

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2020120031

PIVOT CHARTER SCHOOL – SAN DIEGO,

v.

PARENTS ON BEHALF OF STUDENT.

DECISION

MAY 13, 2021

On November 30, 2020, the Office of Administrative Hearings, called OAH, received a due process hearing request from Pivot Charter School – San Diego, naming Parents on behalf of Student. OAH granted the first continuance of this matter on December 21, 2020. Administrative Law Judge Jennifer Kelly heard this matter on April 6, 7 and 8, 2021 by videoconference.

Attorneys at Law Rebecca Diddams and Ryan Williams represented Pivot Charter School – San Diego, referred to as Pivot. No representative from Pivot attended the hearing days on Pivot's behalf.

Student's Mother attended the majority of hearing day one, and Father attended approximately 45 minutes of day one. Parents elected not to attend the remainder of the hearing days.

The ALJ granted Pivot's request for a continuance to April 26, 2021, to allow time for the parties to submit written closing briefs. OAH served the parties on April 9, 2021 with an Order for Closing Briefs Following Due Process Hearing. Pivot timely filed its closing brief, the record was closed, and the matter was submitted on April 26, 2021.

ISSUES

1. Did Pivot's April 9, 2020 individualized education program, or IEP, as completed on November 6, 2020, offer Student a free appropriate public education, called a FAPE, such that Pivot may implement it without parental consent?
2. Did Pivot satisfy its legal obligation to Student by filing the present matter?

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, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, and 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents, and has the burden of proof by a preponderance of the evidence. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 57-58, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) Pivot filed the due process complaint and had the burden of proof. The factual statements in this Decision constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

Student was 10 years old, and by age would be attending fifth grade, at the time of hearing. Student had been enrolled in Pivot, a public charter school, since fall 2018. Student resided with Parents within the San Marcos Unified School District and attended Pivot through independent enrollment. Student was eligible for special education under the autism category.

Student disenrolled from Pivot effective April 1, 2021, a few days prior to the hearing.

ISSUE 1: DID PIVOT’S APRIL 9, 2020 IEP, AS COMPLETED ON NOVEMBER 6, 2020, OFFER STUDENT A FAPE SUCH THAT PIVOT MAY IMPLEMENT IT WITHOUT PARENTAL CONSENT?

Pivot contends that the IEP developed on April 9, 2020 and completed on November 6, 2020, referred to as the November 2020 IEP, offered Student a FAPE. Pivot contends that the information available to the IEP team showed that Student’s autism resulted in academic, communication, behavior and social skills deficits that required specialized academic instruction in a public-school special day class with language, behavior and social skills supports. Pivot offered Student placement in a program administered by the Carlsbad Unified School District. Pivot contends that its offer of placement was appropriate, and that the November 2020 IEP offered Student related services and supports reasonably calculated to ensure that Student made appropriate educational progress in light of his circumstances.

The evidence indicated Parents believed the November 2020 IEP offer was not appropriate because placement in a public-school special day class was not the least restrictive environment in which Student could access his education. Parents informed Pivot they believed Student could make appropriate educational progress in the home setting with the support of a full-time, one-to-one aide trained in applied behavioral analysis.

A FAPE means special education and related services that are available to an eligible child that meets state educational standards at no charge to the parent or guardian. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) Parents and school personnel develop an IEP for an eligible student based upon state law and the IDEA. (20 U.S.C.

§§ 1401(14), 1414(d)(1); 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 and 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].)

There are two parts to the legal analysis of a school district's compliance with the IDEA. First, the tribunal must decide whether the school district has complied with the procedures set forth in the IDEA. (*Rowley, supra*, 458 U.S. at 206-207.) Second, the tribunal must decide whether the IEP developed through those procedures was designed to meet the child's unique needs and reasonably calculated to enable the child to receive educational benefit. (*Ibid*; *Endrew F., supra*, 137 S.Ct. at 1000.)

A determination regarding whether or not a child received a FAPE must be based on substantive grounds. (20 U.S.C. § 1415(f)(3)(E); Ed. Code, § 56505(f).) A procedural violation amounts to a substantive denial of a FAPE only if it either impedes the student's right to a FAPE, significantly impedes the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE or causes the student to be deprived of educational benefit. (*Ibid*.) Mere technical violations will not render an IEP invalid. (*Amanda J. v. Clark County Sch. Dist.* (9th Cir. 2001) 67 F.3d 877, 892.)

A school district's determinations regarding special education are based on what was objectively reasonable for it to conclude given the information the district had at the time. A school district cannot be judged exclusively in hindsight but instead, an IEP

must take into account what was, and what was not, objectively reasonable at the time the IEP was drafted. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041 (*Fuhrmann*).)

BACKGROUND INFORMATION

The initial IEP team meeting to develop the November 2020 IEP was timely held on April 9, 2020, approximately 5 months after the parties completed an annual review of Student's educational program and Pivot made an offer of FAPE in the IEP dated October 31, 2019. Parents consented to the October 31, 2019 offer of FAPE. The evidence established that in developing Student's November 2020 IEP, Pivot relied on the assessments and recommendations used to develop the October 2019 IEP, and the results of independent educational evaluations conducted by school psychologist Crystal Bejarano in July through September 2020.

STUDENT'S ENROLLMENT AT PIVOT

Student enrolled in Pivot on August 2, 2018 for the 2018-2019 school year when he was entering third grade. Parents provided Pivot with Student's IEP dated April 19, 2017, developed by the San Marcos Unified School District when Student was in second grade. Parents had not consented to the San Marcos IEP.

Pivot was a public charter school. It offered a non-classroom based independent study program. A parent or responsible adult acted as a student's primary teacher, with the support of a Pivot general education teacher. Pivot offered students in grades kindergarten through fifth grade an online general education curriculum. Parents enrolled Student in Pivot's home school program, called Accelerate Education. The

Accelerate program used general education curriculum based upon California's common core standards. The Accelerate program allowed students to move at their own pace while working towards mastery of each learning target. Completed assignments were graded by each student's general education teacher and logged into Pivot's course records. Students in grades kindergarten through fifth grade were expected to complete and upload an average of three assignments daily. Student enrolled in the program with Parent to teach a third-grade curriculum.

Pivot used the iReady comprehensive assessment and instruction program to determine each student's level proficiency in core subjects such as reading and math. Students could supplement their educational program by attending Pivot's resource center which provided collaborative art and socialization classes on the Pivot campus. Resource classes were voluntary.

Pivot also provided special education and related services to eligible students in accordance with their IEPs, including specialized academic instruction, speech therapy, and occupational therapy. Each student with an IEP was assigned to a case manager who coordinated their special education services.

Pivot held an IEP team meeting on August 16, 2018 and offered Student an interim IEP, referred to as the Interim IEP. Pivot intended the Interim IEP to be temporary, pending development of a new IEP at an IEP team meeting held after 30 days. The Interim IEP offered Student 90 minutes weekly specialized academic instruction on the Pivot campus, as well as related services in speech and language therapy for 60 minutes weekly and occupational therapy for 120 minutes monthly. The Interim IEP offered Student 78% of his school day in the general education setting and 22% of his school day in special education. Parents consented to the Interim IEP.

