed on Issue 1a.

Issue 1b.: Charter Oak did not deny Student a FAPE from June 24, 2020, through October 7, 2020, by failing to consider assistive technology recommendation made by Nancy Tsubokawa in June 2020. Charter Oak prevailed on Issue 1b.

Issue 1c.: Charter Oak did not deny Student a FAPE from June 24, 2020, through October 7, 2020, by failing to address all areas of need, specifically auditory and visual processing. Charter Oak prevailed on Issue 1c.

Issue 1d.: Charter Oak denied Student a FAPE from June 24, 2020, through October 7, 2020, by failing to provide comparable IFSP services, specifically in the areas of ABA and physical therapy. Student prevailed on Issue 1d.

Issue 1e.: Charter Oak did not deny Student a FAPE from June 24, 2020, through October 7, 2020, by failing to contract with CARD to provide in-home ABA services. Charter Oak prevailed on Issue 1e.

Issue 1f.: Charter Oak denied Student a FAPE from June 24, 2020, through October 7, 2020, by failing to offer in-person services in the areas of physical therapy, occupational therapy, speech and language, and ABA and board certified behavior analyst services. Student prevailed on Issue 1f.

REMEDIES

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

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).) The purpose of the IDEA is to provide students with disabilities a free appropriate public education which emphasizes special education and related services to meet their unique needs. (*Burlington, supra*, 471 U.S. 359, 374.) Appropriate relief means relief designed to ensure that the student is appropriately educated within the meaning of the IDEA. (*Student W. v. Puyallup School Dist.* (9th Cir. 1994) 31 F.3d 1489,

1497 (*Puyallup*.) The award must be fact-specific and be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.)

A school district may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Park, supra*, 464 F.3d at p. 1033.) Compensatory education is a prospective award of educational services designed to catch-up the student to where he should have been absent the denial of a FAPE. (*Brennan v. Regional School Dist. No. 1* (D.Conn. 2008) 531 F.Supp.2d 245, 265; *Orange Unified School Dist. v. C.K.* (C.D.Cal. June 4, 2012, No. SACV 11-1253 JVS(MLGx)) 2012 WL 2478389, *12.) An award of compensatory education need not provide a day-for-day compensation. (*Puyallup, supra*, 31 F.3d 1489, 1496-1497.)

Charter Oak denied Student a FAPE from June 24, 2020, to October 7, 2020, by failing to timely develop an initial IEP and failing to provide comparable IFSP services. Student's IFSP called for physical therapy, occupational therapy, speech and language, and ABA services.

A parallel dispute was litigated against the regional center. Pursuant to an ALJ's order from a due process hearing involving the regional center, Student continued to receive IFSP services in the areas of physical therapy, occupational therapy, and speech and language, during the time period at issue. Because the regional center provided these services, no additional services for those areas are awarded to Student. The regional center did not provide ABA services to Student during distance learning until November 9, 2020. Student was scheduled to participate in distance learning from 9:00 a.m. to 9:30 a.m., Monday through Friday, and 10:15 a.m. to 10:45 a.m., on all

weekdays except Wednesdays. Student's interim program included four and a half hours per week of synchronous distance learning with his classmates.

No evidence was provided regarding how many minutes per week Student was engaged in asynchronous learning. School was in session for 38 days, or seven and a half weeks, from August 14, to October 7, 2020. The undersigned carefully considered the evidence regarding the services to which Student was entitled and the services he actually received. In balancing Student's current age and the services he was receiving at the time of hearing, the ALJ balanced the equities in crafting an appropriate remedy for the FAPE denials determined.

The only area in which Student is awarded compensatory education is ABA, as he received the other contested services through the regional center. Student is awarded 35 hours of ABA services provided by CARD. If CARD is not available to provide ABA services, Parent can select a comparable service provider. Student may utilize the ABA services in-home, in the community, or at school. Student will be entitled to utilize those services through June 2022.

ORDER

1. Parent shall select CARD or a comparable a non-public agency, and notify Charter Oak of that decision. Within 30 days of being notified of Parent's selection, Charter Oak shall contract with the non-pubic agency of Parent's choice, to provide 35 hours of ABA services. Any compensatory ABA services not used by June 30, 2022, shall be forfeited by Student.
2. All other request 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/

Marlo Nisperos

Administrative Law Judge

Office of Administrative Hearings