In fall 2018, Student received specialized academic instruction in an in-person resource class at Pivot on Mondays, Tuesdays and Fridays for three hours in the morning. He attended the resource classroom with children who were in grades kindergarten through 5th grade. Student was in Robin Josse's resource classroom. Judith Clark was a paraeducator in Student's resource classroom. She worked with Student until he stopped attending resource classes at Pivot the following year, in December 2019. Student was mainly non-verbal and required constant supervision. Student did not have an assigned adult aide pursuant to his IEP, but he was informally provided support by Clark throughout his entire time in the resource class. Student did not maintain eye contact with adults or peers and engaged in vocalizations and excessive movements. Student required constant prompting and redirection. Student's behaviors interfered with his learning and that of others. These behaviors included: inattention, elopement, flopping and rolling on the floor, stomping and kicking his feet, tapping the walls, engaging in loud vocalizations and eloping. Student would remove his clothes in the bathroom and play in the sink. He required prompting to get dressed and return to the resource room. He would not interact with his peers, although would from time to time engage in parallel play. Student did not respond to Clark, but sometimes would mimic her words. However, by the second year at Pivot, Student was more aware of his surroundings. He would play simple board games with his peers for up to 10 minutes.

Student attended the resource class during the 2018-2019 school year, and the first half of the 2019-2020 school year. On a daily basis the resource class had an average of eight students. After several months at Pivot, Student was able to line-up with his class and unpack his snack. Student required hand over hand assistance to write, needed prompts to stay seated, and required constant supervision. Student

mimicked or repeated what was said to him. He could not read independently but could recognize his name and identify visual objects by pointing to them.

Pivot held an IEP team meeting on September 26, 2018, to review the adequacy of the Interim IEP. The IEP team meeting was continued to October 15, 2018, November 9, 2018 and November 26, 2018. Student had not accessed Pivot's on-line academic curriculum nor uploaded any completed academic assignments at the time of any of these meetings. Student's first lesson on Pivot's online academic program did not occur until November 27, 2018. The IEP team adopted the offer of special education and services contained in the Interim IEP.

After the 2018-2019 winter break, Student's third-grade year, attendance was sporadic. He did not log into the curriculum on a daily basis, nor complete the required number of weekly assignments. Sometime around January 2019, Parents expressed to Craig Hobart, the Regional Director of Pivot, that they had difficulty accessing the online curriculum and turning in assignments. They expressed the third-grade curriculum was too difficult for Student and they wanted to modify his curriculum. Pivot agreed, and Student's curriculum was adjusted to the kindergarten level. This decision was made outside the IEP process.

Student's attendance continued to be irregular. By March 2019, Student had missed approximately 25 percent of his scheduled specialized academic instruction and related services sessions. He had turned in only 12 academic assignments. By the end of the 2018-2019 school year, Student had completed the on-line academic curriculum for the first semester of kindergarten.

PIVOT'S 2019 ASSESSMENTS

Pivot assessed Student in April and May 2019 in connection with Student's triennial IEP, which was started on April 12, 2019, and completed on October 31, 2019, referred to as the October 31, 2019 IEP. Pivot conducted assessments in the areas of academics, health, intellectual development, speech and language, motor development, social/emotional/behavioral, adaptive behavior and gross and fine motor skills. At Parents' request, it also conducted evaluations in the areas of assistive technology and special circumstances instructional assistant, or SCIA, to determine if Student required a one-to-one aide.

School psychologist Elyssa Luria conducted a psychoeducational assessment of Student during April and May 2019 and documented the results in a Psychoeducational Assessment Report dated May 24, 2019. The report stated Student's overall cognitive ability was in the low range when compared to his same aged peers. Student scored in the very low range for visual motor integration and visual perception on standardized assessments. The report indicated the cognition results should be viewed with caution based on Student's limited attention and inability to complete the tests. Student scored in the significantly below average range across all academic areas.

Rating scales from Student's teachers and his Father indicated that Student had elevated scores for inattention, peer relations, learning problems, unusual behaviors and behavior rigidity, social communication, and emotional reciprocity.

Luria also conducted a SCIA assessment to determine Student's need for the assistance of a paraeducator. Luria observed Student one time in the classroom setting over a 20-minute period, and in two assessment sessions. Student required prompting

for on-task behavior. He participated in class activities with visual supervision and verbal promoting. Student required adult supervision to facilitate social interactions and navigate the campus. However, Luria found that Student's needs were met by a low student to teacher ratio, and Luria did not recommend a one-to-one aide for Student.

Danica Eng, formerly known as Danica Chu, provided specialized academic instruction to Student starting in January 2019. Eng assessed Student in the area of academics. Eng was unable to administer a standardized test instrument to Student because he was inattentive and did not interact or respond to directions. Student's academic scores fell in the significantly below average range. Student was able to add single digit numbers with verbal prompting and manipulatives. Student could mimic and read a four to five-word sentence with verbal support and visual cues. The scores from the academic assessment were incorporated into Luria's psychoeducational report.

Speech pathologist Marilee Thorton conducted Student's speech and language assessment. Student was unable to complete standardized language assessments and demonstrated echolalia and vocalization. He could make verbal requests using single words and had difficulty with multi-syllable words. The assessor reported Student had deficits in receptive and expressive language. His ability to identify pictures and body parts when provided visual cues was an area of relative strength for receptive language. Student could follow one-step directions. Student had deficits in expressive language. He had difficulty answering who, what and where questions. He was able to imitate and repeat words. No speech and language assessment report was offered, and Student's present levels were reported in the notes of the May 24, 2019 IEP team meeting.

Occupational therapist Sheri Genovese assessed Student's fine and gross motor skills. Student needed frequent movement breaks. Motor planning for gross motor

movements, such as running and jumping, was challenging for Student. He could open and close containers but utilized an improper grasp on pencils and other tools. He required verbal and visual prompts and close supervision when working in multi-step projects, such as cutting activities. He benefited from visual examples when copying letters and shapes. Student sought sensory input, such as humming or crawling under the table, when working on non-preferred activities. No occupational therapy report was offered, and Student's present levels were reported in the June 14, 2019 IEP team meeting notes.

Student's need for assistive technology was assessed. The assessor recommended use of a communication device to support Student's expressive and receptive communication skills.

The assessors determined Student's autism disability impacted his ability to access the general education curriculum due to delays in cognitive, language, social and academic skills. Student's areas of need were identified as communication, vocabulary, articulation, handwriting, sensory regulation, motor planning, reading and math. Pivot's offer of FAPE in the October 31, 2019 IEP was:

- 120 minutes weekly specialized academic instruction;
- 30 minutes weekly occupational therapy;
- 60 minutes weekly speech and language services;
- 30 minutes weekly assistive technology for a six-month period;
- 30 minutes weekly consultation between the education specialist and Parents, and
- Extended school year.

Parents consented to Pivot's offer of FAPE at the October 31, 2019 IEP team meeting. This was the IEP in effect at the time of the November 2020 IEP team meeting.

PROCEDURAL COMPLIANCE

INFORMATION AVAILABLE TO THE IEP TEAM

In developing a child's IEP, the team must consider the child's strengths, the parents' concerns for their child's education, the results of the most recent evaluation of the child, and the academic, developmental and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A)(iii); 34 C.F.R. § 300.324(a)(i)-(iv) (2006); Ed. Code, § 56341.1, subd. (a)(3).) If a parent obtains an independent assessment at public expense, the results of the evaluation must be considered by the school district. (34 C.F.R. § 300.502(c); Ed. Code, § 56381, subd. (b).)

During the series of IEP team meetings during which the November 2020 IEP was developed, Pivot funded, and subsequently considered, independent psychoeducational and SCIA educational evaluations at Parents' request. The assessments were performed by independent evaluator Crystal Bejarano in July through September 2020.

Bejarano was a California Licensed Educational Psychologist. Bejarano did not observe Student in the school setting due to the COVID-19 school closures, but observed Student's participation in virtual specialized academic instruction with special education teacher Eng.

Bejarano estimated from standardized assessment results that Student's overall cognitive capacity was 71. This was consistent with the cognitive assessment administered by Luria and demonstrated Student's need for academic support at his individual instructional level, rather than grade level. Student demonstrated relative

strength in his ability to use perceptual skills to complete picture forms and identify and label common objects. Determining similarities and sequencing information was an area of relative weakness for Student. Student's visual memory was significantly below the expected range, reflecting his limitation in learning information. He required repetition and reinforcement activities to recall visual information.

Student was supported in the home setting by his Parent and a private behavior aide. In the area of academics, Student's relative areas of strength were in sight words, names of shapes, and names of letters and number. Student could identify the days of the week and read short passages with verbal prompting and modeling. Student could answer who, what and where questions with guided help and verbal reminders. In math, Student could identify numbers, count when using a visual representation, and classify shapes by size. He experienced difficulty understanding math concepts and over-relied on rote skill. Student independently built sentences by matching words on a strip to a completed sentence.

In the area of adaptive functioning, Student presented global delays in cognition, communication and social impairments. He had personal strengths in the areas of eating, dressing and bathing.

In terms of behavior, Student was friendly and cooperative. He engaged in frequent unusual hand movements. His eye contact was inconsistent. He required movement breaks every 10-15 minutes. His speech was delayed, and he frequently echoed or repeated speech made by others during academics. He required repeated redirection to tasks.

Student required adult support for 51-75 percent of his instructional day to address his behavioral needs, including following directions, and redirection when

engaging in self-stimulatory or self-injurious behavior, such as hand-biting. He required verbal prompts to stay on task and followed directions 76 percent or more of the time. Bejarano determined Student could not participate in general education without individualized adult support. Bejarano recommended an aide trained in applied behavior analysis to support Student in completing his academic tasks and engaging in socialization with his peers.

Student's communication deficits, engagement in stereotypical/repetitive behaviors, and sensory and attention deficits impeded his ability to access his educational program. Bejarano recommended that Student be placed in a highly structured setting, with a small teacher to student ratio, a one-to-one aide trained in applied behavior analysis, and opportunities to engage with peers. Bejarano also recommended a modified curriculum with embedded language supports and a behavior intervention plan.

NOVEMBER 2020 IEP

An IEP is required to be reviewed periodically, but not less frequently than annually, to determine whether the annuals goals for the student are being achieved. (Ed. Code, § 56380, subd. (a)(1).) Here, the IEP team met timely on April 9, 2020 to review Student's IEP and completed its review on November 6, 2020.

The Ninth Circuit has emphasized that parental participation safeguards are among the most important procedural safeguards in the IDEA, and procedural violations that interfere with parental participation in the IEP formulation process "undermine the very essence of the IDEA." (*Amanda J.*, *supra*, 267 F.3d at 892.) An educational agency must therefore permit a child's parents meaningful participation in the IEP process. (*Ms. S. v. Vashon Island School District* (9th Cir. 2003) 337 F.3d 1115, at 1131-1132.)

A parent has meaningfully participated in the development of an IEP when they are informed of the child's problems, attends the IEP team meeting, expresses their disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*Fuhrmann, supra*, 993 F.2d at 1036.) A school district's refusal to adopt the placement, services, or goals advanced by parents does not mean that the parents have not had an adequate opportunity to participate in the IEP process. (*B.B. v. Hawaii Dept. of Educ.* (D. Hawaii 2006) 483 F.Supp.2d 1042, 1051.)

Procedurally, the parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provisions of FAPE to the child. (34 C.F.R. § 300.501(b) & (c); Ed. Code, § § 56034, 56341.) The school district must take steps to ensure that one or both of the parents are present at each IEP meeting or afforded the opportunity to participate. (34 C.F.R. § 300.322(a).) The requisite notice must indicate the purpose, time and location of the meeting and who will be in attendance. (34 C.F.R. § 300.322(b)(1)(i).)

The IEP team must include one or both of the parents or a representative chosen by the parents. It must include not less than one regular education teacher of the child if the child is participating in general education (20 U.S.C. § 1414(d)(1)(B)(ii); 34 C.F.R. § 300.344(a)(2)), and not less than one special education teacher, or where appropriate, one special education provider to the student. It must include a representative of the school district who is:

- qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of the student;
- knowledgeable about the general education curriculum; and

- knowledgeable about the availability of school district resources.

The IEP team must include at least one teacher or specialist with knowledge in the suspected area of disability. (*Seattle Sch. Dist. 1 v. B.V.* (9th Cir. 1996) 82 F.3d 1493, 1499, abrogated in part on other grounds by *Schaffer ex rel. Schaffer*, *supra*, 546 at 56-58.) Any team member who is qualified to interpret the results of any assessment may do so. (20 U.S.C. § 1414(d)(1)(B)(v); 34 C.F.R. § 300.321(a)(5); Ed. Code, § 56341, subd. (b)(5).)

The November 2020 IEP team meetings were held on April 9, 2020, with continuation meetings held on September 28, 2020, October 26, 2020 and November 6, 2020. Parents attended each of the IEP team meetings, as did their advocate Cynthia Norall and Student's privately retained behavioral aide. All required representatives for Pivot attended or were excused, including Student's general education enrichment teacher Josse, and credentialed mild-to-moderate special education resource teacher Eng. Speech pathologists Marilee Thorton and Tiffany Ludwig, occupational therapists Mark Wilson and Allison Litzinger, and Tracy Williams, the director of special education for Pivot attended. Regional Director Craig Hobart and another administrator from Pivot, both of whom were knowledgeable about Pivot's resources, also attended. The procedural safeguards were provided to Parents prior to commencement of the meetings.

LEGAL REQUIREMENTS FOR THE IEP DOCUMENT

In developing a child's IEP, the IEP Team must consider the:

- strengths of the child;
- concerns of the parents for enhancing the education of their child;

- results of the most recent evaluation of the child; and
- academic, developmental, and functional needs of the child.

(34 C.F.R. § 300.324(a)(1)(i-iv).)

An annual IEP must contain a statement of the child's present levels of academic achievement and functional performance, including the manner in which the child's disability affects involvement and progress in the general education curriculum. (34 C.F.R. § 300.320(a)(1); Ed. Code, § 56345, subd. (a)(1)(a).)

School districts must develop measurable, annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and progress in the general education curriculum. The goals must also meet each of the student's other educational needs that result from the disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); Ed. Code, § 56345(a)(2).) The goals must describe how the child's progress toward meeting the annual goals will be measured and when periodic reports on the progress the child is making toward meeting the annual goals will be provided. (20 U.S.C. § 1414(d)(1)(A)(i)(III).)

Goals provide a mechanism for determining whether the anticipated outcomes for the child are being met and are used to determine whether the placement and services are appropriate to the child's special learning needs. (*Letter to Hayden* (U.S. Office of Special Education Programs (OSEP) 1994) 22 IDELR 501; see also *Letter to Smith* (OSEP 1995) 23 IDELR 344; *Letter to Butler* (U.S. Office of Special Education and Rehabilitation Services 1988) 213 IDELR 118; *Notice of Interpretation*, Appendix A to 34 C.F.R. part 300, Question 4 (1999). The development of goals is a procedural requirement. (See *Rodriguez v. Fort Lee Bd. of Ed.* (3rd Cir. 2011) 458 Fed. Appx. 124, 127.)

An IEP must contain a statement of the special education, related services, supplementary aids and services, and program modifications or supports to be provided to the student. It must also specify the frequency, duration, and location of those services. (20 U.S.C. § 1414(d)(1)(A)(i)(IV) & (VII); 34 C.F.R. § 300.320(a)(4) & (a)(7); Ed. Code, § 56345(a)(4) & (a)(7).) It must contain an explanation of the extent to which the student will not participate with nondisabled children in the regular class. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.320(a)(5); Ed. Code, § 56345, subd. (a)(5).)

An IEP must also contain a statement of appropriate accommodations necessary to measure the student's academic achievement and functional performance on state and districtwide assessments. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.320(a)(6); Ed. Code, § 56345, subd. (a)(6).) An IEP must indicate whether extended school year services are offered. (Ed. Code, § 56345, subd. (b)(3).)

An IEP must document its rationale for placement other than the student's school and classroom they would otherwise attend if not disabled. (34 C.F.R. § 300.116; 71 Fed. Reg. 46, 588 (August 14, 2006); Cal. Code Regs., tit. 5, § 3042.) The IEP must indicate why the student's disability prevents their needs from being met in a less restrictive environment even with the use of supplementary aides and services. (*Ibid.*) The IDEA does not confer on the student an absolute right to placement in his neighborhood school, but that the IEP explain why the neighborhood school may not be properly suited to address the student's educational needs.

An IEP is not required to include the particular methodologies that will be used in instruction. (34 C.F.R. § 300.320(d)(1); 71 Fed. Reg. 46,665 (Aug. 14, 2006).) As long as a school district provides an appropriate education, methodology is left up to the school district's discretion. (*Rowley, supra*, 458 U.S. at 208.) This rule is applied in situations

involving disputes among methodologies for educating children with autism. (*Adams, supra*, 195 F.3d at 1149.)

PRESENT LEVELS OF PERFORMANCE AND AREAS OF NEED

The present levels of performance establish a baseline for measuring the child's progress throughout the year. Knowledge of a student's progress from his present levels of performance in one year toward his annual goals is essential for drafting appropriate goals for the next year. Unless a student's progress toward annual goals is accurately measured, new present levels of performance cannot be derived. In turn, new goals cannot adequately be written.

Director of Special Education Williams, Special Education Teacher Eng and School Psychologist Luria testified at hearing. They each explained that the IEP team substantially relied upon independent evaluator Bejarano's report regarding Student's present levels of performance and confirmed the findings from Bejarano's September 24, 2020 report were consistent with their understanding of Student's present levels of performance and needs. The team also considered input from Parents, Student's teachers and service providers, and his educational records.

The IEP team considered Student's achievement in the area of academics. From March 2020 through the November 6, 2020 IEP team meeting, Student accessed his academic classes online. Student received specialized academic services virtually and did not go to in-person classes at Pivot's campus. He attended 15 out of 19 specialized academic instruction sessions during the fall of 2020. Student was working on kindergarten curriculum and was substantially below the grade levels of his general education peers. Student's curriculum was modified to his instructional level, and he

required the assistance of Parent and his behavior aide to access his curriculum. Student's specialized academic instruction was delivered virtually one-to-one by special education teacher Eng.

In the area of behavior, Student struggled with attention and required constant breaks and verbal or visual prompts. Parent and Student's behavior aide assisted Student during virtual instruction. He was largely dependent on adult supervision to complete tasks. Parents expressed concerns about Student's maladaptive behaviors in the school setting, such as going under the table when given instructions, and indicated these behaviors were not observed in the home setting. Parents requested that a functional behavioral assessment be completed in the school setting when in-person resource and enrichment classes resumed. Bejarano described how Student's behaviors impeded his ability to access his education program.

By October 2020, in the area of social/emotional, Student appear more engaged with his academic program. When questioned, he answered when he needed a break. He frequently engaged in movement breaks by jumping on a yoga ball or doing jumping jacks. He sought sensory input and would bite his hand.

Student presented global developmental delays, particularly in the areas of academics, language, communication and social skills, and participation in everyday adaptive skills which adversely impacted his educational performance. Student understood and followed one to two-word simple directions. Functionally, he had strengths in self-care, eating with utensils and dressing, as well as saying his first and last name, age and telephone number. He could dress himself, but had difficulty with fasteners, buttons and tying his shoes.

Parents reported updated health problems, including abnormal head movements, and leg and foot pain. Bejarano reported she observed Student engaged in staring episodes and eye fluttering. The IEP team agreed Student remained eligible for special education under the autism and other health impairment categories.

Speech pathologist Tiffany Ludwig reported on Student's present levels of performance in the area of speech and language at the October 26, 2020 IEP team meeting. Student's spontaneous language had improved, and he was able to make verbal requests and use pictures to answer simple open-ended questions. During group sessions, Student participated in taking turns when prompted. Student's expressive language was limited. He spoke using one to two words. Student's pragmatic, or social language, was an area of weakness. Student spoke at an inappropriate volume, showed lack of interest and decreased use of social language when working with his peers.

Ludwig had worked with Student in a group setting starting in the fall of 2019 and ending around March 2020. Student had not attended any virtual or in-person speech and language sessions since prior to March 2020. Pivot made both types of services available to Student, but Parents declined to allow Student to participate. Accordingly, Ludwig and the team relied on the report of Parents and Student's teacher for information on Student's progress on speech goals.

The November 2020 IEP team had assessment data from the prior year, and independent evaluator Bejarano's fall 2020 assessments of Student's cognitive abilities, academic achievement, emotional functioning and behavioral needs. In addition, speech pathologist Ludwig presented on the assessment of Student's need for assistive technology to support his expressive language deficits. The team also had the current

reports of Parent, Student's private behavioral aide, and Student's teacher to report on Student's progress during virtual online learning from March 2020.

The November 2020 IEP team identified and considered the available information on Student's strengths, Parents' concerns, and Student's academic, behavior, social/emotional, language, communication, social skills and gross and fine motor needs. Two speech pathologists and two occupational therapists were present in the various meetings to discuss the impact of Student's language and gross and fine motor deficits resulting from his autism on his access to the curriculum. The teams considered Bejarano's suggestions for positive behavior interventions, supports and strategies, and the report of Student's assistive technology needs. The present levels of performance were documented at the September 28, 2020 and October 26, 2020 IEP team meetings to include information from the assessments conducted after the initial April 2020 IEP team meeting.

GOALS

The IEP team determined that to receive educational benefit Student required annual goals in the following areas of need: mathematics, sentence comprehension, reading comprehension, adjectives, following instructions, adaptive living, self-advocacy, written language, communication, speech and language, handwriting, self-regulation, executive functioning and keyboarding. In preparation for the IEP meeting, special education teacher Eng proposed goals for discussion in the areas of math, sentence comprehension, reading comprehension, and adjectives. She also incorporated goals offered by Parents and Bejarano in the areas of following instructions, self-advocacy, adaptive living and math.

Speech pathologist Ludwig developed four proposed speech and language goals, which the IEP team adopted and documented in the November 2020 IEP.

No speech pathologist testified that all of Student's language and speech needs were identified from the information available to the November 2020 IEP team on Student's present levels of performance, or that the goals in the November 2020 IEP were appropriate to meet these needs. Although the IEPs, including meeting notes, and transcripts of the meeting were admitted into evidence, Pivot cannot rely solely on statements by the speech pathologist contained in those documents. The evidence did not establish that all of Student's language and speech needs had been identified from the present levels, or that the goals were measurable and based upon reasonable expectations of what Student could accomplish in 12 months. No person licensed in the field of language and speech opined that the goals, and services offered to support those goals, were reasonably calculated to enable Student to make progress appropriate in light of his circumstances. For these reasons, Pivot failed to establish that Student's speech goals were measurable and appropriate.

Similarly, Pivot failed to establish it had developed measurable and appropriate goals in the area of Student's fine and gross motors skills. Although Student's fine and gross motor skills were assessed in 2019, Pivot did not introduce any assessment reports, nor did it call any occupational therapist to testify. The October 26, 2020 IEP notes reflected occupational therapist Allison Litzinger advised the IEP team that an in-person assessment was needed to obtain Student's baseline gross motor and fine motor skills for purposes of writing measurable goals. No evidence was offered that a further assessment was conducted to establish Student's baselines in these areas. Without appropriate baseline information, the IEP team could not develop appropriate goals.

It was unclear when Litzinger had last worked with Student. Another occupational therapist, Sheri Genovese, had assessed Student in the spring of 2019 and reported her findings at the June 14, 2019 IEP team meeting. No evidence was offered about when Litzinger began working with Student, nor when she last observed him. Bejarano commented in her report that Student had sufficient fine motor skills, however there was no evidence she was a licensed occupational therapist nor that she had the qualifications to address Student's needs in this area. No witness was called to testify about Student's fine and gross motor and sensory needs, or to opine regarding the measurability or appropriateness of the proposed occupational therapy goals. Accordingly, Pivot did not meet its burden of proving that it developed measurable and appropriate goals for the November 2020 IEP.

ASSISTIVE TECHNOLOGY

The IDEA requires each public agency to ensure that assistive technology devices and services are made available to each child with a disability if such devices or services are required as part of the child's special education, related services, or supplementary aids and services. (34 C.F.R. § 300.105(a).) As part of the IEP-development process, the IEP must consider whether the child needs assistive technology devices and services. (34 C.F.R. § 300.342(a)(2)(v).) To determine whether and what assistive technology is necessary for a student to receive a FAPE, the district may need to conduct an evaluation of the student's specific needs. Students are entitled to an individual evaluation to determine whether they require these devices or services. (*Letter to Fisher*, 23 IDELR 565 (OSEP 1995).)

Speech pathologist Ludwig conducted an assistive technology assessment of Student in connection with the October 31, 2019 IEP. The IEP notes indicated Student needed verbal modeling to support his receptive and expressive language. The October 31, 2019 IEP team agreed Student would benefit from a high tech, dynamic display device with voice output to augment his language. The October 31, 2019 IEP offer of FAPE included an unspecified assistive technology device and 30-minute assistive technology sessions for up to six months. That offer of FAPE did not state how frequently the 30-minute sessions would take place.

The November 2020 IEP offer of FAPE included 30-minutes of weekly assistive technology services in an individual and group setting. It included an unspecified assistive technology device in the supplementary aides and services section of the IEP. The transcript from the November 6, 2020 IEP team meeting reflected Parents had not yet used the iPad with Student either because the software had not been loaded or they had not been instructed on how to use the program. Ludwig offered to have a meeting with Parents to train them on the device. Ludwig drafted proposed speech and language goals for Student, which included Student augmenting his communication skills through assistive technology.

Ludwig's assistive technology report was not offered into evidence at the due process hearing, nor did Ludwig testify. Pivot also did not offer any other testimony regarding Student's areas of need in the area of assistive technology. Because of the lack of information about Student's needs in this area, Pivot could not develop appropriate goals, nor determine the level of services. Pivot therefore failed to meet its burden of proving it adequately considered Student's needs for assistive technology or developed measurable and appropriate goals in this area.

PIVOT FAILED TO PROVE STUDENT'S GOALS WERE ADEQUATE TO MEET HIS NEEDS.

An IEP must include a statement of measurable annual goals, including academic and functional goals, designed to meet the needs of the student that result from the disability to enable the student to be involved and make progress in the general education curriculum. (20 U.S.C. § 1414(d)(1)(A)(i); 34 C.F.R. § 300.320(a)(2)(i); Ed. Code, § 56345, subd. (a)(2)(A) & (B).) 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).)

The IEP must show a direct relationship between the present levels of performance, the goals, and the educational services to be provided. (Cal. Code Regs., tit. 5, § 3040, subd. (b).) The IEP also must contain a description of the manner in which the progress of the student towards meeting the annual goals will be measured and when periodic reports of the child's progress will be issued to the parent. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.320; Ed. Code, § 56345, subd. (a)(3).)

The April through November 2020 IEP teams determined that Student required annual goals in the following areas of need: mathematics, sentence comprehension, reading comprehension, adjectives, following instructions, adaptive living, self-advocacy, written language, communication, literal language, pragmatic language, handwriting, self-regulation, executive functioning, and keyboarding.

As discussed above, Pivot failed to present persuasive evidence of Student's present levels of performance in the areas of speech and language, fine and gross motor skills and assistive technology. As a result, it could not develop appropriate goals

or determine Student's related services needs in these areas. As a result, the November 2020 IEP did not offer Student a FAPE.

In addition, Pivot failed to prove it developed appropriate academics goals. Special education teacher Eng presented Student's progress in the area of academics. Eng reported to the IEP team that Student had made partial progress towards his goals of adding and subtracting with sums and differences up to 25. Student could add and subtract numbers up to 10 with modeling and verbal prompting. He made partial progress on his goal of independently reading aloud a four or five-word sentence by placing word strips in the correct order. He could not independently place the word strips in correct order but could do so with verbal prompting. Student met his goal of reading comprehension, and partially met his goals in sequencing, answering who, what, and where questions, recognizing rhyming words, and following instructions.

At hearing, Eng opined that the five academic goals developed by the IEP team in mathematics, reading comprehension, adjectives, and written language addressed Student's areas of need in academics. However, there was no testimony as to the appropriateness of the goals, or the measurability of the goals. Pivot did not offer evidence demonstrating the goals in these areas reasonably calculated the progress Student could be expected to make in the following 12 months.

The adequacy of the goals included in the November 2020 IEP was plagued by other problems. First, the number and language of the goals was not finalized at the November 6, 2020 IEP team meeting. The IEP goals were discussed at the October 26, 2020 and November 6, 2020 IEP team meetings. The IEP team agreed at the November 6, 2020 IEP team meeting to add new goals proposed by Bejarano and Parents in self-advocacy, social-communication, math sense, reading fluency, reading

literacy and written language, as well to revise some of the goals proposed by Pivot. Eng conveyed to the IEP team this would be done after the IEP team meeting.

At hearing, Eng testified that the IEP goals in following instructions, adaptive living, self-advocacy and demonstrating an understanding of quantity when counting were proposed by Parents and Bejarano. However, it was unclear whether the language of these goals was proposed to Parents. Eng conceded that not all of Parents' proposed goals were included in the IEP, and it was unclear which goals were rejected by the IEP team. The evidence also did not establish whether Parents' proposed goals were fully discussed at the IEP team meetings.

The purpose of the IEP team meetings was to develop Student's education program for the school year. Parents must be able to use the IEP document to monitor and enforce the services the student is to receive. (*M.C., by and through his guardian ad litem M.N. v. Antelope Valley Union High School District* (9th Cir. 2017) 858 F.3d 1189, 1198.) The failure to fully discuss the goals, including their wording, deprived Parents of the ability to meaningfully participate in the IEP process. The lack of clarity in the IEP document regarding which goals were adopted by the IEP team created confusion and compromised Parents' ability to understand which goals Pivot intended to adopt.

Pivot also did not establish whether the goals in the November 2020 IEP document offered at hearing were the goals presented at the October 26, 2020 and November 6, 2020 IEP team meetings or were the revised goals made following the IEP team meetings. Pivot did not prove the IEP document, including the revised goals, was sent to Parents following the November 6, 2020 IEP team meeting for Parents' review and approval as requested by Student's advocate. The draft stamps on the IEP document and lack of evidence showing that a revised IEP document with corrected

goals was sent to Parents compounds the confusion about which goals were revised and accepted.

Student's advocate asked the IEP team at both the October 26, 2020 and November 6, 2020 IEP team meetings to consider Parents' proposed goals in occupational therapy. The IEP team did not respond to this request and began the discussion of placement and services. Pivot did establish whether the IEP team considered Student's proposed goals in occupational therapy. The failure to consider Parents' goals in this area constituted a procedural violation.

Pivot failed to prove that the annual goals developed as part of the November 2020 IEP complied with the procedural requirements of the IDEA and California law. Pivot did not prove Student had a reasonable chance of meeting the goals in academics by his next annual IEP review. The evidence was unclear whether the goals offered at hearing were the goals discussed at the October 26, 2020 and November 6, 2020 IEP team meetings, or goals revised after the team meeting and shared with parents. Therefore, Pivot failed to meet its burden of proving its development of annual goals was procedurally compliant.

PIVOT FAILED TO MEET IS BURDEN OF PROVING THAT IT MADE A CLEAR WRITTEN PLACEMENT OFFER

A school district's failure to make a sufficiently specific offer of placement and services is a procedural violation of the IDEA and a denial of FAPE if the failure significantly impeded the parents' opportunity to participate in the decision-making process. (*Amanda J.*, *supra*, 267 F.3d at 892; 20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505(f)(2)(B).) An IEP must set forth a formal, specific written offer of placement. (*Union School Dist. v Smith* (9th Cir. 2004) 15 F.3d 1519, 1526 (*Union*).) The offer must

include a statement of the special education and related services and supplementary aids and services, including program modification or supports. (*Id.* at 1527) This requirement “should be enforced rigorously” as it creates a clear record to help eliminate factual disputes. (*Ibid.*) It also assists the parents in presenting complaints with respect to any matter relating to the educational placement of the child and whether to reject or accept the placement and related services. (*Ibid.*; *J.W. ex rel. J.E.W. v. Fresno Unified Sch. Dist.* (9th Cir. 2010) 626 F.3d 431, 459-460.) The school district must offer a single, specific program, in the form of a clear, coherent offer which parents can reasonably evaluate and decide whether to accept or reject. (*Glendale Unified Sch. Dist. v. Almasi* (C.D. Cal. 2000) 122 F.Supp.2d 1093, 1107-1108.) A district does not need to identify the particular school the student will attend. (*Rachel H. v. Department of Edu.* (9th Cir. 2017) 868 F.3d 1085, 1093.)

A formal written offer is more than a mere technicality, and this requirement is vigorously enforced. Parents must be able to use the IEP to monitor and enforce the services that their child will receive. The formal IEP offer may be clarified by a prior written notice. (See 20 U.S.C. § 1415(b)(1)(C); 34 C.F.R. § 300.503; *Union, supra*, 15 F.3d at 1526 [permitting a prior written notice letter to clarify placement offer].)

Pivot seeks a determination that the November 2020 IEP offers Student a FAPE and asks that it be allowed to implement the IEP over parental objection. However, Pivot failed to meet its burden that it made a clear, specific, formal written offer, which Parents could accept or reject.

Parents’ principal dispute in this matter was placement, and most of the hearing testimony addressed this issue. This Decision, however, does not reach a placement determination. Here, Pivot failed to meet its burden of proving that it procedurally

complied with the IDEA by making a clear and coherent offer of placement. Therefore, a substantive analysis regarding placement under the two-part FAPE inquiry is not required. (*W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1485 (*Target Range*).)

Federal and state law require school districts to provide a program in the least restrictive environment to students with disabilities. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114; Ed. Code, §§ 56031, 56033.5.) A student with disabilities must be educated with non-disabled peers to the maximum extent appropriate and may be removed from the regular education environment only when the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2).)

The continuum of program options for placement includes, but is not limited to:

- regular education;
- resource specialist programs;
- designated instructions and services;
- special classes;
- nonpublic, nonsectarian schools;
- state special schools;
- specially designed instruction in settings other than classrooms;
- itinerant instruction in settings other than classrooms; and
- instruction using telecommunication instruction in the home or instructions in hospitals or institutions.

(Ed. Code, § 56361.)

The IEP must contain an explanation of the extent to which the student will not participate with nondisabled children in the regular class. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.320(a)(5); Ed. Code, § 56345, subd. (a)(5); *Bellflower Unified School Dist. v. Jimenez* (C.D. Cal. Feb. 17, 2021, Case No. CV 20-2372-DMG (KS)) WL 1055198, *16 [Vague and contradictory offer as to how much time student would spend in general education versus special education constituted a procedural FAPE violation].)

Director of Special Education Williams briefly summarized the continuum of placement options at the end of the November 6, 2020 IEP team meeting. The entire IEP team agreed Student needed a more restrictive environment to access his educational program. The IEP team members disagreed, however, about what constituted the least restrictive environment for Student. Student's advocate asserted that a non-public school with a low teacher to student ratio, specialized instruction for students with autism on a small campus with staff trained in applied behavior analysis would be the least restrictive environment. Parents wanted Student to continue with home schooling with the support of an in-home aide trained in applied behavioral analysis. Pivot contended that a special day class in a public school was the least restrictive placement for Student.

Pivot's offer of placement in the November 2020 IEP document was placement in a regular classroom in a public day school, that provided 1800 minutes weekly of specialized academic instruction in a group setting. Student would be accommodated in that setting with visual clues, flexible seating, frequent breaks, access to sensory tools and speech-to-text for reading, writing and listening. His curriculum would be modified with a specially designed reading program for comprehension and vocabulary and skill building math program based on solving real world math problems. Student would spend 100 percent of the day outside the regular class, extracurricular, and non-

academic activities, and no time in the regular class, extracurricular and nonacademic activities. Student would not participate in the regular class because of core curricular, speech and language, social/emotional and fine motor deficits.

Pivot's November 2020 IEP offer of special education placement was unclear for several reasons. First, the IEP document offered placement in a regular classroom in a public day school, but then stated Student would spend 100 percent of the day outside the regular class. Student would not participate in the regular class because of deficits resulting from his disabilities. This is a fundamental contradiction in the November 2020 IEP.

Director Williams reported at the November 6, 2020 IEP team meeting that the proposed placement included mainstreaming and Student would be in the general education setting with typically developing peers throughout the day. There was no discussion by the IEP team, however, about the extent to which Student would participate with nondisabled peers in the general education setting and activities so that the IEP team members, particularly Parents, could understand how Student would receive his specialized academic instruction in that setting.

Further, Williams' statement directly contradicted the plain language of the FAPE offer in the November 6, 2020 IEP which provided 100 percent of Student's time would be spent in the special education setting. This discrepancy was compounded by the IEP team meeting notes which described Student's time outside of general education as being 100 percent. This inconsistency is particularly troubling since Student's prior FAPE offer placed him in the general education classroom for 73 percent of the day, and yet there was no evidence the IEP team discussed the reasons for reducing Student's access to typically developing peers.

Williams also conveyed to the IEP team that there were two possible programs, one at Kelly Elementary School and the other at Hope Elementary school. Williams spoke in generalities about the programs, but the IEP team did not discuss the differences, if any, between the programs, nor of the advantages or disadvantages of the programs. When questioned by Student's advocate, Williams was unable to differentiate the programs, other than to state they were special day classes in small, structured environments with imbedded speech and language and occupational therapy services. There was no specificity as to what program was being offered. There was no discussion about the number of students in the class, the structure of the class, the curriculum offered and used in the class, or the grade levels of curriculum taught. It was uncertain whether the IEP team members understood the program offered, which suggested Pivot failed to make an evaluative decision as to what constituted FAPE for Student.

The two programs offered were also very different. Williams advised the IEP team that both programs were taught by special education teachers with mild to moderate teaching credentials, leaving the impression the programs were geared towards students with mild to moderate disabilities. However, at hearing, Director Hobart testified that the Kelly Elementary School program was developed for students with moderate to severe disabilities. Student's advocate advised the IEP team that the Hope Elementary program was geared towards students with autism, and out of the two programs she believed it would be more appropriate to meet Student's needs. The failure to differentiate the programs, or to explain how the different programs could meet the setting and services requirements offered to Student in the November 2020 IEP, resulted in an unclear educational program offer. Although there was some discussion at the November 6, 2020 IEP team meeting regarding the programs available

through the Carlsbad Union School District, the evidence did not prove that the IEP team had a detailed discussion about the programs or that Pivot provided specific information to satisfy its obligations under the IDEA.

There was no discussion by the IEP team about how the programs would address Student's needs. Williams genuinely and persuasively testified at hearing that Student's placement in one of Carlsbad Unified School District's programs would allow Student to gain independence, benefit from modeling his peers' social, language and behavioral cues, and receive imbedded speech and language and behavioral supports. She explained that the offer of placement was in alignment with Bejarano's recommendations. Bejarano had made specific representations regarding the type of services Student should receive, including a one-to-one aide trained in applied behavior analysis, however, this recommendation was not discussed by the IEP team. The IEP document did not provide sufficient information for Parents to evaluate Pivot's offer of placement and services in light of Bejarano's recommendations and contained multiple misstatements about the extent to which Student would participate with nondisabled children in the regular class in violation of the IDEA and California Education Code.

Upon learning of the offer of placement, Student's advocate asked for a break so she could discuss the proposed placement with Parents. Parents would complete paperwork to release Student's records to Carlsbad Unified School District and would tour the schools. Parents repeated their request for a nonpublic school placement, but there was no meaningful discussion by the team about whether a nonpublic school was an appropriate placement.

The placement offer's lack of clarity was compounded by Pivot's issuance of a prior written notice to Parents on November 21, 2020. The prior written notice reduced

the placement offered to one special day class located at Kelly Elementary School. The program had a small class size with a one-to-one or two-to-one staff to student ratio and a curriculum specifically designed for students with disabilities. The class included verbal peers to model and encourage Student's use of language and augmentative communication and provided behavioral supports and imbedded services. Visual schedules and prompts were used throughout the classroom and for each student.

Surprisingly, the prior written notice did not clarify or correct the amount of time Student would spend in the special education and regular education settings. Without clarification, it remained unclear whether Student would have opportunities to engage in activities with nondisabled students, and to what extent. There also was no explanation given why Hope Elementary School was determined not to be an appropriate placement. Student's advocate had informed the IEP team the Hope Elementary School program would be more appropriate than the program offered at Kelly Elementary because it was designed for students with autism. Pivot's unilateral removal of this program from the prior written notice, without explanation, created further confusion regarding Pivot's placement offer.

The offer of placement also was ambiguous because it offered Student 1800 minutes of weekly specialized academic instruction in a group setting. Specialized academic instruction refers to adapting, as appropriate to the needs of the child with a disability, and the content, methodology, or delivery of instruction to ensure access of the child to the general curriculum. (34 C.F.R. § 300.39(b)(3) (2006).) Pivot's prior IEPs, including the October 31, 2019 IEP, offered Student one-to-one specialized academic instruction. No evidence was presented that Student was able to benefit from whole group or small group instruction and the IEP team did not discuss how the specialized academic instruction would be implemented in the special day class setting. For

example, it was unclear if the 1800 minutes of weekly specialized academic instruction, or six hours daily, would be implemented with one-to-one instruction or small group instruction, or some combination thereof. There was no consideration of how delivery of specialized academic instruction to Student in a group setting would meet Student's needs, particularly in light of his need for constant adult supervision and redirection and Bejarano's recommendation that Student be supported by a one-to-one aide.

Pivot convincingly demonstrated that Student required a more restrictive environment to make progress appropriate in light of his circumstances. However, Pivot's failed to offer a coherent description of the program. The ambiguity about the program offered, the statement Student would spend 100 percent of his time in the special education setting, and the lack of clarity about how the offer of specialized academic instruction would be implemented in a group setting were procedural violations. The offer's lack of specificity and contradictory terms required Parents to decide the appropriateness of a placement offer that was incomplete. Parents' opportunity to participate in the decision-making process was significantly impeded. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2).) Pivot's procedural violations therefore amounted to a denial of FAPE and Pivot did not meet its burden of proof.

RELATED SERVICES, BEHAVIORAL INTERVENTIONS AND ACCOMMODATIONS

The term related services means transportation and such developmental, corrective and other supportive services as may be required to assist a child with a disability to benefit from special education. (20 U.S.C. § 1401(26).) Related services includes speech-language pathology and occupational therapy. (34 C.F.R. § 300.34(a).) A child eligible for special education must be provided access to related services

reasonably calculated to enable the child to make progress appropriate in light of the child's circumstances. (*Rowley, supra*, 458 U.S. at 201-204; *Endrew F., supra*, 580 U.S. ___ [137 S.Ct. at 1000].) The IEP must contain a statement of the special education, related services, supplementary aids and services, and program modifications and supports to be provided to the student. It must also specify the frequency, location and duration of those services. (20 U.S.C. § 1414(d)(1)(A)(i)(IV) & (VII); 34 C.F.R. § 300.320(a)(4) & (7); Ed. Code, § 56345, subd. (a)(4) & (7).)

The November 2020 IEP offered Student the following related services with a start date of September 8, 2020, and end date of April 8, 2021:

- Consultation services between Student's special education teacher, educational coordinator, speech and language pathologist, occupational therapist, learning coaches and Parents for 30 minutes weekly;
- Speech and language for 60 minutes weekly in an individual setting;
- Occupational therapy services for 30 minutes weekly in an individual setting;
- Assistive technology services for 30 minutes weekly in individual and group settings;
- Transportation to Student's educational placement or mileage reimbursement; and
- Extended school year.

Pivot offered no persuasive evidence establishing the IEP team discussed services that aligned with the goals. The purpose of the IEP team meeting was to collaboratively develop Student's educational program. This required meaningful parental participation in the IEP process. When the goals and services were not fully discussed at the IEP team

meeting, Parents did not receive full disclosure of what goals Pivot intended to implement, and how the services aligned with the goals.

The IEP document reflected that the IEP team simply restated the amount of services contained in Student's prior offer of FAPE. No evidence was offered showing the IEP team discussed the services offered, or the appropriateness of the services in supporting Student's goals. Further, Pivot's November 21, 2020 prior written notice contained no reference to transportation or the 30-minute weekly consultation between Parents and the service providers despite these services being offered in the initial offer of FAPE. Pivot provided no explanation for the elimination of these services from the FAPE offer. Assuming this was merely an oversight by Pivot, it nonetheless created confusion about whether the services were offered and thereby further impeded Parents' opportunity to participate in the decision-making process and violated the requirement of a coherent, formal written offer of placement. The elimination of these services further resulted in a loss of educational opportunity for Student.

As discussed above, Pivot also failed to offer testimony by qualified professionals on whether the proposed occupational therapy, speech and language and assistive technology services were appropriate to address Student's needs in the areas of literal language, intelligibility, typing, writing, self-regulation, executive functioning and assistive technology. As a result, Pivot failed to prove the nature, frequency, duration, and location of these services were appropriate. Pivot further failed to prove that the services were reasonably calculated to enable Student to make appropriate progress in light of his circumstances.

If a child's behavior impedes the child's learning or that of others, the IEP team must consider the use of positive behavioral interventions and supports, and other

strategies, to address that behavior. (20 U.S.C. § 1414(d)(3)(B)(i); Ed. Code, § 56521.1(b).) Here, the IEP team determined that Student's behaviors impeded his learning. The IEP team developed goals in the areas of self-advocacy and self-regulation. The self-advocacy goals centered on Student independently asking for breaks when working on academic tasks, and on asking for help on academic tasks. The self-regulation goal required Student to choose preferred sensory activities prior to eloping from an activity. The November 2020 IEP offered a variety of accommodations to support Student's behaviors, including visual cues and schedules, a sensory toolbox containing fidgets and pressure items, frequent breaks, social stories, flexible seating, and a sensory board.

The IEP team did not discuss Bejarano's recommendation that the IEP develop a positive behavioral intervention plan, nor respond to Parents' request that Pivot conduct a functional behavioral assessment after Student returned to in-person learning. Moreover, other than generally identifying the accommodations, there was not a thorough discussion by the IEP team about interventions, supports and strategies to address Student's behavior. No witness testified at hearing that the positive behavior supports, and accommodations were sufficient to meet Students' needs, or that the behavior goals were appropriate.

Based upon the foregoing, Pivot failed to meet its burden of proving the related services offer, accommodations and behavioral supports in the November 2020 IEP were procedurally and substantively appropriate.

EXTENDED SCHOOL YEAR

Each public agency must ensure extended school year services are available as necessary to provide a FAPE to a child. (34 C.F.R. § 300.106(a).) Some students have disabilities which are likely to continue indefinitely or for a prolonged period, and

interruption of the student's educational programming may cause regression. (Cal. Code Regs., tit. 5, § 3043.) Extended school year services must be provided only if a child's IEP team determines, on an individual basis, in accordance with 34 Code of Federal Regulations part 300.320 through part 300.324, that extended school year services are necessary for the provision of a FAPE.

Pivot's offer of FAPE in the November 6, 2020 IEP included an extended school year program consistent with the specialized academic instruction provided to him during the regular school year. The extended school year offer was 14 one-to-one 60-minute sessions of direct intensive academic instruction, three times weekly. The IEP meeting notes stated the issue of Student's extended year placement would be discussed at the March 2021 IEP team meeting, which created confusion about Pivot's offer. No witness testified at hearing about whether the offer of extended school year program was reasonably calculated to enable Student to avoid losing skills he had already mastered.

The offer of extended school year did not include an offer of related services during the summer recess, although such services were offered during the regular school year. No evidence was offered regarding the basis of the IEP team's decision not to offer related services for extended school year, despite Student's significant deficits in communication, fine motor skills, and behavior.

Further, Pivot's November 21, 2020 prior written notice eliminated extended school year from the offer of FAPE. No explanation was given for this material change, and this impeded Parents' opportunity to participate in the decision-making process and violated the requirement of a coherent, formal written offer of placement. The

elimination of these services further resulted in a loss of educational opportunity for Student. As a result, Pivot's November 2020 IEP failed to offer Student a FAPE.

ISSUE 2: WHETHER PIVOT FULFILLED ITS LEGAL OBLIGATIONS TO STUDENT BY FILING THE PRESENT MATTER?

Pivot requests, in addition to an order finding the November 2020 IEP offered Student a FAPE, an order determining it fulfilled its legal obligations to Student by filing the present matter. (Ed. Code, § 56346, subd. (f).) OAH does not issue purely declaratory judgments when there is no issue in controversy. Special education due process hearings are limited to an examination of the time frame pleaded in the complaint and as established by evidence at the hearing, and expressly do not include declaratory decisions about how the IDEA would apply hypothetically. (Gov. Code, § 11465.10-11465.60; Cal. Code. Regs., tit. 5, § 3089; see also *Princeton University v. Schmid* (1982) 455 U.S. 100, 102 [102 S.Ct. 867, 70 L. Ed. 2d 855][courts do not sit to decide hypothetical issues or to give advisory opinions]; *Stonehouse Homes v. City of Sierra Madre* (2008) 167 Cal.App.4th 531, 539 542 [matter deemed not ripe for adjudication because it was asked to speculate on hypothetical situations and there was no showing of imminent and significant hardship].)

The sole issue alleged in the complaint over which OAH has jurisdiction is whether the November 2020 IEP offered Student a FAPE such that Pivot may implement it without parental consent. Pivot's request that OAH issue a finding that Pivot fulfilled its legal obligations to Student by filing the present matter seeks an impermissible advisory opinion where there is no case or controversy. The result of such an order would be to absolve Pivot of liability under the IDEA and state law when there is no pending case or controversy. Pivot's request for an advisory declaration is denied.

Further, even if OAH could decide this issue, Pivot failed to prevail because its November 2020 IEP was procedurally deficient.

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: The April 9, 2020 IEP, as completed on November 6, 2020, did not offer Student a FAPE and Pivot may not implement it without Parents' consent. Student prevailed on Issue 1.

Issue 2: Pivot is not entitled to a determination of whether it satisfied its legal obligation to Student by filing the present matter. Student prevailed on Issue 2.

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/

Jennifer Kelly

Administrative Law Judge

Office of Administrative Hearings